WAR ON TERROR

Lessons from Northern Ireland

CAJ
Committee on the Administration of Justice
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What is the CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First and Human Rights Watch and makes regular submissions to various UN and European bodies established to protect human rights.

CAJ’s activities include - publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include - policing, the criminal justice system, equality and the protection of rights.

As an independent human rights group, it is crucial that CAJ be funded independently. We take no government monies, and our financial support comes from supporters, individual donations, UNISON and the support of a range of charitable foundations such as the Atlantic Philanthropies, the Barrow Cadbury Foundation, the Hilda Mullen Foundation, the Joseph Rowntree Charitable Trust, and the Oak Foundation.

In 1998 the organisation was presented with the Council of Europe’s Human Rights Prize for its successful efforts to mainstream human rights and equality considerations into the peace negotiations.
CONTENTS

1 Introduction

5 Chapter One: Lessons from Northern Ireland

21 Chapter Two: Setting the context

43 Chapter Three: Written testimony to Eminent Jurists Panel

75 Chapter Four: Oral testimony to Eminent Jurists Panel

4.1 Sectoral
   _ Non-governmental organisations
   _ Legal academics
   _ Legal practitioners
   _ Northern Ireland Human Rights Commission
   _ Law Society
   _ Director of Public Prosecutions
   _ Police Service of Northern Ireland

4.2 Thematic
   _ lethal force & collusion
   _ internment and ill-treatment
   _ suspect communities

4.3 Public Meeting

Appendices

109 One: Press release issued by Eminent Jurists Panel

111 Two: Council of Europe guidelines on terrorism

123 Acknowledgements
The tragic events 11th of September 2001 in New York and Washington unleashed a “war on terror” with serious human rights consequences around the world.

This response stands in stark contrast to the global response to the heinous acts perpetrated in World War II. At the end of that war, and in response to its many atrocities, states came together and in solemn conclave determined that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. Moreover, the very states that had been at war with each other determined that “it is essential, if a man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”. In 1948, the world saw that the upholding of human rights was the greatest defence against acts of terror, and that security was best achieved by actively promoting equality and justice for all.

Fifty years later, in a very small part of the globe, people in Northern Ireland came to broadly similar conclusions. The agreement negotiated by their political representatives, and subsequently endorsed in referenda, recognised that “the tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died, or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the rights of all”.

In the wake of 9/11, people around the world are now asking themselves what is the appropriate response to terrorism? How does one effectively counter terrorist acts? What does one do in the “ticking bomb” scenario – is torture of suspects ever allowed? How much, if at all, should our well-tried systems of due process, humane treatment of detainees and prisoners, of personal privacy and open government, adapt to the new challenges posed by political violence? Are the human rights gains of the past, luxuries that have to be set aside at times of national emergency?

It was to address these very questions that the world-renowned and respected International Commission of Jurists (ICJ) approached a number of eminent jurists and proposed that they engage in a global study entitled “Terrorism, Counter-Terrorism and Human Rights”. The Eminent Jurists Panel was subsequently launched by the ICJ in October 2005 and is chaired by Arthur Chaskalson, former Chief Justice of South Africa, and includes Georges Abi-Saab (Egypt), Robert K
Goldman (USA), Hina Jilani (Pakistan), Vitit Muntarbhorn (Thailand), Mary Robinson (Ireland), Stefan Trechsel (Switzerland) and Raul Zaffaroni (Argentina). The jurists, all widely respected in their own countries and much further afield, have taken on the task of visiting a broad range of countries to listen to past and present experiences of cycles of terrorism and counter-terrorism, and to produce a final and detailed report with recommendations as to how the international community can best respond to these global challenges.

Much of the focus of the travel undertaken by the Eminent Jurists Panel (EJP) was on countries still experiencing very high levels of political violence, or which are actively engaged in the international “war on terror”. Accordingly in 2006 and 2007, the Eminent Jurists Panel have travelled to receive testimony from countries and regions as diverse as Australia, Canada, Colombia, East Africa, Middle East, North Africa, Pakistan, Russia, South America, South Asia, South East Asia, the UK, the USA, as well as the European Union.

The Panel chose also to accept an invitation to visit Northern Ireland (in addition to their visit to London to discuss wider UK responses to the international war on terror). They were aware that Northern Ireland had already moved away from overt conflict and hoped to explore the learning from at least 30 years of intense political violence, and to determine what lessons this might have for other places. Two members of the eight-member Panel visited Belfast – Justice Arthur Chaskalson, former Chief Justice of South Africa, first President of South Africa’s Constitutional Court, and chair of the Panel, and Justice Zaffaroni of the Supreme Court of Argentina. The two jurists issued a press release at the end of their visit (see Appendix One) and have since indicated (for example in their visit to the USA) that the Northern Ireland hearings did indeed provide them with rich data for their study.

The EJP will be producing a final report on their findings and, presumably, the lessons from Northern Ireland will inform their eventual proposals. Clearly, however, any Northern Ireland component of a global study will be relatively limited in scope and depth. Accordingly, the Committee on the Administration of Justice (CAJ) which facilitated the visit to Northern Ireland by the Panel, decided to issue this fuller report on the Panel’s visit. The report derives from material prepared for, and submitted to the Eminent Jurists Panel, but is the responsibility alone of CAJ. Having already made a preliminary submission to the EJP’s work (see Chapter Two), this publication now constitutes the organisation’s final written contribution to the global study.

CAJ has long believed that human rights abuses fed and fuelled the conflict in Northern Ireland. We fear that, if the lessons from places like Northern Ireland are not taken on board, major world advances in protecting the dignity and worth of all human beings, as summed up in the 1948 Universal Declaration of Human Rights, will be undermined - perhaps irretrievably.
Structure of the Report

This report consists of four distinct elements:

Chapter One: Lessons from Northern Ireland

On the basis of 25+ years of working to uphold human rights in Northern Ireland (at the height of the conflict and in the peace building phases), and drawing on the extensive written and oral submissions made to the Eminent Jurists Panel in Spring 2006, CAJ has drawn up an analysis of the human rights lessons that we believe Northern Ireland has to offer to the current global debates.

Chapter Two: Setting the context

To facilitate the work of the Eminent Jurists Panel, CAJ had prepared an extensive written briefing in advance of their visit. The briefing looks in turn at issues such as internment, the impact of emergency legislation on the criminal justice system, and lethal force. It was initially accompanied by a very extensive bibliography but space prevented its inclusion herewith. Readers wishing to explore further any of the topics explored in this analysis are encouraged to contact the CAJ office for details on the bibliography.

Chapter Three: Written testimony to the Eminent Jurists Panel

To ensure that the short visit to Northern Ireland could be exploited to the full, the Panel urged that those interested in contributing would submit written evidence in advance of their visit. Twenty-three written submissions were forwarded by a range of academics, non-governmental organisations, and international experts, and submitted in full to the Panel. In many instances, the submissions themselves included extensive additional written reports and publications, and these also were submitted to the Panel. For wider study, CAJ has prepared a short summary of all the material for this chapter.

Chapter Four: Oral testimony to the Eminent Jurists Panel

The Eminent Jurists Panel visited Belfast from 19 to 21 April 2006, and received extensive oral testimony in the course of a series of small seminars - organised with different sectors, and on different themes. The Panel met with - human rights organisations from outside Northern Ireland; legal academics; legal practitioners;
representatives of the Northern Ireland Human Rights Commission; the Law Society; the Director of the Public Prosecutions; and the Chief Constable and other senior members of the Police Service of Northern Ireland. There were also three “thematic” seminars organised on - lethal force & collusion; internment and ill-treatment; and suspect communities. Since most of these seminars were by invitation, the Panel also organised a meeting open to the general public, to provide an opportunity for any member of the general public to contribute to their deliberations in person.

Most of these sessions were tape-recorded and transcribed for use by the Panel in its final report. The Panel also held private meetings with the Bar Council and members of the judiciary. The Panel will examine all this material to determine its value for the wider global study they are engaged in.

The summary that appears in this report has been developed by CAJ and is intended to give a flavour of the key exchanges (sometimes very raw) of the very different experiences of those who testified to the Panel.
CHAPTER ONE

Lessons from Northern Ireland

CAJ
Committee on the Administration of Justice
The Committee on the Administration of Justice (CAJ) has long argued that human rights abuses fed and fuelled the conflict in Northern Ireland. It is this assessment that has informed the organisation's contributions to the peace negotiation process itself, and to the many institutional, legal and policy changes that have occurred in the nearly ten years since the passage of the Good Friday/Belfast Agreement.

In inviting the Eminent Jurists Panel to consider holding hearings in Northern Ireland, CAJ had argued that Northern Ireland offered many lessons for the current debate about the global war on terror. On the basis of our own experience over more than 25 years of working to uphold human rights protection in Northern Ireland, and drawing on the written and many of the oral submissions to the Panel, CAJ sets out below the lessons that we believe should be shared with other jurisdictions.

1. In times of crisis, it is even more important to uphold the rule of law and respect human rights

The greatest duty of any state is to ensure the safety and security of its citizens and all within its territory. The surest way of complying with this duty is to make a clear and public commitment that the rule of law and human rights will be protected at all costs. If temporary special security measures are considered necessary, they should be argued on the grounds of protecting the human rights of all in society. All such proposed measures should be subjected to a proper, transparent and objective balancing exercise to ensure that the rights of individuals and society as a whole are properly protected.

Whatever measures are introduced must be legal, necessary and proportionate. The executive alone cannot determine whether these principles are met. The executive, the legislature, the judiciary, a free press, a vibrant civil society, a strong and independent legal profession, and an educated and informed populace – in combination – will provide the best response to violent attack.

The greater the threat to society, the more important it is that society as a whole deliberate on and authorise the security measures being introduced on its behalf, and in its name. When, in England, the Police and Criminal Evidence Act (PACE) introduced a range of safeguards for suspects, there was a concern that it might restrict the police’s ability to pursue successful prosecutions and secure convictions. In practice, the safeguards have ensured that procedures are properly followed; the rights of the accused, the police, and the alleged victim are more effectively protected; and the police and public have greater confidence in the system.

How much more important it is at times of violent attack that public confidence in the police and other organs of the state be maintained? For example, a wave of
attacks, or clear advance information about proposed attacks on a city’s public transport system, do not only allow the government to institute various public safety measures – human rights law requires this of the authorities. Nonetheless, such measures must always be taken with a view to ensuring that fundamental human rights safeguards are not breached. The authorities may argue that such safeguards hamper their efforts. In Northern Ireland, despite the many allegations of ill-treatment and police threats against defence lawyers, the authorities resisted the introduction of video and then audio recording of interrogations for many years. The systems have only recently been introduced - when, hopefully, they may prove less necessary. Their earlier introduction would have meant that detainees were not subject to coercive treatment, protected the police against false allegations of ill-treatment, and maintained confidence in the criminal justice system as a whole.

