

2002

Anti-terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation From the European Convention on Human Rights?

Virginia Helen Henning

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Henning, Virginia Helen. "Anti-terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation From the European Convention on Human Rights?" *American University International Law Review* 17, no. 6 (2002): 1263-1297.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

ANTI-TERRORISM, CRIME AND SECURITY ACT 2001: HAS THE UNITED KINGDOM MADE A VALID DEROGATION FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

VIRGINIA HELEN HENNING*

INTRODUCTION	1264
I. BACKGROUND: THE ACT AND THE CONVENTION.....	1268
A. STATE OF EMERGENCY: THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001	1268
B. THE EUROPEAN CONVENTION ON HUMAN RIGHTS	1270
1. <i>Article 5(1)-The Right to Liberty and Security</i>	1271
2. <i>Article 15-Derogation from the Convention</i>	1272
3. <i>Jurisdiction Over Derogation</i>	1273
4. <i>Margin of Appreciation: The Scope of the Court of Human Rights' Review over Article 15</i>	1274
II. ANALYSIS: ARTICLE 15(1) & <i>LAWLESS V. IRELAND</i>	1275
A. PUBLIC EMERGENCY THREATENING THE LIFE OF THE NATION	1276
B. APPLICATION OF <i>LAWLESS</i> TO THE CURRENT SITUATION IN THE UNITED KINGDOM	1277

* J.D. Candidate, 2003, American University, Washington College of Law; B.A. Economics and Political Science, Dickinson College. I would like to express my appreciation to the members of the INTERNATIONAL LAW REVIEW, particularly to my editors, Jeremy Frey and Michael Haas, for all their help and advice. I would also like to extend my gratitude to Professor Ira Robbins for his guidance throughout this process. Thank you to my unofficial editor, Lincoln Harris, for his encouragement and patience. Finally, and most importantly, I would like to thank my parents, Robert and Helen Henning, and my brother, John, for their love and support.

1. Evidence of Terrorist Activity in the United Kingdom	1278
2. Lawless Versus the Current Situation-the Reality of the Threat to the United Kingdom.....	1283
C. MEASURES TAKEN BY THE HIGH CONTRACTING PARTY IN DEROGATION ARE STRICTLY REQUIRED BY THE SITUATION.....	1285
D. APPLICATION OF <i>LAWLESS</i> TO THE ANTI-TERRORISM ACT...	1286
III. RECOMMENDATIONS	1290
A. REVIEW OF THE LAW: THE CONTINUED NECESSITY OF THE ANTI-TERRORISM ACT	1291
1. Required Review Process of the Anti-terrorism Act.....	1291
2. The United Kingdom's Previous Attempts at Reviewing the Necessity of Emergency Powers	1292
B. THE UNITED KINGDOM MUST ENSURE THAT THE DEROGATION REMAINS A TEMPORARY MEASURE.....	1293
CONCLUSION.....	1296

INTRODUCTION

The terrorist attacks on the United States on September 11, 2001 shocked and terrified the world.¹ Around the world, nations rushed to share their support and sympathies for the United States.² Many

1. See Bush Calls Terror Strikes "Act of War" as Rescuers Comb Debris from Blitz, AGENCE FRANCE-PRESSE, Sept. 12, 2001 (discussing the swift response of NATO to the tragedies), available at 2001 WL 25011152; Marina Jimenez & Carl Honore, *Disbelief Turns to Fury Around the Globe: Britain, Russia Send Messages of Support to United States*, NAT'L POST, Sept. 12, 2001, at A6, available at 2001 WL 27079767 (explaining the reactions of world leaders moving from shock to resolve to fight terrorism and stand by the United States); Carol J. Williams, *World Leaders Condemn 'New Evil' Response: Allies Rush to Boost Security as Embassies, Military Post and Banks Go On High Alert*, L.A. TIMES, Sept. 12, 2001, at A13 (describing the various reactions of world leaders as they increased security in their own countries and announced their sympathies to the United States), available at 2001 WL 2517576; *Worldwide reaction to attacks on the United States* (NPR: Morning Edition, Sept. 12, 2001) (reporting the responses of world leaders to the attacks on the United States and noting the convening of emergency meetings to discuss security), available at 2001 WL 9328832.

2. See Reyko Huang & Dr. Michael Donovan, *Terrorism Project: The World Responds* (Nov. 6, 2001) (stating the reactions of countries around the world to the attacks on the United States), at <http://www.cdi.org/terrorism/world-responds.cfm> (last visited July 2, 2002). The report contains a list of countries that pledged

countries, in addition to the United States, moved swiftly to evaluate their own security measures and to create new laws cracking down on terrorism.³

After issuing the first and strongest declaration of supporting the United States and condemning terrorism,⁴ the United Kingdom responded domestically with a new law to assist the government in combating acts of terror.⁵ The United Kingdom's Anti-terrorism, Crime and Security Act 2001 ("Anti-terrorism Act" or the "Act")⁶ curtails certain civil liberties for a particular group of individuals—those foreign non-nationals suspected of being terrorists.⁷ As a

support to the United States in various ways, including military, intelligence, or logistical support. *See id.*

3. *See* William Hoge, *U.S. Terror Attacks Galvanize Europeans to Tighten Laws*, N.Y. TIMES, Dec. 6, 2001, at B1 (examining the legislative efforts in the European Union, France, Germany, Spain, and the United Kingdom to enhance their laws to protect against terrorism).

4. *See Full Text of Tony Blair's Speech, Made Today from Downing Street* [hereinafter *Tony Blair's Speech*] (declaring that the United Kingdom will stand by the United States and will support America in its efforts to eliminate international terrorism), available at <http://www.guardian.co.uk/wtccrash/story/0,1300,550655,00.html> (last visited July 3, 2002); Williams, *supra* note 1 (reporting Blair's classification of mass terrorism as the world's new evil, which the United Kingdom will help to eradicate).

5. *See* Christopher Cooper & Marc Champion, *Britain Seeks More Power to Jail Terrorism Suspects*, WALL ST. J., Nov. 14, 2001, at A18 (announcing the introduction of the emergency anti-terrorism package in Parliament that allows for indefinite imprisonment of suspected international terrorists), available at 2001 WL-WSJ 29677886; *New Anti-terrorist Measures Announced by the Home Secretary* (Oct. 3, 2001) (stating the objectives of the new anti-terrorism legislation proposed by the Home Secretary), at <http://www.pm.gov.uk/news.asp?NewsId=2676> (last visited July 3, 2002).

6. *See* Anti-terrorism, Crime and Security Act 2001, c. 24, §§ 21-23 (Eng.) (detailing the new law of the United Kingdom for dealing with suspected international terrorists, through certification, deportation, and detention), available at <http://www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm> (last visited July 3, 2002).

7. *See* Brian Groom, et al., *In Liberty's Name - The Sweeping Powers that Britain and the US Want to Assume to Counteract Terrorism Are Raising Fears that Fundamental Freedoms Will Be Lost*, FIN. TIMES (LONDON), Nov. 21, 2001, (noting that although the U.K.'s bill was not as detrimental to civil liberties as the proposed U.S. measures, controversy and debate surrounded the Anti-terrorism Act for its impact on fundamental rights), available at 2001 WL 30141289.

member of the Council of Europe⁸ and one of the original contracting parties to the Convention for the Protection of Human Rights and Fundamental Freedoms⁹ ("Convention" or "Human Rights Convention"), the United Kingdom made a commitment to the protection of basic human rights and democratic principles.¹⁰ Because parts of the Anti-terrorism Act directly violate Article 5(1) of the Convention, the United Kingdom declared a state of emergency to temporarily opt out of its obligations under that part of the Convention.¹¹ The United Kingdom is the only member country forced to derogate from the Human Rights Convention because of the implementation of a new anti-terrorism law.¹²

By December 19, 2001, within days of becoming law,¹³ the government had already used its new powers under the Anti-terrorism Act to detain suspected international terrorists.¹⁴ After the

8. See The Council of Europe's Member States (listing the member countries of the Council of Europe), *available at* http://www.coe.int/T/E/Communication_and_Research/Contacts_with_the_public/About_Council_of_Europe/CoE_Map_&_Members/ (last visited July 7, 2002).

9. See Brice Dickson, *The Council of Europe and the European Convention on Human Rights*, in *HUMAN RIGHTS AND THE EUROPEAN CONVENTION 6* (Brice Dickson ed., 1997) (noting that the United Kingdom was the first country to ratify the European Convention on March 8, 1951).

10. See *id.* at 1-2 (listing the primary aims of the Council of Europe).

11. See Cooper & Champion, *supra* note 5 (stating that the detention section of the Anti-terrorism bill would violate Article 5 of the European Convention on Human Rights).

12. See Hoge, *supra* note 3, at B1 (providing an overview of the new laws proposed in France, Germany, and Spain in response to the terrorist attacks in the United States on September 11, 2001).

13. See *Anti-terrorism, Crime and Security Bill Receives Royal Assent*, M2 PRESSWIRE, Dec. 17, 2001 (announcing the passage of the Anti-Terrorism, Crime and Security Act as a means to combat terrorism in the United Kingdom), *available at* 2001 WL 30052509; see also Ed Johnson, *Britain's Anti-terror Law Passes*, AP ONLINE, Dec. 13, 2001 (discussing the passage of the bill early Friday after days of debate), *available at* 2001 WL 31685820.