There are many practical measures that can be introduced or strengthened to ensure that rights are respected, the rule of law upheld, and effective accountability ensured.

2. In the interests of protecting society, an array of human rights measures must be integral to legislation, policy making and institutional practice

The best security against violent attack is an effective criminal justice system to detect, prevent, deter and punish the perpetrators of violence, alongside measures to tackle any longer term causes that may facilitate or breed violence. The Northern Ireland experience shows conclusively that human rights safeguards should be maintained, and strengthened. Many of the practical protections cited below were notable for their absence at the height of the conflict, and indeed are not all secured even now. Nevertheless, this report provides extensive testimony as to the positive role that these measures could have played, or did on occasion play, in the past.

2a. The importance of legislative human rights safeguards

States should assess and re-assess whether their legislative framework is sufficiently robust in human rights terms to respond to the new situation. Although, there is often pressure to pass counter-terrorist legislation, this needs to be balanced by advancing and promoting human rights protections.

In Northern Ireland, the Human Rights Act (domestic incorporation of the European Convention of Human Rights) was introduced in 2000. If this legislative framework had existed in domestic law earlier, it would have not proved as
necessary as it was for many families to pursue legal remedies at the European Court of Human Rights. Several families were successful in their court cases, but the process was inevitably onerous and slow, and still required domestic operationalisation. This system compounded the original wrong and fed a sense of increasing alienation in victims of state violence, and the communities from which they came.

Moreover, the purpose of incorporation was not simply to ensure speedier and more effective remedies for wrongs done, but to integrate basic human rights protections into relevant policies and procedures to avoid the wrongs in the first place. For example, as a direct result of the Human Rights Act (and increased awareness of the role that the police play in protecting or abusing people’s rights), the Police Service of Northern Ireland now are knowledgeable about their duties when discharging firearms, effecting arrests, training new recruits. The domestic incorporation of the European Convention is therefore a major advance, and earlier passage of such legislation might have significantly reduced the level of human rights abuses reported elsewhere in this report.

No single initiative is sufficient. A commitment in the Good Friday/Belfast Agreement was to consult on the value of introducing a Bill of Rights for Northern Ireland, and discussions to this end are now underway. If such a Bill of Rights had existed prior to, or during the height of the conflict, people with grievances would have had a positive outlet for their concerns. If there had been successful legal challenges about the longevity of the emergency powers, or the gerrymandering of local government divisions, or discrimination in employment, it is likely that some of the violent confrontations of the late 60s and 70s might have been avoided.

The disputes over parading and protesting in Northern Ireland are centuries old. Yet as recently as the mid 1990s, a state of anarchy prevailed for several days on the streets right across Northern Ireland because of these disputes. In response to the breakdown in law and order, government introduced institutions and legislation to address the problem. While all the problems are still not resolved, they are now being addressed through the courts, and local accommodation, and very rarely on the streets by way of violent confrontations.

A key grievance in Northern Ireland had long been the existence of discrimination and the lack of equality for the minority community. A government-established inquiry into the cause of early public disturbances in 1969 concluded that there was a rising sense of continuing injustice and grievance among large sections of the Catholic population in Northern Ireland due to problems such as housing, employment, and fair electoral representation. After an initial spurt of legislative reform to counter the violence spilling out on the streets, government’s legislative measures proved minimalist. Legislation to remedy workforce discrimination, was
passed in 1973, 1976, and then – to greatest effect – in 1989. In the same twenty year period (1969-1989), any number of security-driven measures were tried and failed – the lessons from Northern Ireland suggest that a speedier move to effective anti-discrimination legislation might have been much more successful in undermining grievances and tackling violence.

2b. The need for institutional human rights safeguards

Legislation is important, but so are the institutions that interpret and apply that legislation. The police and criminal justice agencies cannot easily comply with human rights standards without an effective legislative framework; but equally a good legislative framework does not guarantee that society's institutions fully comply with their human rights obligations.

In Northern Ireland, policing was highly contentious. This report alludes to frequent allegations of ill-treatment, lethal force, discriminatory stop-and-search practices. The peace negotiations set out a vision for policing in the future and then had the government establish an independent international commission to make recommendations about how to achieve that vision. The Commission noted “it is a central proposition of this report that the fundamental purpose of policing should be, in the words of the Agreement, the protection and the vindication of the rights of all”. To this end, the Commission proposed measures for ensuring a more representative police; human rights training; more effective accountability mechanisms; a completely independent complaints system; and greater community involvement with the police. Those 175 recommendations - and the new policing institutions, Police Ombudsman, Policing Board, and District Policing Partnerships that they gave rise to - offer a blueprint worthy of study anywhere in the world where human rights compliant policing is considered important.

In the broader criminal justice realm, the changes have been less far-reaching, but measures to monitor the impact of the criminal justice system on different groups within society to detect any discriminatory tendencies; to render the judiciary and other criminal justice agency staff more representative of society as a whole; to establish independent complaints systems; to introduce human rights training; to ensure greater transparency and accountability in the prosecutorial and judicial processes, have all proved very important. A human rights-friendly culture is still in the making, but underway. It is to be hoped that, once flourishing, it would make it much less likely that the judiciary, the Public Prosecution Service, or other officers of the court would countenance some of the serious human rights abuses which were previously ignored by those same agencies.
Given the power that is vested by society in its police and criminal justice agencies (the power to deny someone their liberty and even, in specific cases, their right to life), it is vital that these bodies be subject to effective oversight. The experience of Northern Ireland would suggest that the more power that is exercised by any agency, the greater the need for such oversight.

The oversight is secured in many arenas over and above the political and democratic oversight provided by the legislature, the executive and the judiciary – for example, a free and independent press, informed non-governmental organisations, and a legal profession with integrity. Again, the Northern Ireland experience is that it can often be these very sectors that come under pressure at times of crisis. Defence lawyers have been killed in Northern Ireland because they were associated with the (unpopular) politics of their clients; professional associations and others have hesitated to speak out on behalf of their members for fear of being politically divisive; the media can all too easily succumb to populist pressure to unquestioningly support government’s response to the security threat and demonise those who disagree. States under violent attack must not hold themselves above criticism - that way lies totalitarianism.

In Northern Ireland, the peace agreement put human rights and equality at the heart of many institutions of the state, and it also established specialist agencies to oversee that work. A Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland, funded by the tax-payer, advise government on its statutory responsibilities to uphold human rights. Such bodies cannot do the work on their own, but they provide valuable support to government in its efforts to protect the rights of all.

2c. Policy-making: the human rights perspective

Legislation and institutions are valuable – so are policy measures. For example, it is important to have anti-discrimination and equality legislation, but it is policies introduced to gather disaggregated statistics and to monitor the impact of legislative change that will bed the process down. The police know that there are legislative and institutional constraints on their use of force – but they need an array of policy guidance regarding the circumstances in which the use of force is allowed, the principles which need to be applied in any use of force, and how such incidents are to be recorded and investigated.

To take another example, informers may be essential to effective policing, but the rules which govern the use of informers should lay down the conditions which apply to their use. Can anyone be an informer – or are children and vulnerable adults exempt? What inducements can be offered informers – what happens if
they engage in any form of criminal activity? Who oversees the use of informers and the compliance of police officers with the agreed rules? This report is replete with examples of information gathering efforts that proved counter-productive – while legislation can remedy that to some degree, it is the detailed operational policy guidance to the police that may prove of most relevance.

In Northern Ireland, another valuable policy contribution was the decision to introduce codes of ethics for the police and various criminal justice agencies. In the case of the police, the code of ethics (which follows the model of the Council of Europe’s European Code of Police Ethics), is tied directly into the police disciplinary code. In this way, the Code of Ethics takes on much more significance in the work of the new recruit and the seasoned officer – since violations of the code could lead directly to penalties in terms of pay, promotion or worse.

3_ When a society is under threat, protecting due process is vital

In seeking to protect society as a whole, and defend its security, it is vital to defend the rights of the individuals that constitute that society. At the root of international human rights law is the premise that all human beings are born free and equal in dignity and rights. Moreover, the rule of law and principles of due process exist to ensure that the suspects that are apprehended, detained, and subsequently imprisoned are indeed guilty of the crimes alleged. It is the antithesis of security to fail to apprehend those engaged in criminal acts, or to imprison the wrong suspects and undermine public confidence in the system. The Northern Ireland experience highlights the importance of these principles.

One of the first major responses by the state to public disorder and violent conflict in the early 70s was the introduction of internment. Like so many similar initiatives, it was intended to be a short-term solution to a short-term problem. It proved, even in the opinion of its creators, to be a major setback. Everyone agrees that internment failed because of poor intelligence and the wide-scale detention (for long periods) of innocent people. This wrong was further compounded when some internees were subjected to ill-treatment, amounting, in the view of the European Commission of Human Rights, to torture. The allegations of torture and ill-treatment, further fuelled anger in the communities from which the internees were drawn, and reduced the potential for important information-gathering. The fact that the internees were disproportionately drawn from one community was another aggravating element. There are clearly long-term consequences for individual internees, and for attitudes in the communities they came from: internment in Northern Ireland was an ineffective short-term solution to a long term problem. Worse, it had long term negative consequences.
In subsequent years, internment fell into dis-use but a range of limitations to the principles of due process were introduced: non-jury trials, lower burden of proof, the withdrawal of the right to silence, limited access to lawyers. These measures, when combined with limited oversight of interrogation techniques and allegations of ill-treatment, meant that in the eyes of many, the criminal justice system lost credibility in terms of upholding the rights of the thousands of individuals that came in contact with it.

The learning from Northern Ireland for other jurisdictions is:

- Long, or indeterminate, pre-trial detention/internment is unacceptable;
- Ill-treatment of detainees and prisoners must be actively prevented and allegations of same must be immediately and independently investigated;
- False allegations of torture or ill-treatment can be easily avoided by ensuring independent medical examinations; immediate and confidential access to legal advice and to family; audio and video recording of interrogations; unannounced visits to places of detention by independent observers;
- Coercive interrogations – which can lead to ill-treatment or a subsequent miscarriage of justice – can also be easily prevented by a mixture of regular oversight of the kind noted above, proper police training, detailed custody records, courts’ refusal to accept confession evidence secured in this way, and serious penalties for wrongful behaviour;
- The principle of “innocent until proved guilty” which is the foundational stone of any good criminal justice system requires that suspects be allowed to retain their right to silence and their right not to self-incriminate;
- Trials should be prompt and avoid “internment by remand”; bail should be available for all but the most serious of charges;
- Trials should be fair; ensure equality of arms with full disclosure of evidence to defence solicitors; ensure speedy access by the accused to independent legal advice; have an adequate legal aid system.