14. See Phillip Johnston, *Terror Suspects Rounded Up*, DAILY TELEGRAPH (LONDON), Dec. 20, 2001, at P2 (reporting Immigration officers and police raiding homes in England under the authority of the Anti-terrorism Act), *available at* 2001 WL 31846724; see also Paul Waugh, *Campaign Against Terrorism: Terror Suspects to be Rounded Up Under New Law*, THE INDEPENDENT (LONDON), Dec. 15, 2001, at 14 (discussing the authority that the Anti-terrorism Act gives to the immigration officers to begin arresting those on a list of suspects prepared by

arrests of eight individuals, civil libertarian groups announced that they planned to challenge the law both in the British courts and the European Court of Human Rights ("Court of Human Rights" or "the Court").¹⁵ The civil libertarians claim that the British government lacks a valid justification for the state of emergency it declared to suspend its obligations under the Human Rights Convention.¹⁶

This Comment argues that the United Kingdom correctly concluded that it faces a public emergency within the meaning of Article 15 of the Convention and has only taken those steps required by the circumstances of global terrorism to protect the nation. Part I discusses the Anti-terrorism Act and the emergency powers that it confers upon the British government.¹⁷ The background of the Human Rights Convention and the details of Articles 5 and 15 are also discussed, as well as the authority of the Court of Human Rights to render a decision concerning the appropriateness of the United Kingdom's derogation from the Convention. Part II examines how the Court should rule on the existence of a public emergency in the United Kingdom and the extent to which the Anti-terrorism Act's

intelligence services), *available at* 2001 WL 31602573. In addition to the Anti-terrorism Act, police are using the Terrorism Act 2000 and the Immigration Act 1971 in an effort to clamp down on European terrorism. *See More Held in UK Terror Probe* (Jan. 18, 2002), *at* <http://www.cnn.com/2002/WORLD/Europe/01/18/inv/Britain/index.html> (last visited July 3, 2002).

15. *See* Frances Gibb, *Civil Liberties Lawyers to Challenge Detentions*, *TIMES* (LONDON), Dec. 20, 2001, at 4 (noting that civil liberties lawyers had been waiting for the opportunity to challenge the Anti-terrorism Act), *available at* 2001 WL 29013421.

16. *See id.* (stating the belief of John Wadham, director of the civil liberties group Liberty, that the arrests destroy the basic principles of human rights of British law and the European Convention on Human Rights); *see also* Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11), Nov. 4, 1950 [hereinafter Convention] (stating that pursuant to Article 15(1), a member country may temporarily opt out of the Convention under certain circumstances), *available at* <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (last visited July 7, 2002).

17. *See infra* notes 20-54 and accompanying text (introducing the Anti-terrorism, Crime and Security Act of 2001 and the European Convention on Human Rights).

detention powers are required by that emergency.¹⁸ Part III argues that the United Kingdom must actively review both the need for the detention powers and the entire Anti-terrorism Act in light of changing circumstances within its borders.¹⁹ The validity of the derogation from the Convention hinges on the existence of a public emergency and an actual need for the measures taken. The United Kingdom must ensure that the detention powers remain a temporary measure and that they are repealed or allowed to expire when no longer necessary.

I. BACKGROUND: THE ACT AND THE CONVENTION

A. STATE OF EMERGENCY: THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001

The Anti-terrorism Act increases the British government's power to prevent international terrorists and suspected international terrorists from abusing the asylum and immigration laws of the United Kingdom.²⁰ Since the 1970s, the United Kingdom has repeatedly denied extradition requests from countries that use the death penalty, leading to the criticism that Britain is a haven for many political refugees suspected of terrorism.²¹ Sections 21 through 23 of the Anti-

18. See *infra* notes 55-130 and accompanying text (analyzing the precedent of *Lawless v. Ireland* and its application to the Anti-terrorism Act).

19. See *infra* notes 131-163 and accompanying text (recommending that the United Kingdom remain cautious in its restriction of civil liberties).

20. See UK's Blunkett Says Anti-Terrorist Bill Has 'Proportionate, Targeted Measures,' AFX (UK), Nov. 13, 2001 (declaring that the purpose of the Anti-terrorism bill is, among other things, "to prevent terrorists abusing immigration and asylum laws"), available at 2001 WL 28041638; see also *Britons Shocked by Terror Links* (mentioning the use of the United Kingdom as a haven for people fleeing other governments), at <http://www.cnn.com/2002/WORLD/Europe/01/18/inv.Britain.terror/index.html> (last visited July 3, 2002).

21. See Cooper & Champion, *supra* note 5 (reporting that the United Kingdom has routinely ignored Egypt's requests for extradition, because the United Kingdom dislikes Egypt's death penalty and justice system); see also *Investigating Terror Places: London* [hereinafter *Investigating Terror Places*] (stating that countries have criticized the United Kingdom for becoming a haven for suspected international terrorists), at

terrorism Act allow the government to take action against foreign non-nationals whom the Secretary of State for the Home Department ("Secretary of State") suspects of terrorist activity.²² Under section 23, "a suspected international terrorist may be detained . . . despite the fact that his removal or departure from the United Kingdom is prevented" by international law.²³ Prior to the enactment of this section of the Anti-terrorism Act, the United Kingdom had only three options for dealing with suspected international terrorists: (1) deport them to a safe country; (2) prosecute them under existing U.K. law; or (3) let them go free.²⁴ Section 23 gives the government a fourth option, detention to prevent the suspected terrorist from taking part in any future activities that may be harmful to the United Kingdom.²⁵

http://news.bbc.co.uk/1/hi/english/static/in_depth/world/2001/war_on_terror/investigation_on_terror/places_7.stm (last visited July 3, 2002).

22. See Anti-terrorism, Crime and Security Act 2001, §§ 21-23 (stating the Secretary of State has the authority to issue a certificate to suspected international terrorists allowing for the deportation or detention of the certified individuals). A person can be certified as a suspected international terrorist if "the Secretary of State reasonably (a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist." *Id.* § 21(1)(a)-(b). The Act defines terrorism through the definition used in the Terrorism Act 2000. *Id.* § 21(5). Terrorism is "the use or threat of action where . . . (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." Terrorism Act 2000, c. 11, § 1(1) (Eng.), <http://www.legislation.hmso.gov.uk/acts/acts2000/20000011.htm> (last visited July 3, 2002). In addition, section 1(2) of the Terrorism Act requires that the action, either

(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.

Id. § 1(2).

23. Anti-terrorism, Crime and Security Act 2001, § 23 (defining the government's power to detain those certified as suspected international terrorists even though the suspect may not be removed from the country because of international agreement or practical considerations).

24. See *Blunkett's Bill: A Necessary Measure To Deny Terrorists a Haven in Britain*, TIMES (LONDON), Nov. 20, 2001, at 17 (on file with author) (discussing the need for a fourth option for dealing with those suspected of international terrorism).

25. See *id.* (asserting that detention of suspected international terrorists will protect not only Great Britain, but Western democracy as well).

The detention of a non-national without the intention or authority to deport him violates Article 5(1)(f) of the Human Rights Convention,²⁶ because the Convention only permits detention of non-nationals if deportation proceedings are in progress.²⁷ In order to prevent this violation, the United Kingdom declared a state of emergency to temporarily suspend its obligations under the Convention as permitted under Article 15 of the Human Rights Convention.²⁸

B. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Adopted in 1950, in part to avoid the reoccurrence of the human rights atrocities of the Second World War, the Human Rights Convention obligates the member countries to "secure the rights and freedoms" of the Convention to everyone within their jurisdictions.²⁹ The Convention expresses the idea that promoting individual rights and freedoms above those of the state will best protect democracy.³⁰ Called "the most advanced international system for protecting human rights in existence today,"³¹ the Human Rights Convention has a significant impact on the lives of the residents of Europe.³²

26. See Convention, *supra* note 16, art. 5(1)(f) (stating "[N]o one shall be deprived of his liberty save in . . . the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition"); see also *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413, 465 (1997) (holding that the requirements of Article 5(1)(f) are met when "action is being taken with a view to deportation").

27. See *Chahal*, 23 Eur. H.R. Rep. at 465 (stating that if deportation proceedings are not in progress or are not prosecuted with due diligence, the detention of a non-national violates Article 5(1)(f)).

28. See Convention, *supra* note 16, art. 15 (allowing for a Contracting party to "take measures derogating from its obligations under this Convention" in times of public emergency).

29. See *id.* art. 1 (defining the obligations of the members to the Human Rights Convention).

30. See A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 157 (2001) (concluding that of the two theories discussed in Europe during and following World War II to preserve peace and democracy, the Convention favored the theory of individual rights over the alternative theory of economic and social justice).

31. See Elizabeth A. Faulkner, *The Right to Habeas Corpus: Only in the Other Americas*, 9 AM. U. J. INT'L L. & POL'Y 653, 675 (1994) (discussing the well-

1. Article 5(1)-The Right to Liberty and Security

Article 5 of the Convention protects against unwarranted state intrusions upon the liberty and security of individuals by prohibiting unjustified detentions.³³ Article 5(1) provides that “[e]veryone has the right to liberty and security of person.”³⁴ Establishing the test for the lawfulness of a detention, Article 5(1) defines the six situations in which a state may detain a person, none of which allow for the kind of detentions used in the Anti-terrorism Act.³⁵ The Convention allows states to protect the rights of the public,³⁶ but specifies that members’ actions must not exceed the limits of the rule of law established by the Convention.³⁷ Member countries believe so strongly in the idea that individuals should be free from unwarranted state intrusions that a person has the right to compensation if a

established judicial system to protect the rights guaranteed in the Human Rights Convention).

32. See Dickson, *supra* note 9, at 6 (remarking that of all the actions of the Council of Europe, many of which were instrumental in changing the lives of European residents, the Human Rights Convention has had the greatest influence).

33. See J.L. MURDOCH, ARTICLE 5 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE PROTECTION OF LIBERTY AND SECURITY OF PERSON 7 (1994) (explaining the general purpose for Article 5 of the Convention).