It has already been noted that all law officers (police, defence lawyers, prosecutors, judges) must be held to the highest possible standards of behaviour. It is particularly important, if people are to receive the best legal representation possible, the innocent are to go free, and the guilty be convicted, that police codes and professional support networks recognise and respect the vital contribution to the rule of law by defence lawyers. Confusing defence lawyers with the views of their clients limits their potential to defend clients effectively, creates a much wider “chill factor” in the profession, and may indeed put lives at risk.
All of these safeguards are guaranteed in international and regional human rights treaties signed up to willingly by most states – the UK included. At times of crisis, international human rights standards should be the key guarantor of everyone’s security.

4. Democratic and legal safeguards rarely operate effectively once extraordinary measures have been taken that curtail human rights

Most governments that consider themselves democratic introduce emergency or special legislation with a panoply of supposed safeguards - knowing that there will initially be extensive resistance to the state taking on extraordinary powers. The experience of such safeguards in Northern Ireland has been that they rarely work effectively.

For example, regular and independent reviews of emergency powers were a common feature in Northern Ireland. However, either because the reviewers were unwilling to challenge the executive, or because their terms of reference were extremely limited, the review process rarely led to fundamental change. Occasionally, minimal recommendations for change were made, but never did the reviewers feel able or willing to propose that government consider ending the emergency measures entirely. Ten years into ceasefires by all major paramilitary groups in Northern Ireland, reviewers were still not challenging the very existence of emergency powers.

Judicial oversight is also often seen as a panacea – given the assumption that an independent judicial figure will properly balance the rights of the individual against the rights of society overall. While the option for judicial oversight is better than none at all, judges are not immune from the climate of fear that is often deliberately stoked to maintain public vigilance. The concept of “national security” is allowed to predominate over all other considerations, and yet only the government of the day is authorised to interpret its meaning in any particular instance. The executive rarely leave much autonomy to the judiciary (or legislature) in the interpretation of what constitutes national security; and the judiciary tend to be very respectful of the executive’s discretion in this domain.

The Northern Ireland example also highlights how weak international oversight is in this regard. While in many other domains, positive international intervention can be recorded (see on), international oversight mechanisms err on the side of granting great leeway to sovereign states in determining the nature and extent of the emergency faced, and the legislative responses acceptable. The European Convention, and the International Covenant on Civil and Political Rights, both speak of the right of states “in time of war or other public emergency threatening
the life of the nation” to take measures derogating from their responsibilities “to
the extent strictly required by the exigencies of the situation, provided that such
measures are not inconsistent with its other obligations under international law”.
These pre-conditions for derogation appear to set fairly high standards, yet CAJ
is unaware of any clear recommendation to the UK government from the United
Nations, the Council of Europe, or the European Court of Human Rights, regarding
the appropriateness (or otherwise) of emergency-type provisions operating in
Northern Ireland for nearly ninety years. The widely accepted international norms
of “legality”, “necessity” and “proportionality” appeared to be left largely to the
state to interpret.

5. “Special” or “emergency” legislation may lead to serious abuses and be
counter-productive

Judging from the Northern Ireland experience, there is extensive evidence that
emergency or special legislation, introduced to counter serious violent threats,
may lead to serious human rights violations and can be counter-productive.

In particular, the creation of distinct “terrorist offences” by way of such legislation,
is often unnecessary and unhelpful. It is unnecessary because all relevant offences
can be made amenable to the normal criminal process, if they are not already. It is
unhelpful because such concepts create obstacles to understanding and dialogue.
Language introduced to emphasise social solidarity can inadvertently fuel the very
“us and them” mentality which the authorities are seeking to reduce, and facilitate
(particularly in the long term) discriminatory practices against the “out” group.

If the Northern Ireland experience is examined, it is obvious that - once introduced
– special/emergency legislation can all too easily become a permanent feature.
The UN Special Rapporteur on States of Emergency, Leandro Despouy, is cited
elsewhere in this report as noting about emergency provisions generally that;
“(what) was temporary, becomes definitive; what was provisional, constant; and
what was exceptional, permanent - which means that exception becomes the
rule”. Northern Ireland experienced ‘special’ counter-terrorist legislation from 1921
continuously until recently, when the Northern Ireland specific elements were
merely replaced with UK-wide powers. The risk is great that the government that
introduces such extraordinary powers becomes accustomed to them, and finds it
convenient to keep operating outside the legal constraints of ‘normal’ procedures.
The passage of anti-terrorist legislation poses a serious threat to the rule of law in democratic societies. The Northern Ireland experience shows that emergency law:

- corrodes the normal criminal justice system;
- politicises the rule of law;
- allows a climate of fear to be mis-used against minority groups;
- privileges the gathering of information for intelligence/political purposes rather than for evidential reasons;
- corrupts individuals and institutions, especially undermining the vital non-political and independent role that must be played by judges, prosecution and defence lawyers, police etc;
- is ineffective in deterring terrorism because it ‘demonises’ and alienates the very communities that could be of most assistance;
- fuels the very violence it is attempting to undermine by exacerbating real or perceived grievances, by ‘normalising’ violence, and by potentially giving propaganda victories to state opponents.

6. Equality and non-discrimination are crucial principles for security and good community relations

In Northern Ireland, and in many other conflict situations, there are important societal divisions. These divisions are sometimes caused by human rights abuses, but nearly always further exacerbated when political violence and human rights abuses occur. It is therefore no accident that all the international and regional standards emphasise equality and non-discrimination as core human rights principles necessary to a just and peaceful society.

A society that treats its individual members respectfully, and respects diversity, seeks to root out the inequalities, social exclusion, and marginalisation that often foster anger and violence. A comprehensive human rights programme of prevention which addresses any underlying causes of conflict – perhaps tackling a legacy of poverty, or educational disadvantage, or discriminatory behaviour – is likely to be more effective than a punitive policy in response to conflict. Support for this analysis interestingly lies not only in the Universal Declaration of Human Rights but in a British military assessment of the army’s handling of the conflict in Northern Ireland which has recently come into the public domain. The document
concludes “unless the causes of unrest are addressed, insurgency or serious unrest will continue. In Northern Ireland, this did happen over a number of years… simplistically, the long-term solution was not to deploy three battalions into the Divis Flats (notorious high-rise flats in west Belfast), but rather to bulldoze them and build decent, respectable homes, with proper amenities”.¹

This report gives many examples of the day-to-day problems that arise when whole communities are seen as potentially suspect. It became accepted in certain communities that the police and army would hassle people on their way to work or school and one CAJ report into security force harassment summed up the experience of many of those interviewed in its title - “It’s part of life here….”. The ‘normalisation’ of emergency powers becomes inevitable if the powers of state agents are continually extended, and the safeguards are inadequate. Many of those who testified to the Eminent Jurists Panel argued that the very legislation intended to target and marginalise terrorists, fuelled violence. Young Catholic males from nationalist and republican communities were consistently targeted, and this promoted a sense of grievance and injustice across the whole community. Extensive stop-and-search powers meant that the web of suspicion extended well beyond legitimate suspects. The police needed to gain the support and trust of the very communities that their policies were targeting and alienating.

7_ Domestic efforts to protect human rights in times of crisis need to be backed by international measures

The Northern Ireland experience shows that domestic legislation and local campaigning efforts were insufficient to withstand the perceived need on the part of government to introduce increasingly non-human rights compliant measures to counter violence. The learning from Northern Ireland is that there needs to be closer international scrutiny in individual circumstances of what constitutes an “emergency”, and regular monitoring to assess when those pre-conditions no longer apply. The current international standards for declaring an emergency, as laid down in article 4 of the International Covenant on Civil and Political Rights, seem appropriate but the UN member states need to be held to account and justify how these pre-conditions have in fact been met, or the extent to which they continue to be met, long after the initial declaration.

International standards are independently verified, and freely entered into by states, and as such cannot easily be ignored. The very fact that states have to choose to formally “derogate” from some of those standards at times of crisis,
highlights the fact that states are expected to be accountable to the international community for any diminution of human rights protections.

From the early 1990s onwards, CAJ and others turned frequently to external scrutiny bodies and to the international community, asking that they bring their influence to bear on the local situation. Interventions by the UN Committee Against Torture, the UN Committee for the Elimination of Racial Discrimination, the European Committee for the Prevention of Torture, and the European Court for Human Rights, all had identifiably positive consequences for the protection of rights. While not true for all jurisdictions, many states do not like to be criticised by the international community, and do not like to have their security tactics and resultant human rights abuses subjected to the glare of international scrutiny. In some instances, such pressure can be much more influential than local efforts, though of course such pressure is best exerted when it is informed by local knowledge and expertise.

CAJ found that the interventions by internationally respected human rights groups such as Amnesty International, the then Lawyers Committee for Human Rights (now Human Rights First), Human Rights Watch, the International Commission of Jurists and others, were positive in highlighting failures on the part of the UK government to comply with basic international standards and bringing about change. Such interventions were valuable in their own right, but also because the motivations of local actors are frequently challenged and disputed in a highly contested political conflict. The fact that such respected organisations were citing the same international standards, and making the same criticisms, as local groups such as CAJ, gave greater credibility and legitimacy to local human rights efforts.

The need for such international scrutiny and support remains valid today. Northern Ireland faced emergency powers for some 80+ years, and now has a Terrorism Act which has placed many of those powers on a permanent basis – who and how will the international community hold the UK government to account for the operation of this counter-terrorist legislation?

8. Dealing with the past offers human security in the future

It has been said that “what we don’t learn from history, we are condemned to repeat”. Political dialogue between former enemies is underway in Northern Ireland, and this will hopefully allow for the development of a shared vision of a more just and peaceful society. But Northern Ireland has a long way to go and one of the biggest challenges still facing society is how to handle the tragedies of the past.
Official inquiries have been, or are being established; police investigations into the 3600+ deaths are underway; and efforts are being made privately and publicly to engage in a more comprehensive debate about dealing with the past. The Eminent Jurists Panel talked of the need to challenge impunity and the needs of victims to have full and transparent investigations of the circumstances in which those deaths occurred.