34. See Convention, *supra* note 16, art. 5(1) (declaring that every individual has a right to liberty and property).

35. See *id.* art. 5(1)(a)-(f) (announcing the limited circumstances in which a detention may occur); MURDOCH, *supra* note 33, at 7 (stating that the six exceptions listed in Article 5(1) provide the test for legality of detention).

36. See MURDOCH, *supra* note 33, at 10 (accepting that the Court allows member states to consider the public interest when making determinations regarding the validity of a detention under Article 5 of the Convention); see also KEIR STARMER, EUROPEAN HUMAN RIGHTS LAW: THE HUMAN RIGHTS ACT OF 1998 AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 108 (1999) (noting that the reason for the six exceptions to the protection of liberty and security are to allow states to protect the public).

37. See MURDOCH, *supra* note 33, at 10-11 (indicating that the Court understands that certain problems such as organized crime and terrorism present particularly “delicate issues” for member states, requiring states to balance the interests of the public with the protection of individual rights); see also *infra* notes 48-54 and accompanying text (containing material on the margin of appreciation and discussing the Court’s deference to the decision made by a member state for the protection of its citizens).

member state deprives him of his liberty and security in violation of Article 5.³⁸

2. Article 15-Derogation from the Convention

Although the member countries consider the rights and freedoms detailed in the Convention to be fundamental to democracy,³⁹ the Convention contains a public emergency exception.⁴⁰ The exception states, “[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation.”⁴¹ While states may not derogate from the entire Convention,⁴² Article 15 allows member countries to derogate from the provisions of Article 5.⁴³

38. See Convention, *supra* note 16, art. 5(5) (“Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.”); see also MURDOCH, *supra* note 33, at 53-54 (explaining that Article 5(5)’s right to compensation is a domestic remedy). Domestic courts of the offending country must provide compensation for a violation of Article 5. See *id.* at 53. Article 5(5) requires countries to make this compensation to victims of violations of Article 5 even if the Convention has not been incorporated into the domestic law of the country. See *id.* Article 41 of the Convention allows the Court of Human Rights to order “just satisfaction” if the domestic law of the country involved only provides for partial reparations. See Convention, *supra* note 16, art. 41.

39. See D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 2 (1995) (specifying that the Convention was meant to function as an alarm against the violation and suppression of human rights in Western Europe).

40. See Convention, *supra* note 16, art. 15 (allowing any member to temporarily opt out of certain obligations under the Convention because of war or other public emergency).

41. See *id.* art. 15(1) (articulating the requirements that must be met for a member country to properly derogate from its responsibilities and obligations under the Convention).

42. See *id.* art. 15(2) (“No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.”).

43. See *id.* art. 15(2) (listing the specific articles of the Convention from which no derogation may be made); see also Ireland v. United Kingdom, 2 Eur. H.R. Rep. 25, 91 (1978) (finding that because Article 5 is not expressly mentioned in Article 15(2), it is therefore “subject to the ‘right of derogation’ reserved by the Contracting States”).

3. Jurisdiction Over Derogation

Article 15 of the Convention requires that the member country must notify the Secretary General of the Council of Europe of its derogation from the Convention and the reasons for the derogation.⁴⁴ Under the Convention, either an individual or a member country may challenge the derogation of a member country at the Court of Human Rights.⁴⁵ A petitioner must first exhaust all reasonable domestic remedies before the Court will declare a matter admissible.⁴⁶ The Court has the jurisdiction to decide if the challenged country made a proper derogation under Article 15.⁴⁷

44. See Convention, *supra* note 16, art. 15(3). Article 15(3) states that:

Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Id.

45. See Convention, *supra* note 16, art. 34.

The Court may receive applications from any person...or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Id. Previously, individuals could not petition directly to the European Court of Human Rights. Instead, individuals petitioned the European Commission on Human Rights ("the Commission"). See Faulkner, *supra* note 31, at 676. The Commission could then decide to refer the case to the Court. See *id.* This process created a backlog of cases, resulting in the enactment of Protocol 11 to the Convention in 1998. Protocol 11 replaced the Commission and the Court with a single Court to which individuals may petition directly. See STARMER, *supra* note 36, at 697 (1999).

46. See Convention, *supra* note 16, art. 35(1) (stating that the Court may only deal with a matter once "all domestic remedies have been exhausted," and that the petitioner must bring the matter to the Court's attention within six months of the final domestic decision); see also STARMER, *supra* note 36, at 707 (clarifying that the petitioner must only exhaust domestic remedies that are likely to be effective).

47. See Convention, *supra* note 16, art. 32(1) ("The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto"); see also Lawless v. Ireland, 1 Eur. H.R. Rep. 15 (1961) (holding that the Court makes the determination of whether the condition for derogation under Article 15 have been met).

4. *Margin of Appreciation: The Scope of the Court of Human Rights' Review over Article 15*

The Court of Human Rights decided that it plays a limited role in the review of a member country's declaration of a public emergency under Article 15.⁴⁸ The Court grants member countries this margin of appreciation because it recognizes that each member state is primarily responsible for its own survival and stability.⁴⁹ A member country must determine the severity of a threat to the nation and its people and the scope of the measures necessary to control the situation.⁵⁰ The Court reasoned that because the individual governmental authorities have continuous and direct contact with the daily conditions of the state, those authorities are in the best position to make such a determination.⁵¹

Member nations, however, do not enjoy absolute deference from the Court regarding the scope of derogation from their obligations under the Convention.⁵² The Court's job is to rule on the lawfulness, not the wisdom, of the derogation and the measures taken to combat the emergency.⁵³ Therefore, the Court maintains the limited role of ensuring that member states do not abuse the right to derogate by acting in a manner that the situation does not strictly require.⁵⁴

48. See *Ireland*, 2 Eur. H.R. Rep. at 91 (conceding that the Court's power of review is limited when a member country makes a derogation under Article 15 because of a public emergency).

49. See *id.* (placing the responsibility for maintenance of the nation in the hands of each member state).

50. See *id.* at 91-92 (stating that each member state should bear the responsibility for making decisions regarding its security and safety).

51. See *id.* at 92 (deciding that a member state's authorities are in a better position than the Court to make determinations regarding the circumstances affecting that nation).

52. See *id.* (explaining that the Court grants only a margin of appreciation, not complete deference to their decision to derogate).

53. See *id.* at 95 (acknowledging the Court's limited role in merely reviewing the lawfulness of the measures that the derogating member state has taken).

54. See *Ireland*, 2 Eur. H.R. Rep. at 92 (clarifying that the Court has a supervisory role in the derogation decisions made by member countries). But see Oren Gross, "Once More Unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies, 23 YALE J. INT'L L. 437, 460 (1998) (arguing that the Court of Human Rights gives almost

II. ANALYSIS: ARTICLE 15(1) & *LAWLESS V. IRELAND*

In *Lawless v. Ireland*,⁵⁵ the Court heard the first challenge by an individual to a country's derogation under Article 15 of the Convention.⁵⁶ In response to acts of violence committed by the Irish Republican Army ("IRA") beginning in 1921, the Republic of Ireland's ("Ireland") legislature conferred special powers on the Irish Government with the Offences Against the State Act 1939 ("Offences Act").⁵⁷ The Offences Act and its subsequent amendments allowed the Irish Minister of State to detain individuals without a trial if the Irish Government declared such powers necessary to secure public peace and order.⁵⁸ Because a trial did not accompany this detention, Ireland derogated from the Human Rights Convention in 1957 when it invoked the special powers under the Offences Act.⁵⁹

complete deference to member countries, rarely disagreeing with a country's decision to declare a public emergency or with measures taken in response to the emergency).

55. 1 Eur. H.R. Rep. 15 (1961).

56. See BRIAN DOOLAN, *LAWLESS V. IRELAND (1957-1961): THE FIRST CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS; AN INTERNATIONAL MISCARRIAGE OF JUSTICE?* 154 (2001) (labeling the *Lawless* case a "legal history" because it was the first complaint by an individual where the Court decided the merits); see also Dickson, *Northern Ireland and the European Convention*, *supra* note 9, at 144 (noting that *Lawless* was the European Court of Human Rights' first decision).

57. See *Lawless*, 1 Eur. H.R. Rep. at 17 (stating the need for extraordinary powers following the commencement of IRA violence aimed at ending British control over Northern Ireland).

58. See *id.* at 17 (describing the process allowing the Minister of State to use the powers conferred on him by the Offences Against the State Act 1939 and the Offences Against the State (Amendment) Act 1940). To arrest the individual, the Minister of State had to believe that the person was engaged in activities contrary to the preservation of public peace or the security of the state. *Id.* at 18. The individual would be detained in prison until he met certain conditions for release or until the Offences Act was repealed. *Id.*

59. See *id.* at 31 (stating that the Irish Government notified the Secretary General of the Council of Europe that Ireland intended to derogate from the Convention to preserve public peace and order).

The Irish Minister of Justice detained G. R. Lawless under the Offences Act.⁶⁰ After an unsuccessful challenge through the Irish court system, Lawless challenged both Ireland's detention law and its derogation before the European Court of Human Rights.⁶¹

After addressing the other violations of the Convention alleged by Lawless, the Court turned its attention to the issue of derogation and the meaning of Article 15(1).⁶² The Court declared that it had the authority to "determine whether the conditions laid down in Article 15(1) for the exercise of the exceptional right of derogation [had] been fulfilled in the present case."⁶³ Because Article 15(1) has two parts, the Court first considered the "existence of a public emergency threatening the life of the nation," and then examined the "measure[s] taken [by Ireland] in derogation from obligations under the Convention."⁶⁴

A. PUBLIC EMERGENCY THREATENING THE LIFE OF THE NATION

Using the customary and natural meaning of the words, the *Lawless* Court established that public emergency means "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."⁶⁵ The Court examined

60. *See id.* at 20 (introducing the facts of Lawless's arrest and detention in 1957).

61. *See Lawless*, 1 Eur. H.R. Rep. at 20-21 (chronicling Lawless' attempts before the Irish courts and his claims before the European Commission on Human Rights). Following the opinion of the Commission, Lawless was permitted to appeal to the European Court of Human Rights. *Id.* at 17. By this time, Lawless had been released, but he continued the proceedings in hopes of winning compensation, damages, and reimbursement of costs. *Id.* at 20.

62. *See id.* at 30 (examining the text of Article 15 of the Convention and the situation in Ireland at the time of the derogation).

63. *Id.* (establishing the Court's jurisdiction, as stated in Article 32 of the Convention); *see* Convention, *supra* note 16, art. 32 (stating that the Court has jurisdiction over all matters concerning the application of the Convention).

64. *See Lawless*, 1 Eur. H.R. Rep. at 31, 32 (articulating the requirements of Article 15 that the Court uses to determine if a member country has made a valid derogation).

65. *See id.* at 31 (defining the terms by which the Court would judge Ireland's derogation); *see also* DOOLAN, *supra* note 56, at 251 (concluding that the major

the facts and circumstances surrounding the government's derogation to ensure that the derogation fell within this conception of public emergency.⁶⁶

In *Lawless*, the Court relied on several key facts in reaching its conclusion that Ireland faced a public emergency including: the secret nature of the IRA's unconstitutional behavior and violence; the operations of the IRA outside of Ireland potentially jeopardizing relations with other countries; the steady increase in the levels of violence used by the IRA; and the failed attempts to control the situation using ordinary legislation and criminal procedure.⁶⁷ From these factors, the Court held that Ireland reasonably believed it faced a public emergency, thus satisfying the first element of Article 15.⁶⁸

B. APPLICATION OF *LAWLESS* TO THE CURRENT SITUATION IN THE UNITED KINGDOM

In applying the *Lawless* holding to the current situation in the United Kingdom, the Court of Human Rights should find that the United Kingdom has a reasonably justifiable belief that it faces a "public emergency threatening the life of the nation," thus satisfying the first element of Article 15(1).⁶⁹ The British government enacted extraordinary means to deal with the threat of terrorism due to an increased sense that the United Kingdom is a terrorist target, in part because of its close relationship with the United States.⁷⁰ Although

contribution of the *Lawless* case was the establishment of a definition of public emergency for the application of Article 15).

66. See *Lawless*, 1 Eur. H.R. Rep. at 31 (explaining the criteria on which the Court would base the determination of the validity of Ireland's derogation).

67. See *id.* at 31-32 (noting the combination of factors which allowed the Court to find that a public emergency existed in Ireland at the time of derogation).

68. See *id.* at 31 (finding that a public emergency existed).

69. See Convention, *supra* note 16, art. 15(1) (allowing derogation of a member country's obligation under the Convention "in time of war or other public emergency threatening the life of the nation").

70. See Groom, et al., *supra* note 7 (commenting that the broad anti-terrorism proposals in the United Kingdom and the United States following the attacks on September 11, 2001 result from their perceived vulnerability to further attacks); *Tony Blair's Speech*, *supra* note 4 (announcing that the attack on America was an attack on the world and that the United Kingdom would work with the United States to defeat international terrorism). A long-standing relationship exists

the focus of the campaign against terrorism since September 11 has been in Afghanistan, intelligence sources suggest that terrorist cells are operating and coordinating activities throughout Europe, including the United Kingdom.⁷¹ As a result, the British government believes that a public emergency exists requiring the use of extraordinary measures to detain suspected international terrorists in order to protect the nation from terrorism.⁷²

1. Evidence of Terrorist Activity in the United Kingdom

The United Kingdom believes that it is not only a possible target of international terrorism,⁷³ but also an organizational base of terrorist activity.⁷⁴ A recent study by the International Institute for

between the United States and the United Kingdom. See Thomas K. Grose & Kenneth T. Walsh, *A Statesman, Steadfast and Strong*, U.S. NEWS & WORLD REP., Oct. 12, 2001 (reporting that President Bush declared Prime Minister Blair is "all you could want from an ally"), available at 2001 WL 30366126. In addition, bin Laden has stated that the freedoms and human rights in the United States, and in the west in general, are doomed. See *Bin Laden's sole post-September 11 TV interview* aired, CNN ONLINE, at <http://www.cnn.com/2002/US/01/31/gen.binladen.interview/index.html> (last visited Feb. 1, 2002). See generally Jeffrey Ian Ross, *The Nature of Contemporary International Terrorism*, in DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM 31 (David A. Charters ed., 1991) (discussing that the citizens of the United Kingdom, along with the France, Israel, Turkey, and the United States, account for approximately half of the targets of terrorists).

71. See Rod Nordland, et al., *Al Qaeda Runs for the Hills*, NEWSWEEK, Dec. 17, 2001 (reporting that most of the planning for recent major terrorist attacks, such as the bombing of the U.S. embassies in Africa and the USS Cole, has largely taken place outside of Afghanistan), available at 2001 WL 19505648. Evidence suggests that preparation for the September 11th attacks originated in Hamburg, Germany. *Id.* Authorities also believe that the Hamburg cell developed contacts with other European cells. *Id.*

72. See *UK Debates Terror Arrest Measure* (Nov. 19, 2001), CNN ONLINE (reporting Home Secretary David Blunkett's statement that to protect the United Kingdom, he will detain suspected international terrorists since he cannot deport them), at <http://www.cnn.com/2001/WORLD/Europe/11/19/gen.britain.debate/index.html> (last visited July 2, 2002).

73. See Groom, et al., *supra* note 7 (discussing the United Kingdom's belief that it, too, is a target for international terrorists following the attacks on the United States).

74. See *infra* notes 75-81 and accompanying text (detailing support for the United Kingdom's suspicion that it has become a base for terrorist operations).

Strategic Studies indicates three possible reasons for the United Kingdom's popularity with terror suspects,⁷⁵ helping to explain Britain's label as a terrorist haven.⁷⁶ First, a large immigrant community exists in the United Kingdom, allowing non-nationals to blend in easily.⁷⁷ Instructions from a terrorism operations manual produced by Osama bin Laden's organization recommend integrating into society by adopting the style of dress and manner of the host country.⁷⁸ The large immigrant community in Great Britain enables foreign terrorist suspects to go unnoticed with very little effort,⁷⁹ allowing them to maintain the secrecy of their activities.⁸⁰

The second reason the United Kingdom attracts terrorist suspects is the population's concern for the protection of civil liberties, which makes it difficult for law enforcement agencies to investigate and

75. See *Britons Shocked by Terror Links*, *supra* note 20 (reporting a study completed by the International Institute for Strategic Studies, indicating the reasons why terror suspects choose the United Kingdom as a base for their activities).

76. See *Investigating Terror Places*, *supra* note 21 (explaining that England's Anti-terrorism Act is, in part, a response to international criticism that the United Kingdom has become a haven to terrorist suspects). The Court of Human Rights reasoned that a situation that jeopardizes relations with other countries may present a partial justification for declaring a public emergency. See *Lawless*, 1 Eur. H.R. Rep. at 31. Recently, Spain and France discovered links between the United Kingdom and international terrorist groups like al Qaeda. See Jason Burke, *Terror Video Used to Lure UK Muslims: Mosque Recruitment Film Shows Bin Laden Slayings*, THE OBSERVER (LONDON), Jan. 27, 2002, at http://www.observer.co.uk/uk_news/story/0,6903,640035,00.html (last visited June 30, 2002).

77. See *Britons Shocked by Terror Links*, *supra* note 20 (stating that there a large immigrant community in the United Kingdom).

78. See John Cloud, *The Plot Comes Into Focus; A Low-Profile, Even Meager Lifestyle Allowed 19 Hijackers to Blend Into the American Tapestry*, TIME, Oct. 1, 2001, at 50 (remarking that the ordinary nature of the terrorist suspects and the apparent lack of structure in the organization are intentional parts of the operation), available at 2001 WL 22575202.

79. See *Britons Shocked by Terror Links*, *supra* note 20 (finding the large immigrant population makes blending in very easy in the United Kingdom).

80. See *Lawless*, 1 Eur. H.R. Rep. at 31 (relying on the secret nature of the IRA terrorist activity as part of the basis for finding that a public emergency existed in Ireland).

identify suspected activities quickly.⁸¹ The debate, both in the public and the Parliament, surrounding the passage of the Anti-terrorism Act provides ample proof of the overwhelming resistance to any change in, or limitations on, civil liberties in the United Kingdom.⁸²

The third factor indicating the United Kingdom's popularity with terror suspects concerns the recruiting activities of several mosques.⁸³ Evidence of those recruiting activities comes from admissions by suspected terrorists that experiences at certain London mosques radicalized them.⁸⁴ The figurehead of the Finsbury Park mosque, to which several suspects have connections, openly supports Islamic

81. See *Britons Shocked by Terror Links*, *supra* note 20 (concluding that liberal societal concerns for safeguarding civil liberties make it difficult for enforcement officials to carry out surveillance, allowing terror suspects to engage in planning activities unobserved).