From CAJ’s perspective, we have worked for many years with families who have lost loved ones during the conflict - we have campaigned on individual cases; we have worked to improve the inquest system; and we have successfully taken cases to the European Court of Human Rights. We believe that any proposal for dealing with the past must build on these experiences, must be in accordance with domestic and international human rights standards, and must properly engage with the rights of victims and others. While CAJ’s mandate relates only to the actions of the state, we believe that it is self-evident that any examination of the past must take place in the context of a full and informed examination of the actions of all relevant actors.

Obvious human rights principles against which any eventual proposals must be measured include:

- **Independence**
  Any process must be completely independent of all parties to the conflict including the state. Those who are charged with guiding the process must be persons of sufficient standing in the international human rights community to command respect across the community in Northern Ireland.

- **Transparency**
  Cooperation on the part of the state must include full disclosure of material including documents relevant to the conflict. Nothing should be exempted from this undertaking, save information which would clearly put someone’s life in danger. Any process must involve public hearings.

- **Accountability**
  The process should be primarily about ensuring that institutions and individuals are held accountable for their actions or inactions. This process of accountability need not necessarily be about punishment or actual imprisonment, and a range of accountability measures could be considered.

- **Procedures should be compliant with the European Convention**
  The European Court of Human Rights has laid down a series of tests to ensure that any violations of the right to life (article 2) should be effectively and
independently investigated. Any acceptable process must comply with these and other Convention human rights safeguards.

- **There can be no impunity or blanket amnesty**
  Truth processes which grant unqualified amnesty for those accused of serious violations are in violation of human rights law. So, while there is a growing legal debate about what - short of a blanket amnesty - is an acceptable compromise when reconciliation and political stability are major concerns, there is, at least certainty that there can be no blanket immunity.

- **The process should be voluntary**
  Victims should retain the option of pursuing their case through the normal legal process if they so choose, and ought not be forced to take part in a truth and reconciliation process.

- **Process of acknowledgement of wrong-doing**
  There must be acknowledgement from the state and all parties to the conflict that wrongs were committed, and there must be undertakings from all parties to cooperate with a fair and impartial truth seeking mechanism.

- **Integrity of criminal justice process should be upheld**
  The conflict in Northern Ireland warped the criminal justice system and undermined public confidence. We believe any truth process should not repeat this pattern, and instead should restore confidence in the criminal justice system by making recommendations for improvements.

- **International human rights law should guide the process**
  Any truth and reconciliation process examining deaths or allegations of torture or ill-treatment should comply with the safeguards relating to them as laid down by articles 2 and 3 of the European Convention on Human Rights. Other relevant international human rights standards should also be part of the parameters for any such process.

- **No hierarchy of victims**
  Victims of the conflict should be self-defined. There should be no discrimination as between different classes of victims.

- **A clear outcome**
  The process should culminate in a published report which, in addition to describing the work undertaken, will make recommendations to ensure that such violations do not recur. Where appropriate, the process should be capable of making reparations.
Setting the Context
In advance of the visit in April 2006 by the Eminent Jurists Panel, the Committee on the Administration of Justice (CAJ) had secured the help of a volunteer – Julie Harris, studying at Queens University - to help prepare a first draft of a background paper.

The briefing was intended to provide the Panel with a fairly detailed analysis of the human rights situation in Northern Ireland over recent decades, thus providing them with some context for the evidence they were likely to hear during their visit. The topics selected were thought to be ones that the Eminent Jurists Panel might want to inquire into in the course of their meetings.

The original briefing (2006) was accompanied by extensive footnotes and a very detailed bibliography amounting to several hundred books, articles, academic studies, statistical surveys, and international reports – past and present. For practical purposes, all the original footnotes (including sources of citations) and the extensive bibliographic references have been omitted in this report; readers wishing to avail of the fuller text, should contact the CAJ office directly for a copy. The submission addresses topics such as:

- Development of emergency legislation
- Impact of emergency legislation on trial procedure
- Impact of emergency legislation on the legal profession
- The role of the Director of Public Prosecutions
- Impact of emergency law on the security forces
- Internment 1972-1975
- Holding Centres for Terrorist Suspects
- Use of lethal force by the security forces
- Treatment of suspect community
Introduction

To set the context, it is worth pointing out that there are few jurisdictions in the world that have experienced emergency legislation and the operation of counter-terrorism measures for such a prolonged period of time. In 1921, the Special Powers Act was enacted in Northern Ireland; it was replaced by the Emergency Powers Act in 1973, which was supplemented with the Prevention of Terrorism Act 1974. These pieces of legislation had to be routinely reviewed but were consistently renewed and often strengthened, and were replaced by the Terrorism Act in 2000, and 2006, with a chapter devoted to special provisions relevant to Northern Ireland.

In addition, few other places have experienced the intensity of conflict over such a long period. Northern Ireland is a small geographical entity, with a small population (1.6m), but it has lost 3600+ people, which is equivalent in per capita terms to the loss in the USA of five Twin Towers for each of the past 30 years. Nearly 80% of these deaths occurred in three small geographical areas – Belfast, Derry and South Armagh – and some families suffered multiple losses.

The experiences in Northern Ireland are directly and immediately relevant to many of the current debates about the “war on terror”. Internment, proscription, surveillance, ill-treatment (indeed the very same forms of ill-treatment - the “5 techniques” used in Northern Ireland in the past and in Abu Ghraib recently), creation of suspect communities, special courts, lower standards of proof, etc. have all been tried previously, and success can certainly not be claimed. In addition – somewhat differently to many other conflict zones – Northern Ireland had many of the safeguards that are commonly expected to protect citizens during periods of violent upheaval (free press, vibrant civil society, independent judiciary) and yet those safeguards failed in many instances.

It is worth highlighting at this juncture that Northern Ireland is steadily moving out of conflict, and as such, has been undergoing a process of change to its policing and criminal justice systems, much of which is to be welcomed and praised. As a result, many of the problems identified in this report have either been addressed over time or are currently being addressed. This makes a study of Northern Ireland all the more relevant to current international debates since there is much experience as to how – or how not as the case may be – to respond to the “war on terror”.

Development of Emergency Legislation

The Government of Ireland Act 1920 provided the Northern Ireland (NI) parliament with wide discretion to make security laws. Subsequently, the NI government passed the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 which provided almost unrestricted power to make regulations “for the preservation of peace and maintenance of order”. These special powers were particularly invoked by the Stormont government in order to deal with the public disorder arising from the civil rights movement in the late 1960s and early 1970s and to loyalist violence. It was believed that the legislation would contain the problem and therefore, presumably, maintain majority unionist rule. The emergency powers were seen by many to be a disproportionate state reaction to what were largely legitimate concerns relating to discriminatory state practices.

With the implementation of Direct Rule in 1972, the British government contended that ordinary common law practice and principles were ineffective to deal with the terrorist situation. Therefore in order to deal with the “public emergency,” temporary emergency legislation was deemed necessary. Two major pieces of legislation emerged. The first, following the Diplock review, was the NI (Emergency Provisions) Act (EPA) which was enacted in 1973, amended in 1975, and re-enacted in 1978, 1987, 1991 and 1998. The legislation was aimed at dealing with paramilitary suspects once they were arrested, and therefore resulted in wide ranging and controversial changes in the administration of justice by creating two different trial systems, with a juryless court for paramilitary suspects, the creation of scheduled offences and lower rules for the admissibility of evidence. Furthermore, it included the powers to proscribe organisations and wide arbitrary powers of stop, search, question, arrest and interrogation by both the army and police. The EPA applied only in Northern Ireland.

The EPA was reinforced with the introduction of several successive Prevention of Terrorism (Temporary Provisions) Acts (PTA). Whereas the former related only to Northern Ireland, the latter applied throughout the United Kingdom. The initial legislation, which was aimed at preventing terrorist activity, was rushed through parliament in 1974 in reaction to the Birmingham bombs in Britain. The PTA was subject to annual review and was re-enacted in 1976, 1989, amended by the Criminal Justice and Public Order Act 1994, re-enacted in 1996 and amended and maintained in 1998. Notably, following the Omagh bomb in 1998, the Criminal Justice (Terrorism and Conspiracy) Act was similarly rushed through parliament.

In 2000 the Terrorism Act was passed (updated in 2006), consolidating previous pieces of emergency legislation into one permanent Act. The 2000 Act still contained a section devoted to NI. This legislation contained important and highly controversial powers, such as the extension of police authority to arrest individuals
for questioning for up to 7 days (extended to 28 days in the 2006 version), the 
offence of withholding information relating to terrorist activity, the banning of 
paramilitary organisations, and port and airport screening of those entering the UK 
or travelling between Britain and Ireland.

Other important legislation which affected the emergency structures were the 
Criminal Evidence (NI) Order 1989 and Criminal Justice (NI) Order 1996 which 
dermined and limited the right to silence and Public Order (NI) Order 1987 - 
amended by the Public Processions (NI) Act 1998 - which restricted the right 
to hold open air public meetings. Furthermore, the period of 1988-94 was 
characterised by a media ban of direct telecasts of members of proscribed 
organisations.

The government continually contended that there was a need for special 
legislation in order to deal with paramilitary violence. It was also claimed that 
due to the annual reviews of both the PTAs and EPAs, the situation was being 
continually monitored and, when the security situation allowed, the legislation 
would be repealed. However, as commentators note, the remit for these reports 
was dictated by the government and therefore contained restricted terms of 
reference, which had little or no impact. Moreover, it is undeniable that sometimes 
the emergency legislation was little more than a knee-jerk reaction to a particular 
event. The government failed to appoint fully independent investigators to 
examine complaints relating to the use of the powers or restricted their remit so 
that they were excluded from challenging the very existence of the legislation. 
Therefore, many commentators agree that particularly in light of the ceasefires, 
the draconian nature and restrictions on fundamental human rights were and are 
unwarranted and counter-productive. It has been postulated that existing criminal 
law procedures were sufficient to deal with the paramilitary activity; therefore there 
were frequent calls for the emergency measures to be immediately repealed or 
for them to be allowed to fade away over time. Indeed, it has been convincingly 
argued that the overall impact of emergency legislation resulted in a pollution of 
the legal system, a destruction of the moral standing of the government, and 
severely undermined public respect and confidence in the administration of justice 
and the rule of law.