82. See, e.g., Peter F. Carter-Ruck, *Anti-terrorism Bill Will Erode Civil Liberties*, DAILY TEL. (LONDON), Nov. 21, 2001, at 25 (expressing concern over the injustices that may arise from the detention powers of the Anti-terrorism Act, leading ultimately toward the erosion of a trial by jury), available at 2001 WL 30371383; Greg Hurst, *Blunkett Limits Detention Power*, TIMES (LONDON), Nov. 22, 2001, at 12 (discussing concessions required during the committee-stage debate on the Anti-terrorism Act due to the cross-party criticism of the detention powers); Johnson, *supra* note 13 (noting that "a bruising contest" preceded passage of the Anti-terrorism Act, forcing compromise on the bill); R. J. Overy, *Deep Concern Over Anti-terrorism Bill*, TIMES (LONDON), Nov. 28, 2001, at 19 (articulating the "alarm" felt because of the detention provisions in the Anti-terrorism Act and the eroding impact it will have on civil liberties); T.R. Reid, *Britain Proposes Anti-Terrorism Measures*, WASH. POST, Nov. 14, 2001, at A29 (on file with author) (noting the strong criticism of the civil libertarians to the proposed anti-terrorism measures); Martin Thomas, *The Anti-terrorism Bill Undermines Both the Human Rights Convention and the Rule of law*, THE GUARDIAN (LONDON), Nov. 26, 2001 (fearing that injustice of the detention powers will feed the terrorists' cause and undermine the rule of law), available at 2001 WL 30420163; John Wadham, *Innocents Are Going to Be Locked Up: The Terror Bill Is Not Needed and Will Lead to Human Rights Abuses*, THE GUARDIAN (LONDON), Nov. 21, 2001, at 18 (asserting that the Anti-terrorism Act will follow in the footsteps of other anti-terrorism laws and lead to human rights abuses, contribute to miscarriages of justice, and cause the detention of innocent people), available at 2001 WL 30418102.

83. See *Britons Shocked by Terror Links*, *supra* note 20 (believing that the inciting language the clerics used in these mosques to encourage congregations seduces some into action).

84. See *Investigating Terror Places*, *supra* note 21 (stating that many arrested in connection with the September 11 attacks said that their time in London contributed to radicalizing them).

extremism.⁸⁵ To further support the United Kingdom's fears that it is a recruiting center for radical Muslims, investigations have discovered that mosques, including the Finsbury Park mosque, are distributing recruitment videos produced by bin Laden-backed organizations.⁸⁶

Terrorism has become increasingly global and sophisticated, requiring governments such as the United Kingdom to recognize that a public emergency exists.⁸⁷ German secret service officials estimate that bin Laden's organization has trained thousands of terrorists, with

85. See *id.* (reporting the connection between several terrorism suspects and Finsbury Park mosque, where the Imam is an open supporter of Muslim extremism).

86. See Burke, *supra* note 76 (explaining that the recruitment videos, labeled by security sources as "pornographic catalogue[s] of violence," are sold to raise funds for the "Islamic cause" and recruit new volunteers).

87. See Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 97 (declaring that terrorism is now global, operating within a network that exchanges intelligence, tactics, weapons, and training information and assists with funding); Cloud, *supra* note 78 (explaining that bin Laden has terrorist cells around the world); see also Roland Jacquard, *The Guidebook of Jihad*, TIME, Oct. 29, 2001, at 58 (stating that European anti-terrorism investigators have obtained evidence through terrorists' confessions that biological and chemical weapons, as well as active recruitment of engineers, have become a part of the training camp regime), available at 2001 WL 29385322; see also Nordland, *supra* note 71 (reporting that the destruction of bin Laden's base in Afghanistan will have little effect on the tens of thousands whom bin Laden had already trained and remain at large); see also Edward T. Pound, *The Root of All Evil*, U.S. NEWS AND WORLD REP., Dec. 3, 2001 (describing the "formidable" global network of Islamic charities, front companies, legitimate businesses, and criminal activities established to fund bin Laden's terrorist network), available at 2001 WL 30366285; see also Randall E. Stross, *A Web of Peace—or War?*, U.S. NEWS AND WORLD REP., Nov. 26, 2001 (noting that some evidence suggests that the terrorists behind the attacks on September 11, 2001 used the internet as a means of coordinating the attacks), available at 2001 WL 30365714. See generally WALTER LACQUEUR, *THE NEW TERRORISM, FANATICISM AND THE ARMS OF MASS DESTRUCTION* 59-70 (1999) (examining the current state of chemical and biological weapons used by terrorists). The United Kingdom is one of several countries to report that chemical weapons have in fact been used there, although the amounts were insignificant and did no real harm. *Id.* at 60. Biological weapons carry several advantages for terrorists, including ease of production and difficulty in detection. *Id.* at 65. The additional benefit of biological weapons is the panic and terror that they cause because of the possible widespread effects on humans, animals, crops, and the economy. *Id.*

as many as one thousand of them making their way to Europe after training.⁸⁸ The ease with which people can communicate makes the globalization of international terrorism a significant threat to the security of a nation,⁸⁹ enabling terrorists to plan operations in one location to be carried out in another, potentially straining international relations.⁹⁰ This information, combined with suspected international terrorists' attraction to the United Kingdom,⁹¹ the confirmation of terrorism recruitment activities in the United Kingdom,⁹² and Britain's aversion to deporting foreigners who could face execution or torture in their home countries,⁹³ gives the United Kingdom ample reason to conclude it has become a popular location for terrorists to locate their operations.⁹⁴ This, in turn, creates a

88. See Cloud, *supra* note 78 (indicating the fear of German officials that Europe is home to many bin Laden terrorist cells); see also Nordland, *supra* note 71 (citing German federal police reports that as many as 70,000 Muslims from many different countries have passed through bin Laden's training camps).

89. See *Bin Laden's Sole Post-September 11 TV Interview Aired*, *supra* note 70 (reporting bin Laden's statement that he does not need to use secret messages to communicate with his terrorist network because of the existence of the Internet and email). In addition to using global communication technology to communicate with each other, terrorists can use it in their operations to increase the size of their attacks. See Thomas Homer-Dixon, *The Rise of Complex Terrorism*, at http://www.foreignpolicy.com/issue_janfeb_2002/homer-dixon.html (last visited June 30, 2002). The expanded use of the Internet, cellular phones and twenty-four-hour news stations allowed people instant and continuous information on the September 11 terrorist attacks. *Id.* The global interconnectedness dramatically amplifies the emotional impact of terrorism by allowing vast numbers of people to witness the attacks. *Id.*

90. See *Investigating Terror Places*, *supra* note 21 (noting international criticism directed toward the United Kingdom for becoming a terrorist's haven); see also Burke, *supra* note 76 (reporting that France and Spain arrested al-Qaeda operatives with connections to the United Kingdom).

91. See *Britons Shocked by Terror Links*, *supra* note 20 (stating three reasons why the United Kingdom's attracts suspected international terrorists).

92. See Burke, *supra* note 76 (explaining that the United Kingdom's determination that it has become a recruitment center after finding terrorist recruitment videos and hearing that three British citizens are being held at the U.S. detention center in Cuba).

93. See Cooper & Champion, *supra* note 5 (explaining the United Kingdom's aversion to extradition requests from countries using the death penalty or torturous punishments).

public emergency that, "affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."⁹⁵

2. Lawless Versus the Current Situation-the Reality of the Threat to the United Kingdom

In examining the current situation under the Court of Human Rights' holding in *Lawless*, critics assert that the current situation in the United Kingdom fails to qualify as a public emergency requiring a derogation from the Human Rights Convention because of the differences in the circumstances.⁹⁶ In *Lawless* and the United Kingdom's previous uses of extraordinary measure to combat the violence stemming from Northern Ireland, the terrorism actually occurred in the country declaring the public emergency.⁹⁷ Parliament enacted the Anti-terrorism Act, however, in response to an attack that occurred in the United States, not in the United Kingdom.⁹⁸ The United Kingdom, however, believes that the attack on the United

94. See UK's Blunkett Say Anti-terrorist Bill Has 'Proportionate, Targeted Measures,' *supra* note 20 (announcing that preventing abuse of terrorism and asylum laws is a key component of the Anti-terrorism Act).

95. See *Lawless*, 1 Eur. H.R. Rep. at 31 (defining public emergency under Article 15(1) of the Human Rights Convention).

96. See Gibb, *supra* note 15 (reporting the claims of civil liberties groups that a public emergency does not exist in the United Kingdom, therefore the derogation is invalid and the detention of suspected international terrorists violates the Human Rights Convention); see also *infra* notes 97-107 (noting the differences between the previous uses of anti-terrorism legislation to address terrorism directly attacking the United Kingdom and the current legislation that addresses the threat of global terrorism).

97. See *Ireland*, 2 Eur. H.R. Rep. at 33-50 (detailing the violence caused by IRA and Unionists in both Northern Ireland and other parts of the United Kingdom resulting in the enactment of special powers legislation to combat the situation, often requiring derogations from the Convention); see also LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 207 (2001) (noting that Parliament enacted the 1974 Prevention of Terrorism Act to deal with the IRA's bombing campaign in Great Britain).

98. See *supra* notes 3, 5 and accompanying texts (announcing that the United Kingdom responded to the attacks in the United States, as most other countries did, by reviewing and increasing the authority of the government to deal with the threat of international terrorism).

States was essentially an attack on the United Kingdom,⁹⁹ in part because of its connections to the United States, which makes it a potential target for future international terrorists.¹⁰⁰

To support this conclusion, it is important to consider that terrorism not only damages the location where the attack occurs, but also the areas in which the terrorists plan and organize the attacks.¹⁰¹ The United Kingdom continues to find evidence that terrorist planning and recruiting are taking place inside its borders.¹⁰² As the *Lawless* Court stated, terrorist activity within a country's borders that jeopardizes relations with other countries helps support the finding that a public emergency exists.¹⁰³ The United Kingdom also has reason to suspect that terrorist organizational activities taking place within its borders will strain and harm relations with neighboring countries and other allies based on the criticism that Britain has become a terrorist haven.¹⁰⁴ Even though the attacks on September 11 occurred in the United States, the realities of international

99. See *Tony Blair's Speech*, *supra* note 4 (declaring Tony Blair's belief that this was not just an attack on America, but also an attack on the democracy and the world).

100. See Nicholas Barry, *The International Islamic Terrorist Network* (noting that bin Laden called upon his followers "to kill Americans and their allies, civilian and military, as an individual duty"), at <http://www.cdi.org/terrorism/terrorist-network.cfm> (last visited Apr. 13, 2002); see also Cloud, *supra* note 78 (reporting that although no direct evidence exists that additional attacks are planned, the next attack would not likely occur in America because the United States is on high alert).

101. See *Lawless*, 1 Eur. H.R. Rep. at 31-32 (finding of a public emergency resulted from the secret nature of the terrorist organizations, the international operation of the groups, and the inability to control the groups using traditional law enforcement).

102. See *supra* notes 75-85 and accompanying text (detailing the popularity of the United Kingdom with international terrorists, as well as the links other countries have discovered between international terrorists and the United Kingdom, leading to the United Kingdom's reputation as a "haven" for terrorists).

103. See *Lawless*, 1 Eur. H.R. Rep. at 31 (declaring that IRA activity "outside the territory of the State" could harm relations with neighboring countries).

104. See *Investigating Terror Places*, *supra* note 21 (noting the criticism facing the United Kingdom because of its popularity with international terrorists).

terrorism have created a public emergency in the United Kingdom that meets the standards established in *Lawless*.¹⁰⁵

C. MEASURES TAKEN BY THE HIGH CONTRACTING PARTY IN
DEROGATION ARE STRICTLY REQUIRED BY THE SITUATION

In *Lawless*, the Court examined Ireland's actions to make the determination that the measures of Offences Act were "strictly required by the emergency existing" at the time.¹⁰⁶ In making the determination that Ireland's actions were proportional, the Court concluded that "the application of ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland."¹⁰⁷ In addition, the Court found that Ireland included many safeguards in the Offences Act and its subsequent amendments to prevent abuses of its emergency powers, further limiting the Irish government's measures to those strictly required by the situation.¹⁰⁸ The Irish Parliament supervised the application of the law by receiving details of its enforcement.¹⁰⁹ Ireland's Parliament also possessed the authority to annul its proclamation that a public emergency existed.¹¹⁰ Finally, the Offences Act and amendments

105. See *Lawless*, 1 Eur. H.R. Rep. at 31 (defining public emergency as a serious situation that affects the entire population and presents a threat to the life of the State).

106. See *id.* at 32 (continuing the examination of the appropriateness of Ireland's derogation from its obligations under the Convention).

107. See *id.* at 33 (stating that Ireland had attempted to control the situation using traditional means, but had failed). Some members of the Commission had suggested that Ireland had other means available before it took such extraordinary measures. *Id.* at 32. Those dissenting members suggested the possibility of using special criminal or military courts, which the Offences Act allowed, or sealing the border between the Republic of Ireland and Northern Ireland to control the IRA. *Id.* at 32-33. The Court found sealing the border an inappropriate response, because it would have seriously affected the population as a whole, a result that was beyond the scope required by the circumstances at the time. *Id.* at 33.

108. See *Lawless*, 1 Eur. H.R. Rep. at 33 (describing the steps taken by the Irish government to prevent abuses of the special powers available under the Offences Act and its subsequent amendments).

109. See *id.* (listing the safeguards that the Court found important to the proportionality of the measures used by Ireland).

110. See *id.* at 33 (mentioning an additional safeguard provided in the legislation).

provided the terms by which a person could end his own detention.¹¹¹ The Court found that the safeguards provided were of particular importance to the determination that the measures were "strictly required by the exigencies of the situation."¹¹²

D. APPLICATION OF *LAWLESS* TO THE ANTI-TERRORISM ACT

Traditional law enforcement appears powerless to protect the United Kingdom from the threat posed by suspected international terrorists, thus requiring the extraordinary powers of the Anti-terrorism Act.¹¹³ The United Kingdom understands, from its long history of dealing with the threatening nature of terrorism, that terrorism deters many people from providing information and prevents, or severely hinders, law enforcement officials' successful use of ordinary methods.¹¹⁴ If traditional law enforcement systems cannot function properly, the safety of the entire nation is threatened.¹¹⁵

The United Kingdom often faces this problem when dealing with the situation in Northern Ireland, which reinforces the belief that any attempt to rely solely on ordinary legal measures will fail with regard to the current terrorist threat.¹¹⁶ Although terrorists rarely accomplish

111. See *id.* at 33-34 (explaining that the government would release a detainee if he gave an undertaking to respect the law and refrain from illegal activities).

112. See *id.* at 34 (finding that Ireland's law permitting detention without a trial was within the meaning of Article 15(1)).

113. See *infra* notes 114-120 and accompanying text (declaring that traditional law enforcement generally has been ineffective in dealing with terrorism).

114. See *Ireland*, 2 Eur. H.R. Rep. at 37 (determining that traditional methods of investigation and prosecution became inadequate in attempting to deal with IRA terrorists in Northern Ireland, because widespread intimidation made it virtually impossible for the government to obtain evidence). In *Ireland*, the Court of Human Rights found that a public emergency existed in the United Kingdom, in part because of the government's inability to curb the IRA terrorists' intimidation of potential witnesses when it attempted to use traditional criminal trials. *Id.* at 43.

115. See *Lawless*, 1 Eur. H.R. Rep. at 37 (discussing how the IRA's terrorism rendered ordinary law enforcement ineffective to maintain peace and order, thereby causing imminent danger to the entire nation).

116. See *id.* at 33 (discussing the United Kingdom's lack of control over terrorists groups in Northern Ireland due to the secrecy and fear created by such groups, leading to the use of emergency powers); see also *Ireland*, 2 Eur. H.R. Rep. at 33-51 (detailing the conflict in Northern Ireland between the Catholic

their ultimate goal of causing the government to collapse,¹¹⁷ they usually succeed in terrifying the citizenry into silence.¹¹⁸ Also, because of their training, terrorists themselves often remain silent during interrogations, preventing law enforcement officials from learning about and stopping future acts of terrorism.¹¹⁹ Terrorism perpetuates a silence that renders typical law enforcement practices powerless, requiring the use of extraordinary measures to combat the terrorists' activities.¹²⁰

Nationalists and the Protestant Loyalists and the ineffectiveness of ordinary legal and political attempts to quell the violence, resulting ultimately in the use of emergency powers on several occasions).

117. See Jacquard, *supra* note 87 (stating that terrorists attempt to traumatize the citizenry in the hope that it will eventually cause the government to collapse). While the goal of terrorism is unrealistic, its irrationality is directly in line with the "madness driving bin Laden and his terrorist associates." See *id.*; see also Martha Crenshaw, *The Logic of Terrorism: Terrorist Behavior as a Product of Strategic Choice*, in WOODROW WILSON CENTER SERIES, ORIGINS OF TERRORISM: PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATES OF MIND, 8 (Walter Reich ed., 1992) (examining the idea that terrorism is based on collective preferences or values, which lead those involved to choose violence because they believe it is the most efficient way to achieve their collective goals). Generally, the terrorist "non-state" actors choose terrorism as a last resort because they feel helpless in comparison to the superior size of the governments they oppose. *Id.* at 11. Terrorism, therefore, becomes a weapon of last resort because the terrorists perceive such an imbalance of power between themselves and the government that they are trying to change or affect. *Id.*

118. See *Ireland*, 2 Eur. H.R. Rep. at 37, 43 (discussing law enforcement officials' inability to obtain information from the public because of intimidation by terrorist actors or sympathizers). Authorities were also unable to convince potential witnesses that the government could protect them from IRA retaliation, impeding the use of trials against those responsible for the terrorist activities in Northern Ireland. *Id.*

119. See *Brannigan v. United Kingdom*, 18 Eur. H.R. Rep. 539, 559 (1993) (finding that special arrest and detention powers are often needed to combat terrorism because of the difficulty in using ordinary law enforcement methods to successfully gather and because of the terrorists' training to remain silent).

120. See *Ireland*, 2 Eur. H.R. Rep. at 44 (reporting that the Commission charged with studying the problem in Northern Ireland found that "[t]he fear of intimidation [was] widespread and well-founded," and until the government could remove the fear, extraordinary means of law enforcement were necessary to control the terrorists through detention); see also *Brannigan*, 17 Eur. H.R. Rep. at 599 (finding that terrorists' silence during interrogation allows them to frustrate law enforcement officials).

The Anti-terrorism Act contains several safeguards that limit the United Kingdom to those measures strictly required by the exigencies of the circumstances.¹²¹ Section 21 of the Anti-terrorism Act requires the Secretary of State to provide both the person certified and the reviewing court with a copy of the certificate.¹²² A person certified as a suspected international terrorist may appeal the certification to the Special Immigration Appeals Commission ("SIAC"), which possesses the authority to cancel the certificate if it finds a lack of "reasonable grounds for a belief or suspicion" of terrorist activity.¹²³ To further prevent abuse of the certification process, the Anti-terrorism Act requires the SIAC to review all certifications, regardless of whether the suspected international terrorist appealed the certificate.¹²⁴ The Anti-terrorism Act also mandates a review of, and sets an expiration date for, the sections concerning the certification and detention of suspected international terrorists.¹²⁵ A committee, appointed by the Secretary of State, must

121. See Anti-terrorism, Crime and Security Act 2001, §§ 21, 25, 26, 28, 29, 122 (describing the different methods of review, appeal, and other safeguards in the Anti-terrorism Act).