**Impact on Trial Procedure**

The Diplock review and the subsequent implementation of its recommendations 
in the Northern Ireland (Emergency Provisions) Act 1973 significantly altered the 
criminal justice system in Northern Ireland and has been seen as symbolising the 
beginning of the government’s policy of criminalizing the conflict. The report led to 
the creation of a two tier criminal justice system, which was originally implemented
as a temporary measure yet exists to the present date, with the creation of “scheduled” offences which led to trial by a single judge, sitting without a jury, while trial by jury for those offences that were certified as “non-scheduled” was maintained. The “Diplock” courts were established as a result of Lord Diplock’s conclusions that the “ordinary” legal system was ineffective in dealing with terrorist suspects, particularly in response to (largely unsubstantiated) claims that jury members would be open to intimidation and would succumb to partisan pressures and product perverse verdicts.

There are many debates concerning the legitimacy of the Diplock Courts with commentators postulating that trial in the ordinary criminal courts was a viable and more legitimate method than non-jury courts. Related to this was the problem of the wide ranging nature of “scheduled offences” which were not necessarily confined to terrorist activity. This resulted in trials being held in the Diplock Courts which could have been dealt with in the ordinary criminal courts.

Additionally, due to the restrictive rules on bail applications, individuals charged with scheduled offences experienced lengthy remand periods, and could expect to serve 18 months in custody before charges went to trial - a marked difference from those accused of non-scheduled offences. Moreover, the low acquittal rates and increasing willingness of judges to convict on lower standards of evidence acquired through unfair pre-trial procedures, led to accusations of case hardening.

Importantly, the substantial departure from the common law test of voluntariness in relation to the admissibility of confessions marked the end of a significant safeguard for the suspect during interrogation and in trial proceedings. The rules of admission were changed, initially in 1973, modified in 1996 and, finally, normalised in 2002. The justification given by the authorities for this change was that paramilitary suspects were trained in evading admissions of guilt – and therefore special measures were required in order to gain convictions. Although the judge retained the discretion to exclude confessions, this was rarely used. The heavy reliance on confessions for convictions in the Diplock Courts stimulated much concern, encouraging questionable interrogation techniques with the additional risk of convicting innocent persons.

Another particularly controversial issue was the use of uncorroborated evidence of an accomplice or “supergrass” evidence prevalent between 1981 and 1985. Essentially these trials consisted of the trial of allegedly key members of paramilitaries for a huge range of offences, on the basis of evidence given by alleged accomplices in a series of mass trials. Such evidence is extremely problematic given the nature of the motivations that may lie behind the individuals’ confession. In these circumstances it has been convincingly argued that a judge
sitting alone without a jury is an inadequate mechanism for assessing the reliability of the evidence.

The initial success of the system (in terms of numbers of prosecutions) has been attributed to an “uncritical judiciary which subsequently realised its mistake and about-turned, destroying the phenomenon it had helped create”. It is evident that the “supergrass” system failed in its intention to end or even to reduce paramilitary violence in NI. As such it was seen by some as an example of another failed controversial law enforcement initiative which had sought “conviction maximization through the criminal justice system at the expense of the defendants’ rights”.

Additionally, another significant and controversial “emergency” measure was the abrogation of the right to silence. This was particularly detrimental to defendants in the Diplock courts due to the heavy reliance on confessions for conviction. The legislation allowed a trial judge to draw certain inferences from silence during interrogation and trial, which meant that a fundamental common law safeguard and right for the accused was removed. The government contended that this restriction was required as hardened criminals, in particular paramilitary suspects, were deliberately not co-operating with investigations by remaining silent and/or withholding crucial evidence.

Many commentators argue that in the absence of immediate access to legal advice for suspects, and no audio and video recording of interviews in the Holding Centres until 2000, such inferences improperly shifted the balance of power in police-suspect encounters significantly towards the police, and the burden of proof away from the prosecution - which resulted in miscarriages of justice. Importantly, the European Court of Human Rights judgment in John Murray v. UK ruled that although the right to silence is not absolute, when combined with the absence of immediate access to a lawyer, it was incompatible with the concept of fairness - therefore the applicant’s rights were irretrievably prejudiced. Subsequently, and in response to the Murray decision, it was announced that such inferences could only be drawn after an accused had had access to legal advice.

Essentially, the impact of emergency legislation on trial procedures resulted in the departure from common law practices, which significantly weighted proceedings in favour of the prosecution. The changes, which were implemented in 1973, and left relatively unmodified until the late 1990s, significantly reduced the rights of suspects to a fair trial. Moreover the changes to the criminal justice system were inextricably linked to the government’s security and criminalization agenda, thereby playing an integral role in the perpetuation and maintenance of this policy to the cost of public confidence, in particular in the minority community, in the rule of law.
Impact on the Legal Profession

The impact of the emergency legislation on the judiciary and legal profession has stimulated much debate. Central to these debates was the question of judicial independence from the state, the extent of judicial impartiality and the difficult position of defence lawyers. The legislation imposed limitations on the normal functioning of both the judiciary and the legal profession in the criminal justice system. The judiciary appear to have initially approached the new measures with caution, but they never effectively challenged such measures on the grounds that such changes were serious violations of the rights of a defendant and risked the conviction of innocent people; indeed they appeared “to have willingly operated and enforced the changes”.

There was historically a tendency for judges to be almost exclusively drawn from middle to upper class unionist backgrounds, which led to questions regarding their representativeness and their ability to judge impartially. Despite this, the judiciary were initially cautious of the modifications to the criminal justice system, and very importantly the judiciary clearly “indicated their independence from manipulation by the executive by their ultimate refusal to convict on the ‘supergrass’ evidence”. Moreover they also declined to participate in official reviews of the PTAs, due primarily to the belief it would conflict with the judicial process. However, they have been accused of missing out on valuable opportunities to interpret unclear legislation in support of the rights of an individual, given the doctrine of parliamentary sovereignty, and the judicial assumption that government’s explicit intention was indeed to restrict individual rights (presumably for the greater good).

The role of the judiciary was particularly important given their unique position in Diplock Courts. The debates concerning the degree of the judiciary’s independence from the government, and its ability to preside impartially, primarily reside in accusations - such as case-hardening; the extent to which a single judge can fairly balance the requirements of law and fact; the increasing willingness of judges to draw inferences from silence based on a “common sense approach”; the perceived willingness of many judges to readily accept prosecution evidence and in particular the word of police officers; the reluctance to use discretionary powers to exclude confessions gained through police misconduct; and the failure to pursue members of the security forces in cases of alleged ill-treatment and coercion of detainees and use of lethal force. These problems have led some commentators to believe that there was “close coordination and common purpose” between the judiciary, executive and security forces. Indeed it is undeniable that the judiciary’s rulings were controversial in a number of instances, particularly in cases relating to allegations of security force misconduct. However, it could also be argued that the judiciary was working within the constraints that the statutory framework had imposed upon them. It is important to note that
judges and their families were amongst those targeted and killed by paramilitary organisations.

In terms of defence lawyers, their position was substantially weakened under the emergency regime and police intimidation was frequently reported. These charges are inextricably linked to the effective administration of justice and the public perception of the rule of law. The RUC (police), and indeed the government, accused some defence solicitors of being unduly sympathetic to the republican movement and this was used as part of the justification for delaying a suspect’s legal access for up to 48 hours. This delay of counsel severely impeded the ability of defence lawyers to provide adequate legal advice to clients; this delay was particularly worrying due to the curtailment of the right to silence, the 7-day detention period, and reliance in court on confessions made during interrogation. Furthermore, until October 2000, the police denied lawyers access to clients during interviewing. Controversially, even privacy during consultation with clients could be withheld if the Assistant Chief Constable insisted that a police officer be in the same room in order to “observe” the discussion. Such circumstances undermine the ability of suspects to have a fair trial and directly contravene the UN Basic Principles of the Role of Lawyers which states that all arrested and detained persons have an immediate right to consult with counsel of their choice “within sight but not within hearing of law enforcement officials”.

Furthermore, evidence clearly shows that some defence lawyers were targeted by the RUC (police) and paramilitaries. Investigations have found that there were widespread reports of harassment and threats being made against defence lawyers by the RUC and paramilitaries, yet the lawyers involved were offered limited, if any, protection. Directly related to this was the absence of a satisfactory complaints mechanism to deal with issues of police harassment and intimidation. The bleak epitome of this situation was the controversial deaths of the prominent human rights defence lawyers Pat Finucane (1989) and Rosemary Nelson (1999). There is a wealth of evidence suggesting that the security forces knew that the two lawyers were targets, yet did nothing about it, contributed to the climate of personal hostility surrounding both of them, and/or had participated in the planning and carrying out of the murders.

The Role of the Director of Public Prosecutions (DPP)

The department of the DPP was established by way of the Prosecution of Offences (Northern Ireland) Order 1972, and was operationalised on 30th March 1972. Following the peace negotiations, and the recommendations from the Criminal Justice Review, the Office of the DPP was replaced with the Public
Prosecution Service on the 13th June 2005. The then incumbent Director of Public Prosecutions (DPP) became the head of the new Service.

During the period 1972-2005, the DPP prosecuted individuals charged with serious offences including all offences arising out of the conflict. The office had been created due to the government desire to replace the previous system of RUC (police) prosecution with an independent prosecutor, in order to dissipate allegations of bias and partisan prosecutions. It was envisaged that the new arrangements would ensure that the DPP would be independent of both the government and the police.

The most contentious issue surrounding the functions of the DPP was his role during the pre-trial stage of the prosecution process. This phase consisted of the transfer of files from the police to the DPP for assessment as to whether or not prosecution should be initiated or continued, or for charges to be dropped. The decision requires careful consideration due to the implications for the accused in terms of their innocence, the stigmatization associated with prosecution, and how a prolonged delay in decision-making may result in individuals spending a lot of time on remand for an offence for which they are ultimately not prosecuted. Importantly, a wrongful decision may result in the undermining of public confidence in the criminal justice system. There is evidence that decisions to prosecute taken by the DPP were sometimes taken on the basis of questionable evidence, such as “supergrass” evidence, forced confessions and scant circumstantial evidence. Related to this is the fact that there appears to have been a reluctance to pursue cases against the security forces, in particular the shoot-to-kill, brutality and ill-treatment cases - with little or no public explanation as to why charges were not brought.

Consequently, many commentators have questioned the DPP’s independence from political influence. On the one hand, the DPP was held accountable by the Attorney General who, in addition to his legal duties, is also a political appointment and serves on the Executive. On the other, there was much public scepticism about the extent to which the DPP was or could be truly independent of the police. Many concerns were expressed about the ability of the Office to perform its functions impartially and fairly. For example, the Stalker/Simpson inquiry delineated the central and controversial role that the Attorney General played in relation to politically sensitive cases. In this instance the Attorney General is believed to have “opted to protect the then Conservative government, of which he was a senior member, from well-founded allegations that the state was operating a shoot-to-kill policy against opponents”.