122. See *id.* § 21(6)(a)-(b) ("Where the Secretary of State issues a certificate under subsection (1) he shall as soon as is reasonably practicable (a) take reasonable steps to notify the person certified, and (b) send a copy of the certificate to the Special Immigration Appeals Commission.").

123. See *id.* § 25(1)-(2) (establishing a person's right to appeal the Secretary of State's certification labeling him as a suspected international terrorist). The defendant must file an appeal within a period of three months from the issuance of the certification, or by permission of the Commission after three months have passed. *Id.* § 25(5)(a)-(b).

124. See Anti-terrorism, Crime and Security Act 2001, § 26 (requiring the SIAC to hold a first review six months after the issuance of the certificate, or from the final determination of appeal, and further review every three months thereafter). *Id.* § 26(1), (3). If the SIAC finds that the certificate lacks "reasonable grounds for a belief or suspicion" of terrorist activity at the time of review, it must cancel the certificate. *Id.* § 26(5)(a).

125. See Anti-terrorism, Crime and Security Act 2001, §§ 28, 29 (requiring a person appointed by the Secretary of State to review sections 21-23, as well as setting November 10, 2006 as an expiration date for those sections). The appointed person must complete his review within fourteen months after the Anti-terrorist Act enters into effect. *Id.* § 28(2)(a). Both the Parliament and the Secretary of State must receive the review. *Id.* § 28(3),(4). Section 29 establishes several expiration periods for sections 21-23, while also allowing the Parliament or Secretary of State to renew those sections for emergency purposes. *Id.* § 29(1)-(6). However, section

review the entire Anti-terrorism Act after two years.¹²⁶ The final safeguard against abuse is the guarantee that the United Kingdom will release those people detained under the Anti-terrorism Act if they promise to leave the country.¹²⁷

The Court has warned member countries not to adopt measures that will destroy democracy in the effort to fight terrorism.¹²⁸ Based on its previous experiences with terrorism, the United Kingdom has determined that the extraordinary detention powers of the Anti-terrorism Act provide the only means to protect the nation from the threat of suspected international terrorism.¹²⁹ The United Kingdom understands the Court's caution to protect democracy and civil liberties, but also understands that without these extraordinary powers of detention, the United Kingdom has no way of protecting the population from suspected international terrorists.¹³⁰

29 firmly sets November 10, 2006 as the date on which sections 21-23 shall "cease to have effect," and allows no further renewals of those sections. *Id.* § 29(7).

126. See *id.* § 122 (articulating further safeguards that require a committee to review the entire Anti-terrorism Act, and present a report to the Secretary of State and the Parliament).

127. See Ben Taylor & Tania Shankinovsky, *Eight Held in Raids on Terrorism Suspects*, DAILY MAIL (LONDON), Dec. 20, 2001, at 2 (maintaining that the United Kingdom could indefinitely detain the persons arrested in the first use of the Anti-terrorism Act unless they choose to leave the country), available at 2001 WL 31776801.

128. See *Klass v. Federal Republic of Germany*, 2 Eur. H.R. Rep. 214, 232 (1978) (announcing that the Court limits the discretion afforded to member countries in their adoption of anti-terrorism policies, because of the danger that unlimited discretion can lead to laws which destroy democracy in the name of defending it). But see Ronald St. J. Macdonald, *Derogations Under Article 15 of the European Convention on Human Rights*, 36 COLUM. J. TRANSNAT'L L. 225, 237-38 (noting that the Court recognizes terrorism as a paramount threat to the safety of a nation that requires the Court grant some latitude to member states to enable them to safely and effectively handle terrorism).

129. See *supra* note 116 and accompanying text (discussing the previous attempts and failures of using ordinary law enforcement to protect the nation from terrorism).

130. See *supra* notes 24-25 and accompanying text (detailing that before the enactment of section 23 of the Anti-terrorism Act, the government had no way of preventing suspected international terrorists from using the United Kingdom as a safe haven).

III. RECOMMENDATIONS

The United Kingdom has a long history of using emergency powers.¹³¹ Starting in colonial times and continuing throughout its dealings today with Northern Ireland, the United Kingdom often found it necessary to use emergency powers to resolve difficult situations.¹³² The Convention intended that the use of emergency powers and derogations under Article 15 would be limited only to the extent required by the situation.¹³³ Following the introduction and the passage of the Anti-terrorism Act, the government stressed that the measures taken were a proportional response to the threat of global terrorism.¹³⁴ In order to show continued respect for human

131. See DONOHUE, *supra* note 97, at 306-07 (discussing the United Kingdom's repeated use of emergency powers to control the situation in Northern Ireland). See generally A.W.B. Simpson, *Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights*, 41 LOY. L. REV. 629, 633-82 (1996) (exploring the different methods the United Kingdom has used to suspend habeas corpus). Originally, the United Kingdom used martial law in colonial South Africa between 1899 and 1902 to suspend habeas corpus during the war-like conditions of the time. *Id.* at 635. The United Kingdom then experimented in Western African countries by combining detentions with exile. See *id.* at 636-37. To deal with the unrest in Ireland in the early nineteenth century, the United Kingdom began enacting emergency codes to permit administrative detentions, because it believed that jury trials would be ineffective. *Id.* at 638. The United Kingdom frequently enacted emergency detention legislation, particularly to control the situation in Northern Ireland, but also in other parts of the United Kingdom during World War I and World War II. *Id.* at 639-46, 651-55, 679-82.

132. See Simpson, *supra* note 131, at 633-82 (chronicling the United Kingdom's long practice of using emergency codes to allow for administrative detentions).

133. See Convention, *supra* note 16, art. 15(1) (requiring that the member country limit the measures taken in derogation of the Convention to those strictly required by the scope of the emergency). Article 15 requires the member country to keep the Secretary General informed of the measures taken and the reasons for those measures. *Id.* art. 15(3). The member country must also notify the Secretary General when the public emergency no longer exists and country is again fulfilling its obligations under the Convention. *Id.*

134. See *Blunkett Defends Anti-Terrorism Powers*, TIMES (LONDON), Nov. 19, 2001 (on file with author) (labeling the proposed anti-terrorism powers a proportional response to the threats to national security); Johnson, *supra* note 13, (noting that moderate precautions were needed in the United Kingdom's legal system "for dealing with the terrorists rewriting their rulebook"); *UK's Blunkett Says Anti-Terrorist Bill Has 'Proportionate, Targeted Measures'*, *supra* note 20 (announcing that the Anti-terrorism Act is the proportionate response needed to protect the United Kingdom's way of life from terrorists).

rights and due process, the United Kingdom should continually review the necessity of the emergency powers provided by the Anti-terrorism Act and ensure that the derogation is in fact only temporary.¹³⁵

A. REVIEW OF THE LAW: THE CONTINUED NECESSITY OF THE ANTI-TERRORISM ACT

1. Required Review Process of the Anti-terrorism Act

The Anti-terrorism Act requires review of the sections concerning detention of suspected international terrorists,¹³⁶ as well as review of the entire Act.¹³⁷ The Act provides specific details that the government must follow in the review process, including the number of people to conduct the review, the timing of the review, and the presentation of a report on the review to both the Secretary of State and the Parliament.¹³⁸ Additionally, the Anti-terrorism Act limits the Secretary of State's power to certify and detain suspected international terrorists by setting November 10, 2006 as the expiration date for sections 21 through 23.¹³⁹ These provisions help ensure that the measures the British government takes in response to the public emergency are strictly tailored to the circumstances of the

135. See Fionnuala Ni Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1359 (1996) (finding that due process rights are often neglected and limited under emergency regimes); see also Emanuel Gross, *supra* note 87, at 91 (discussing that in fighting terrorism, liberal democracies face the unique challenge of maintaining the nation's security without destroying democracy).

136. See Anti-terrorism, Crime and Security Act 2001, § 28(1) (requiring the Secretary of State to appoint a person to review sections 21 through 23 of the Act).

137. See *id.* § 122(1) (mandating that the Secretary of State appoint a committee to review the Act as a whole).

138. See *id.* §§ 28, 122 (describing the details and requirements of the separate mandatory reviews required for sections 21 through 23 and the entire Act).

139. See *id.* § 29(7) (declaring that sections 21 through 23, which give the Secretary of State the power to label individuals as suspected terrorists and to detain individuals even when removal from the United Kingdom is not practical, shall expire at the end of November 10, 2006).

emergency.¹⁴⁰ The United Kingdom's past failures in reviewing temporary and emergency powers raise concerns regarding the limits of the Anti-terrorism Act, thus the government must strictly follow the provisions to prevent abuses of human rights and the violation of the Convention.¹⁴¹

2. The United Kingdom's Previous Attempts at Reviewing the Necessity of Emergency Powers

In response to internal and international pressure in the 1970s, the United Kingdom began limiting the scope of its emergency legislation in an attempt to prevent violations of human rights.¹⁴² Therefore, part of the emergency powers enacted for Northern Ireland in 1973 called for the ongoing reviews of the terms of the emergency regimes.¹⁴³ However, reviews of both the Northern Ireland (Emergency Provision) Act ("EPA") and the Prevention of Terrorism Act ("PTA") resulted in the expansion of the respective laws.¹⁴⁴

In 1995, Parliament renewed the EPA and PTA in spite of a six-month long cease-fire in Northern Ireland.¹⁴⁵ Parliament based that renewal on a review that used data collected before the six-month

140. See *supra*, notes 121-126 and accompanying text (explaining the safeguards written into the Anti-terrorism Act that limit the measures available to the government when dealing with a public emergency).

141. See *infra* notes 143-148 and accompanying text (describing the United Kingdom's past failures to protect human rights when acting under limited emergency powers).

142. See DONOHUE, *supra* note 97, at 340-41 (describing the balance that the British government sought between preventing terrorism from harming the population while also ensuring that the laws did not subvert democracy).