In terms of the relationship with the police, there were a number of controversial decisions on cases relating to use of lethal force by the security forces. Very few prosecutions were initiated by the DPP in response to claims that the RUC had
not intervened to prevent the deaths of certain civilians, or in response to the many complaints about RUC behaviour, even though massive compensation pay-outs suggested that there was wrong-doing that should have been pursued in court. It is postulated that this is indicative of the dependency of the DPP on RUC investigative material which effectively inhibited the ability to make fair decisions. Moreover, the lack of transparency and efficiency of the prosecution process, which is reflected in the failure to provide explanations for not pursuing prosecutions, and the lengthy delay for decisions on some cases, can be seen to have frustrated legal accountability and undermined the process in the eyes of the public.

Impact on the Security Forces

In comparison to ordinary criminal law, emergency legislation provided wide-ranging arbitrary powers of stop, search and arrest for both the army and police, which had serious implications for the pre-trial stage of the criminal justice system. Until 1987, these measures could be exercised on mere suspicion, however since that date a better but still somewhat ambiguous concept of “reasonable” suspicion has applied. These tactics were a great source of public concern due to the persistent allegations of security force harassment and brutality, often of a sectarian nature, and the absence of effective accountability mechanisms.

Despite vehement opposition, the powers were expanded and strengthened throughout successive EPAs and PTAs as the government insisted that they were needed in order maintain public order and safety from terrorist related activity. The army had initially been mobilised to Northern Ireland in reaction to the disturbances of the early 1970s, however in 1976 the government, rhetorically at least, abandoned its policy of counter-insurgency by reversing the roles of the army and police, and explicitly giving the police “primacy”. Despite this, a considerable number of police functions continued to be carried out by the army. The IRA campaign, recurrent allegations of misconduct by the security forces, combined with the essentially Protestant make up of the police, and the treatment of many in the Catholic community as “suspect”, all contributed to making Catholics reluctant to join the force, and reinforced feelings of alienation and discontent with the rule of law.

The stop, question and search powers provided by both the EPAs and the PTAs gave the army and the police great scope for intelligence gathering exercises both on the streets, and through the screening of individuals travelling between Britain and Northern Ireland at ports and airports. Essentially the security forces were able to stop and question anyone concerning their identity, current movements and what s/he knew concerning recent terrorist activities; failure to answer questions was a prosecutable offence. Many commentators believe that these powers were open to abuse due to the absence of effective legal controls and were used
primarily for intelligence gathering purposes and to monitor people's movements, rather than as a procedure which would lead to arrest and conviction. Importantly, section 13a of the PTA 1989 and section 81 of the Criminal Justice and Public Order Act 1994 introduced a new reduced definition of the “reasonable suspicion” test which effectively allowed the security forces to randomly stop and search vehicles and persons “where it appears expedient to do so in order to prevent acts of terrorism.” However, since the EPA 1996, the police and army must have reasonable grounds to believe that the person is in possession of firearms, ammunition or wireless transmitters, or would be suitable for arrest for terrorist related activities.

The security forces and the government consistently contended that these powers were necessary in order to deter the movements of weapons, explosives and terrorist activities. However, evidence now clearly shows that the stop and search powers were used by both the army and the police in order to screen large sections of the population, particularly in republican areas, in order to build up substantial information on as many people as possible. Moreover, reports have found that the powers regularly resulted in the harassment and humiliation of individuals, particularly young people in nationalist areas, and the Irish community travelling between Great Britain and Northern Ireland, some of whom were repeatedly stopped, and subjected to verbal abuse.

Controversial search and entry powers provided under successive EPAs were a constant source of friction particularly between the Catholic community, the police and the army. The measures led to early morning raids, random and repeated searches of premises, the searching of entire rows of houses, and householders being arrested for allegedly obstructing officers; consequently there were many complaints of gratuitous damage and insulting behaviour. Additionally, there were reports of listening devices being planted, offensive graffiti and structural damage to houses, which resulted in many compensation payments. The “burden of proof” was reversed in the situation where a “proscribed article” was found during a search. This sharply contrasts with ordinary law. Moreover, the 1991 EPA provided the power to examine and remove documents without reasonable grounds or judicial authority; this inadvertently provided an additional source for “low-level intelligence material on the group from which the documents were seized”.

Importantly, it has been noted that the majority of searches failed to uncover any weapons, ammunition, illegal radio equipment, or hiding places, with the result that many innocent individuals and families were left traumatised, feeling insecure and discontent with the actions of the forces of law and order.

Furthermore, the majority of arrests were concentrated in nationalist working class areas and importantly, around three-quarters of all those arrested under the legislation were released without charge; this implies that the measure was
primarily used for the “illegitimate purpose of harassing people or fishing for snippets of incriminating evidence about other people.” Additionally, an individual arrested under one piece of legislation could be re-arrested under another piece of legislation, due to the substantial amount of overlapping within the EPAs and PTAs. In terms of detention powers, the army had the ability to detain any individual, including children, during the course of a search, and also for up to four hours following arrest. Importantly, questioning did not have to relate to terrorist activities. Police officers were permitted to detain suspects incommunicado for 48 hours and then to extend the detention period for another 5 days. Reports have confirmed that the majority of suspects were released within 2 days, which suggested that the legislative provision for a lengthy detention period was unnecessary. Furthermore, the treatment of detainees during detention was a major source of concern due to widespread allegations of physical and psychological ill-treatment.

A key concern was the fact that the powers conferred on the security forces lacked effective accountability mechanisms, despite the creation of several oversight agencies. Notably, Amnesty International investigated the situation in 1978 and declared that “maltreatment of suspected terrorists by the RUC has taken place with sufficient frequency to warrant the establishing of a public inquiry”. Despite the findings and recommendations of the Bennett review, subsequent accountability mechanisms remained relatively unchanged. The absence of an actively critical judiciary meant that the security forces were able to perform their functions with limited public scrutiny or legal accountability. Furthermore, any investigations into the abuse of powers by police or soldiers were pursued by the DPP, and largely regulated by the RUC; this may have accounted for the low success rates in convictions for security force malpractice, even though there were high rates for out-of-court compensation settlements.

The Police Authority created in 1970, whilst having the ability on paper “to guard against the development of persistent or oppressive policing policies or practices” was in reality “weak and ineffectual.” Additionally, the creation of the Police Complaints Board in 1977 was ineffectual due to the absence of any role for it in the actual investigation of complaints: the Board’s role was confined to reviewing police investigations once they were complete. The replacement organisation in1988, the Independent Commission for Police Complaints, was slightly more effective but was largely confined to supervising police investigations (with the authority to insist on the police interviewing additional witnesses, or pursuing particular lines of enquiry), rather than conducting its own investigations.

Persistent allegations of harassment, intimidation, use of lethal force, physical abuse and collusion, emanating from both sides of the community and from defence lawyers, should have been publicly and independently investigated.
Commentators have agreed that the use and abuse of these “widely drawn powers” caused widespread “individual and community resentment” which made “policing by consent an even remoter prospect”. Indeed, the legislation can be seen to have curtailed the most basic human rights and resulted in the “constant and systematic harassment of thousands of people within clearly defined areas.” Consequently, these security measures significantly contributed towards the alienation, distrust and discontent of many within the nationalist community in relation to the forces of law and order and subsequently the rule of law.

**Internment 1972-75**

The power to intern without trial was used most extensively between 9th August 1972 and 5th December 1975. Despite the official end of the use of the technique, the power was kept on the statute books through all the re-enactments of the legislation until it was repealed by section 3 of the Northern Ireland (Emergency Provisions) Act 1998. Although there was some scepticism concerning the need for internment in 1972, the government’s rationale for its use was that ordinary common law procedures were inadequate and therefore in order to protect “life and the security of property” draconian powers of arrest, detention and internment were needed.

The legislation governing internment was initially provided under Regulation 12 of the Civil Authorities (Special Powers) Act (Northern Ireland) 1922. This allowed the Minister of Home Affairs to issue an Internment Order against a person “who is suspected of acting of having acted or being about to act in a manner prejudicial to the preservation of the peace and the maintenance of order in Northern Ireland”. Following the imposition of direct rule from London in 1972, the power to detain without trial was incorporated into the Northern Ireland (Emergency Provisions) Act 1973. The ministers at the time emphasized the “quasi-judicial procedures” of this process (as the decision to detain a suspected terrorist suspect beyond the 28 day period now resided with a judicially qualified Commissioner) in order to try to dispel the common connotation of internment meaning “imprisonment at the arbitrary diktat of the executive government”.

The widespread consensus is that internment was counterproductive in that it essentially fuelled tensions, led to outbreaks of violence throughout Northern Ireland and provoked “the most extensive public reaction by the minority community to the administration of justice”. One reason for this was the targeting by security forces of suspected republican members on the basis of flawed and inadequate information, which resulted in the detention of many individuals who were known in their communities as having no connection with the republican movement. It was also used in a discriminatory manner - of the 1,981 individuals interned throughout the entire period, 107 were Protestant, 1874 were Catholic.
There were also frequent allegations of interrogators inflicting systematic physical and psychological torture. Indeed evidence clearly shows that selected internees were subjected to the use of now notorious techniques of interrogation. These methods of sensory deprivation had been used by the British army in previous military campaigns. However, even with the formal abandonment of the techniques, evidence suggests that prolonged interrogation with threats of violence and ill-treatment of suspects continued.

It needs to be noted that official reviews until the Gardiner Report in 1975 consistently denied that systematic torture or ill-treatment was occurring. This was contradicted by others. The European Commission on Human Rights for example “considered the combined use of the five methods (wall standing, hooding, noise, sleep deprivation, food and drink deprivation) to amount to torture”. The European Court in its judgment in Ireland v UK however determined that the techniques “undoubtedly amounted to inhuman and degrading treatment” in breach of article 3 of the Convention, even if “they did not occasion suffering of the particular intensity and cruelty implied by the word torture”. Whatever definition is applied, the Attorney General, in proceedings before the European Court on 8 February 1977, stated that “The government of the UK have considered the question of the use of the ‘five techniques’ with very great care and with particular regard to Article 3 of the Convention. They now give this unqualified undertaking that the ‘five techniques’ will not in any circumstances be reintroduced as an aid to interrogation”.