143. See Aolain, *supra* note 135, at 1371 (noting the creation of independent reviews of the emergency powers enacted to control the situation in Northern Ireland).

144. See *id.* at 1371-72 (discussing the expansions of the Acts as a result of the reviews in 1987).

145. See *id.* at 1372 (stating that the review in 1995 resulting a recommended continuation of the emergency powers despite the cease-fire that was in effect at the time).

long cease-fire.¹⁴⁶ Officials insisted that the cease-fire did not halt the training activities of the terrorist groups in Northern Ireland,¹⁴⁷ even though authorities significantly decreased the use of emergency laws during this period.¹⁴⁸ The validity of the government's claim of the continued threat to the security of the nation becomes questionable when the government does not use the very means designed to eliminate that threat.¹⁴⁹

B. THE UNITED KINGDOM MUST ENSURE THAT THE DEROGATION REMAINS A TEMPORARY MEASURE

A major part of the debate in Parliament concerning the Anti-terrorism Act was that the detention of suspected international terrorists must remain a temporary measure.¹⁵⁰ The debate resulted in a sunset clause in section 29, causing the detention powers to expire on November 10, 2006.¹⁵¹ While the expiration date sets an important limitation on the extraordinary powers to detain suspected international terrorists, Parliament can renew the detention powers through further legislation.¹⁵² Allowing the detention powers to expire when the emergency situation ends is necessary not only to

146. *See id.* (asserting that although the officials presented their review after the cease-fire, they collected the data prior to the cease-fire).

147. *See id.* at 1366-67 (explaining officials' belief that the public emergency continued after the cease-fire because terrorist training continued).

148. *See Aolain, supra* note 135, at 1369 (noting the decrease in the use of the emergency powers during the Northern Ireland cease-fire).

149. *See id.* at 1370 (addressing apparent contradiction of the United Kingdom in claiming the situation in Northern Ireland still required the existence, but not the use of, the emergency powers).

150. *See Hurst, supra* note 82 (reporting that the concession of a five-year sunset clause was necessary to prevent the demise of the Anti-terrorism Bill during Parliamentary debate). The lifespan of sections 21-23 now matches the duration of the derogation from the Human Rights Conventions. *Id.*

151. *See* Anti-terrorism, Crime and Security Act 2001, § 29 (stating that sections 21 through 23 will expire on the date specified in section 29).

152. *See Hurst, supra* note 82 (noting that the detention power of the Anti-terrorism Act will expire in November 2006, but new legislation can extend these powers).

the protection of the right of due process,¹⁵³ but also for maintaining the validity of the derogation under Article 15 of the Convention.¹⁵⁴

In addition to a long history of using temporary emergency powers, the United Kingdom has also continually renewed the temporary acts, ignoring the limitations on derogations under Article 15(1).¹⁵⁵ In 1922, the Northern Ireland government passed a temporary special powers act that essentially allowed for the continuation of two previous acts; by 1933, the Northern Irish Parliament made the act indefinite.¹⁵⁶ Despite the fact that Parliament limited the 1973 Emergency Powers Act to two years, the Act remained in existence for twenty-seven years through a series of extensions and renewals.¹⁵⁷ Parliament has often repeated this process of proclaiming an act to be a temporary measure to deal with a specific emergency, only to either extend the act or reenact virtually identical legislation under a different name.¹⁵⁸

153. See Emanuel Gross, *supra* note 87, at 162 (articulating that the preservation of due process rights through the ordinary criminal process presents the best method for dealing with internal threats). Emanuel Gross asserts two reasons why the United Kingdom should use criminal law. *Id.* First, the resulting appearance of normalcy demonstrates symbolically that the government can overcome the problem using the ordinary legal system. *Id.* Second, the ordinary criminal procedure carries a greater legitimacy than does the use of extraordinary powers. See *id.*; see also DONOHUE, *supra* note 97, at xix (arguing that emergency measures provide short-term benefits, but in the long-term, the measures can eliminate confidence in the government's ability to address terrorism).

154. See Convention, *supra* note 16, art. 15(1) (allowing extraordinary measures contrary to the Convention only to the extent required by the situation).

155. See DONOHUE, *supra* note 97, at 353 (concluding that the emergency powers enacted to resolve Northern Ireland's terrorism problems were not temporary because they were continually renewed); Emanuel Gross, *supra* note 87, at 148 (noting that the United Kingdom renews most of its anti-terrorism or rewrites them into new legislation); see also Convention, *supra* note 16, art. 15(1) (stating that the second requirement of derogation is that the measures taken in derogation from the obligations of the Convention may only be those that are strictly required by the circumstances of the emergency).

156. See DONOHUE, *supra* note 97, at 306 (discussing the early instances where the United Kingdom made temporary laws permanent).

157. See *id.* at 306 (noting the series of the British Parliament's extensions of the 1973 Emergency Powers Act, which was proclaimed to be a temporary act limited to the emergency situation in Northern Ireland).

158. See *id.* at 306-07 (detailing the British Parliament's practice of extending temporary measures beyond the time frame originally set forth in the acts).

The public played an important role in many of the previous extensions of temporary legislation, because the legislation only applied to a small portion of the population.¹⁵⁹ The public did not call for the repeal of the legislation, because it only affected terrorists who were attacking the democracy.¹⁶⁰ The Parliament hesitated even at the suggestion of repealing previous anti-terrorism legislation to avoid the appearance that the government had yielded to the demands of the terrorists.¹⁶¹

Pressure from several sources will help to ensure that the United Kingdom's derogation from the Convention and the extraordinary powers of detention remain temporary. Although the public supports the Anti-terrorism Act and abhors the acts of violence committed in the United States on September 11, the public has voiced its concern for the protection of basic civil liberties.¹⁶² Members of Parliament also expressed their concerns regarding the indefinite detention of suspected international terrorists through the establishment of the expiration date in section 29 of the Anti-terrorism Act.¹⁶³ Additional pressure from the international community, particularly the Council of Europe may help decrease the United Kingdom's temptation to extend the temporary powers of the Anti-terrorism Act beyond their expiration date.¹⁶⁴

159. *See id.* at 310 (noting that the British public remained largely unconcerned by the extension of previous temporary measures because the measures only affected a small portion of the population).

160. *See id.* at 316 (explaining the public's view that the only people affected by the continuous extension of the previous temporary measures were the terrorists).

161. *See id.* 317 (asserting that the United Kingdom was slow in repealing temporary measures to demonstrate that the government would not tolerate terrorism).

162. *See supra* notes 81-82 and accompanying text (discussing British citizens high regard for civil liberties and the fear of the powers of the detention under the Anti-terrorism Act); *see also*, Oren Gross, *supra* note 54, at 460, 463 (asserting that the Court of Human Rights is overly deferential to the decisions of the member countries and rarely challenges a member country's conclusions regarding the existence of a public emergency).

163. *See supra* note 82 and accompanying text (noting the Parliamentary pressures placed on the government during the Anti-terrorism Act debate to limit the duration of the detention powers).

164. *See* Macdonald, *supra* note 128, at 239 (proposing that the Court of Human Rights and the Council of Europe subject emergency measures to continuing

CONCLUSION

International terrorists executed a complex and devastating attack on September 11, 2001, and in response, the United Kingdom enacted extraordinary legislation aimed at preventing such action from occurring again.¹⁶⁵ Although the Anti-terrorism Act deprives suspected international terrorists of civil liberties, the United Kingdom has concluded that suspected international terrorists are such a threat to the nation extraordinary legislation is required.¹⁶⁶ The Human Rights Convention allows member countries to use extraordinary measures that would otherwise violate the Convention, during times of public emergency so member countries can properly protect their citizens.¹⁶⁷

The United Kingdom reasonably believes that it faces a public emergency that threatens the life of the nation.¹⁶⁸ While the Court of Human Rights will likely side with the United Kingdom, declaring Britain's derogation valid, the United Kingdom must ensure that it

supervision to guarantee that the circumstances causing the derogation are still present); *Council of Europe Secretary General Advocates Proportionality and Balance of Anti-terrorist Measures* (announcing that the Secretary General of the Council of Europe had received the United Kingdom's notice of derogation from Article 5 of the Convention, but heavily stressed that democracies should not allow terrorism to destroy the rule of law), at [http://press.coe.int/cp/2001/983a\(2001\).htm](http://press.coe.int/cp/2001/983a(2001).htm) (last visited June 28, 2002). *But see* Oren Gross, *supra* note 54, at 463 (arguing that although the Court of Human Rights professes to critically review a country's decision to derogate, the Court hesitates to interfere in the member states' decisions to declare a state of emergency).

165. *See supra* notes 1-5 and accompanying text (noting that the attacks on September 11 prompted the enactment of the United Kingdom's Anti-terrorism Act).

166. *See supra* notes 69-95, 113-130 and accompanying text (detailing the current situation in the United Kingdom that has led the British government to determine that a public emergency exists).

167. *See supra* notes 36-37 and accompanying text (explaining that while the protection of civil liberties is important, member countries must also consider the safety and protection of their citizens).

168. *See supra* notes 75-95 and accompanying text (explaining why the British government currently believes that a public emergency exists in the United Kingdom).

does not permanently suspend civil liberties.¹⁶⁹ The British public and the Court of Human rights may approve of the curtailment of civil liberties as a short-term emergency response, but neither group wishes to allow terrorism to result in the permanent destruction of civil liberties.¹⁷⁰

169. *See supra* notes 131-164 and accompanying text (explaining the importance of limiting the emergency powers of the Anti-terrorism Act in both duration and scope).

170. *See supra* notes 81-82, 128, 164 and accompanying texts (stressing the importance of ensuring that responses to terrorism are proportional and do not destroy democracy).