There is widespread agreement that internment was a fateful decision as it fuelled and deepened the existing tensions, failed in its intentions to arrest members of the IRA due to the inadequate information of the security forces, and was one of the most serious assaults on human rights and civil liberties. Indeed it is argued that the overall effect of this period was that it alienated the “minority community whose reconciliation was essential to a political settlement and military victory against the PIRA”. It suggested “to the nationalist population that their demands for a more fair and just society in Northern Ireland could no longer be carried forward through dialogue and persuasion”. In this context, internment can be seen to have been most beneficial for the republican movement as it led to literally “hundreds of young men in working class nationalist communities joining the IRA and creating one of the most efficient insurgency forces in the world.”

**Holding Centres for Terrorist Suspects**

The “holding centres” created for terrorist suspects in Northern Ireland were at the centre of the controversy regarding security force powers of arrest, detention and interrogation and subsequently were an ongoing source of public concern.

These special interrogation facilities, at Castlereagh in Belfast, Gough Barracks in Armagh and Strand Road in Derry/Londonderry, were established to provide
facilities for administratively processing detainees. From 1975 until 1999 the Holding Centres became sites for police interrogation and were seen as central to the official campaign to gather information and ensure confessions. The most basic safeguards for civil liberties were missing and the centres were condemned by the European Committee for the Prevention of Torture.

The power to detain terrorist suspects without trial, and therefore judicial approval, was originally provided for by regulation 10 of the Special Powers Act 1922, and expanded under Northern Ireland (Emergency Provisions) Act (EPA) 1973 which permitted detention by police officers for up to 72 hours with a view to, in the words of some commentators, “build up an atmosphere in which the initial desire to remain silent is replaced by the urge to confide in the questioner”. The possible duration of time spent in the centres was extended under section 12 of the Prevention of Terrorism (Temporary Provisions) Act (PTA) 1974. Applicable to the whole of the UK, this legislation allowed for the detention of suspects for up to 48 hours which could then be extended for a further five days with the formal consent of the Secretary of State. These powers remained essentially unchanged, being re-enacted in the successive EPAs and PTAs until the Terrorism Act 2000, which stipulated that the power to detain beyond the initial 48 hour period now required permission from a county court judge or magistrate, although the potential total detention period doubled to fourteen days. Under the Terrorism Act 2006, this period has now been extended to 28 days, with occasional parliamentary debates about further extensions.

Importantly, in Brogan and Others v. UK, the European Court of Human Rights ruled that detention under the PTA for more than four days breached Article 5 (3) of the European Convention on Human Rights which stipulates that an arrested suspect must “be brought promptly before a judge or other officer authorized by law to exercise judicial power”. This was considered to be an essential protection for the “individual against arbitrary interferences by the state with his right to liberty”. However, instead of repealing the relevant section of the PTA, the government entered a derogation notice under Article 15 of the European Convention, and similarly under Article 4 of the International Covenant on Civil and Political Rights, in order to retain the seven day detention power.

Subsequently in Brannigan and McBride v. UK, the European Court of Human Rights ruled that the derogation itself was not contrary to the Convention, as it was “strictly required by the exigencies of the situation”. However, many commentators maintained that this derogation, which was withdrawn only in 2001, was no longer valid under international law as the emergency to which it was a response had come to an end with the formal announcement of ceasefires by all the major paramilitary organisations in Northern Ireland.

Directly related to this was the widespread concern relating to the ill-treatment of individuals detained in the Holding Centres. The facilities, in particular Castlereagh,
received widespread criticism due to lack of natural daylight; the prohibition of reading and writing materials until 1999; unclean holding cells; the absence of clocks and watches; and the lack of outside space to exercise. Additionally, there were frequent documented reports of physical and psychological ill-treatment. These allegations included being slapped, punched, and kicked; the placing of prolonged pressure on various parts of the anatomy; personal insults and abusive remarks; threats against family and friends; inducements to inform on others; deprivation of sleep; long interrogation sessions with alternating teams of detectives with minimal breaks; confusion tactics; and coercive persuasion, particularly of young people.

Furthermore, there were reports of police trying to discredit and threaten defence lawyers during the course of interviews. Access to legal advice could be denied for up to 48 hours from the time of arrest and individuals could also be held incommunicado for that length of time. Legal advisers were not permitted to be present in interview rooms with their clients during interviews. Moreover, due to the reliance on confessions for the conviction of terrorist suspects these problematic pre-trial procedures, combined with the ability to draw inferences from silence, and the absence until 2000 of audio and video recording of interviews, significantly undermined the reliability of any eventual confessions.

Despite the creation of the office of Independent Commissioner for the Holding Centres and annual reviews carried out by that office, there were constant failures to adequately investigate complaints concerning ill-treatment.

A combination of the facilities at the Holding Centres, interrogation techniques and the lack of safeguards for detainees created an intimidating atmosphere and left the system open to abuse, thereby failing to provide adequate protection against ill-treatment. Importantly, due to the centrality of interrogation in the administration of justice in Northern Ireland, these abuses significantly affected the public perception of the rule of law, resulting in further alienation of the communities affected.

Use of Lethal Force by the Security Forces

The most controversial use of emergency legislation relates to charges of the excessive use of force, and even charges of a shoot-to-kill policy, adopted by the security forces - particularly aimed at republican activists in the 1980s. The domestic law governing the use of lethal force by the police and military was section 3(1) of the Criminal Law (Northern Ireland) Act 1967, and the common law principles governing self-defence. The law has been condemned as too vague, and the combination of this, with the seeming reluctance of the DPP to initiate prosecutions, and the attitudes of the judiciary, meant that there were “few effective controls”. 
Commentators have identified three broad categories of lethal force incidents: accidental shootings, spur-of-the-moment shootings, and planned confrontations. The most cited example of the “state resorting to the might of its armed forces and the use of lethal force ... to crush public protest” is the controversy over Bloody Sunday on 30th January 1972 and the death of 14 civilians and the flawed inquiry that followed. However, accusations of extrajudicial killings were frequently reported throughout the history of the conflict, involving all ages of people, but predominantly members of the nationalist/republican community located in urban areas (89%). Importantly, 363 people have died directly as a result of actions by the security forces, 75 of whom were children. Only 4 serving members of the army went to prison, all were released early and reinstated back into their regiments, two of whom were subsequently promoted, and no serving police officers were sentenced to imprisonment. Significantly, the Stalker Inquiry implied, what many commentators already believed, that a shoot-to-kill policy was in operation.

Furthermore, significant problems existed within the inquest system due to the coroners’ lack of powers. Reports comment on the problem of lengthy delays; problems of adjournment; limitations on the requirements of witnesses to attend; lower standards of evidence; the absence of legal aid; the inadequacy of conclusions, as they were findings not verdicts; and the lack of any right to appeal. Such circumstances not only undermine the rights of the deceased and their families to a remedy, but also have raised serious questions concerning the accountability of the security forces. Consequently, many bereaved families were left without any answers concerning the deaths of their loved ones.

A distinct but related issue is the debate over the use of plastics bullets as a form of riot control. Official sources postulate that the weapon is non lethal but in reality 14 people have been killed, and three more with rubber bullets. More than half of the victims were aged 18 or under, and in only two inquests was rioting found to be a possible factor in the death of the victim. Many commentators believe that the guidelines for their use were ineffective. Moreover, charges concerning the sectarian use of the weapon have not been adequately addressed. In one specific period of serious public disorder in 1996, 5340 bullets were fired at Catholic/ nationalist protestors over 3½ days of rioting, whereas 662 had been fired in the previous 3½ days of Protestant/unionist rioting. Sixteen of the seventeen deaths from plastic bullets over the years have been of Catholics.

In addition, there is evidence that suggests that there has been collusion between the security forces and many paramilitaries, which may have resulted in the deaths of individuals, for instance, the controversial murder of leading human rights lawyer, Pat Finucane. Such instances further underscored the inadequacy of the legal and political mechanisms of accountability for security force members, and perpetuated a feeling within sections of the community that the security forces, and consequently the legal system, could not be trusted.
Treatment of Suspect Community/Discriminatory practices

The civil rights movement, which began in the early 1960s, was a reaction against the discrimination experienced by the Catholic community. The campaign centred international media attention on the “allegations of gerrymandering of electoral boundaries, of discrimination in public housing and employment and in the implementation of government schemes for social welfare and economic development, and of infringement of basic legal rights under the Special Powers Act”. However, the violent disturbances that followed, and the subsequent imposition of Direct Rule from London with the accompanying implementation of emergency legislation, led to the alienation of the minority community. In practice emergency provisions targeted the Catholic community, thereby constructing a “suspect community”, which isolated the community and undermined its confidence and trust in the rule of law. The legislation was counterproductive in that it often seemed to fuel and reinforce support for the violence that it was designed to prevent.

The sectarian nature and brutality of internment has been identified as a major factor in the escalation of violence and support for terrorist organisations. The targeting of predominately nationalist/republican suspects based on flawed intelligence resulted in the detention of many innocent Catholics. Moreover, the persistent reports of internees being subject to systematic physical and psychological abuse resulted in outbreaks of violence throughout the country. Furthermore, most military activity was concentrated in Catholic areas. In addition, the policy of detention provoked a hostile public reaction, which was dramatically exacerbated by the killing of non-violent civil rights demonstrators on Bloody Sunday in 1972 and in the next decade by the handling of the hunger strikes in 1981. Such events had a disastrous impact on the nationalist community and ensured “a continuing flow of new recruits” for the IRA.

As noted above, the reports of physical and psychological abuse of detainees did not end with the period of internment. As the majority of detainees were Catholic, it follows that the treatment of this group of detainees was central to that community’s concern over allegations of coercive tactics being used by investigative officers.

The widely drawn powers to stop, search and question also caused widespread resentment in the community. It is indisputable that the security forces’ primary target was Catholic men between the ages of 16 and 44. Importantly, the figures available for the period 1978 to 1986 suggest that over 50,000 people were arrested, around three-quarters of whom were Catholic. Similarly, the majority of house searches were carried out in Catholic areas with “certain houses in certain areas” being searched “perhaps ten times or more.” Importantly, these early morning raids of houses and “house arrests” were much despised and frequently
found to be unjustified, given the failure to find incriminating evidence. So the results were often structural damage to the buildings and the traumatisation of the families involved, but no prevention of terrorism. The constant surveillance of clearly defined urban areas and the invasion of privacy afforded by the security forces caused widespread protest. The cost to public confidence in the administration of justice was considerable.

The nature and reputation of security force operations in nationalist areas led to much resentment. For example, the road blocking powers of the security forces angered many in the communities as it restricted the freedom of movement of innocent civilians. Moreover, the presence of heavily-armed army patrols reinforced nationalist perceptions of a military occupation. Also, it was known to the minority community that the army were actively gathering intelligence in order to produce and maintain “house cards” of “all houses and small businesses within republican areas.” Additionally, the police maintained its own detailed intelligence system, which is claimed to have been “more powerful than that of the Metropolitan Police which polices a population five times larger than Northern Ireland’s”.

Policing was often used in Northern Ireland to maintain order rather than police crime, and this appeared to justify the deployment of strong arm tactics, including in some instances the use of lethal force and plastic bullets as a form of riot control. Since Catholics suffered disproportionately, such tactics exacerbated the Catholic community’s feelings of intimidation and discrimination. Moreover, the inability or reluctance to prosecute security force personnel for any kind of malpractice reinforced the feeling that the rule of law was designed to protect the forces of the state, as opposed to the rights of citizens.

Exclusion orders issued by successive PTAs provided the government with a “system of internal exile.” These could be issued against a person who was said to be involved in terrorism, yet where no offence had been proven. The subjective nature of the power was open to abuse due to the abandonment of any “reasonableness” test, which meant that “anyone supporting a political viewpoint which challenge(d) the status quo” could be excluded. There is evidence that this emergency power was used to target those who articulated a political message in opposition to British government policy on Northern Ireland. In practice, the imposition of these orders resulted in the abuse of a number of human rights, including rights to travel, to family life, to a fair trial and to freedom of expression. Importantly, the primary targets of this legislation were the Irish community living in Great Britain, which meant that they felt treated both by the security forces and British people as “suspect” and presumed to be criminal. This meant that the policy of exclusion came to be seen by some as a form of “institutionalised racism.”
Conclusion

Whilst there is sometimes an understandable and even genuine tension between protecting the security of all and the liberties of the individual, these should not be considered to be contradictory goals. On the contrary, the experience of Northern Ireland in adopting a ‘security-first’ approach demonstrates that the freedoms that are claimed to be defended are those very freedoms that are removed by ever increasing demands for more and more draconian powers. In fact human rights standards guarantee security. It may be blindingly obvious, but it is important to articulate it - in order to defend the rule of law it is necessary to defend the rule of law. Human rights standards, in their focus on the demands of accountability and safeguards, actually underpin the rule of law and thereby contribute directly to everyone’s security.

As the material in this paper demonstrates, a number of key mistakes were made in Northern Ireland – the use of internment, the use of lethal force, wide powers in relation to stop, search and arrest, the undermining of due process, the lack of effective accountability mechanisms, inadequate investigations and the cumulative effective of these in creating of an “us and them” mentality – all fed and fuelled the conflict and led to alienation from and distrust of the rule of law. A key learning point from Northern Ireland for the international debates is the need for effective accountability mechanisms to be in place, both at a formal institutional level (e.g. truly independent complaints mechanisms against the police and army and other criminal justice institutions, independent and civic oversight of police forces etc) and other practices (e.g. codes of conduct, guidelines and regulations for the use of force, access to lawyers, training etc). In addition, the experience in Northern Ireland shows that it is highly questionable whether emergency powers actually help in any “war against terror”. If they are to be introduced, it is clear that they must comply with international human rights standards, be short-term in nature, and be necessary and proportionate to the exigencies of the situation.

In Northern Ireland, some of the security tactics that were tried failed ignominiously and were in due course withdrawn. Others contributed to fuelling the conflict rather than resolving it. Despite the many international reports and judgments expressing concern at UK security policy as it operated in Northern Ireland, the state has persistently dismissed concerns about the law and policies it chose to adopt. Some of the experiences of Northern Ireland may prove of interest to those seeking to avoid a repeat of the same mistakes, particularly in the febrile atmosphere engendered by the current ‘war on terror’.
CHAPTER THREE

Written Testimony to the Eminent Jurists Panel

CAJ
Committee on the Administration of Justice
Invitations were sent to well over 400 individuals and organisations to make submissions to the Eminent Jurists Panel. Twenty-three written submissions were received and made available to the Panel.

Given the possible interest in this material, CAJ has sought to produce a short synopsis of all the submissions, but the full documents are available on request, either from CAJ or (where appropriate) the organisation directly. The synopsis that follows sets out in alphabetical order material submitted by:

- British Irish Rights Watch
- Castlederg/Aghyaran Justice Group
- Council of Europe
- Professor Brice Dickson and Dr Jean Allain
- Neil Farris
- Monsignors Denis Faul and Raymond Murray
- Professor Martin Flaherty
- Human Rights First
- Human Rights Watch
- Law Society of England and Wales
- London Metropolitan University
- Dermot Nesbitt (Ulster Unionist Party)
- New Lodge Six
- New York City Bar Association
- Northern Ireland Human Rights Commission
- Northern Ireland Policing Board
- Pat Finucane Centre
- Relatives for Justice
- Sinn Fein
- Peter Smith QC
- Madeleine Swords
- Transitional Justice Institute, University of Ulster
- Ulster Human Rights Watch
British Irish Rights Watch

The submission is 25 pages plus attachments.

British Irish Rights Watch is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and the peace process, in Northern Ireland since 1990.

The submission by BIRW begins by highlighting four key lessons on terrorism that can be learnt from the Northern Ireland experience:

- Terrorism can rarely be defeated by repression.
- Terrorism is not usually mindless; it is usually done for a reason - that reason needs to be addressed as well as the terrorism itself.
- Repressive laws do not prevent terrorism or eradicate it.
- Although governments often seek to portray themselves as neutral in combating terrorism, they are never so in fact.

Accordingly, only three mechanisms can effectively combat terrorism;

- Prevention: the collection of accurate intelligence and the use of that intelligence to prevent attacks.
- Deterrence: the effective detection of crime.
- Political resolution.

The gathering of intelligence in Northern Ireland has quite often been for the wrong purposes, i.e. for the sake of it, rather than for the prevention of crime. Further, this intelligence has often been used in the wrong way, failing to prevent or detect crimes the intelligence has uncovered. Terrorist attacks which could have been prevented have been allowed to go ahead, the perpetrators have gone free and the trials collapsed. As a result, the submission argues, the law has been brought into disrepute and people have lost faith in the administration of justice, the police, the army, the intelligence services, politicians and governments.

The submission then moves on to consider in turn a number of issues that the Eminent Jurists Panel said it wanted to explore surrounding terrorism and the fight against it.
The submission concludes: “If our work in Northern Ireland has taught us anything, it is that terrorism is not overcome by adopting the terrorists’ methods or values. It is overcome by being better than that terrorist, even if sometimes occupying that moral high ground comes at an almost unbearable price.”

Castlederg/Aghyaran Justice Group

112 pages

The Castlederg/Aghyaran JusticeGroup (C/AJG) is a community group working in a nationalist area that came together to establish their own inquiry into the murder of Patrick Shanaghan in 1991. It is alleged that Patrick Shanaghan’s death was a result of collusion between the Ulster Freedom Fighters (UFF) and the police (the Royal Ulster Constabulary, RUC), and following a formal coroner’s inquest into the killing, which the group had labelled “a farce”, the community of Castlederg/Aghyaran began their own inquiry.

The C/AJG submitted the report of their public inquiry into Patrick Shanaghan’s murder, held in 1996. This report brings together submissions from human rights organisations with submissions from the Shanaghan family. It goes on to look at the coroner’s inquest, evidence on the murder itself given to the Inquiry, and conclusions.

The key point that helped the Inquiry reach its final conclusion was the inadequacy of the coroner’s inquest into Mr Shanaghan’s murder. The report found that the inquest system in Northern Ireland is very limited, which led to crucial evidence being declared inadmissible. The five years the inquest took to convene were unjustified, since very little evidence was gathered during that time, and no adequate investigation of the facts was carried out. The government has continually ignored calls for review or accountability in cases such as this, and in doing so have contradicted in spirit and law the United Nations principles which call for a thorough and comprehensive investigation of all killings where there are allegations of collusion, as well as detailed written public reports which would outline the scope of the inquiry, methods used to evaluate evidence, and conclusions and recommendations.

The inquiry reached the conclusion that Patrick Shanaghan was murdered by the government with the collusion of the police (the RUC).
The Council of Europe is the continent’s oldest political organisation: set up to defend human rights, parliamentary democracy and the rule of law. It has 46 member states and the Council monitors each of them to ensure they uphold their obligations and commitments. The Council acts as a political anchor and human rights watchdog and provides know-how in areas such as human rights, local democracy, education, culture and the environment.

The submission by the Council of Europe outlines the full range of activities and achievements made regarding the fight against terrorism, including the preparation of country profiles on counter-terrorism, exchanges of information and best practice on compensation and insurance schemes for the victims of terrorism, and monitoring the signatures and ratifications of the conventions and to promote their early entry into force.

The submission then looks in detail at the case law of the European Court of Human Rights that is relevant to Northern Ireland.

The UK has been brought before the ECHR six times, with several violations found in connection with the security forces in NI. Examples of such violations include a lack of independent police investigations, defects in police investigations and lack of scrutiny over the Director of Public Prosecution’s decisions to not bring a prosecution. The submission then identifies the measures that were taken to combat these violations to try and ensure that they cannot happen in the future. For example, a completely independent Police Ombudsman was introduced to investigate complaints against the police and a Historical Enquiries Team has been established to re-examine unsolved cases. Moreover the Director of the Public Prosecution Service should now explain any decision of no prosecution in cases where death is, or may have been, occasioned by the conduct of agents of the state. Some of these measures are still under scrutiny from the Council’s Committee of Ministers, to ensure that they are effective in preventing human rights violations. These examples could be useful to the Eminent Jurist Panel in dealing with similar violations worldwide.

The final part of the submission is a booklet entitled “Human rights and the fight against terrorism; The Council of Europe Guidelines” (March 2005, ISBN 92-871-5694-8), originally published in 2002 and updated in 2005 (see Appendix Two). The purpose of the booklet is to guide member states on the best way to defend their societies from the threat of terrorism, while also preserving fundamental rights and freedoms. The guidelines includes a positive obligation on the state to protect its citizens from terrorism, any anti-terrorist measures taken by a state must be lawful and any restrictions to human rights must be proportionate.
and necessary. Torture is prohibited absolutely, as is extradition to a country where it is believed that that person may be at risk of torture.

The key message that is reinforced throughout the submission is that it is in times of crisis, under the threat of terrorism, that it is most important to uphold legal safeguards and respect human rights.

Professor Brice Dickson and Dr Jean Allain

7 pages

Brice Dickson is Professor of International and Comparative Law at Queens University Belfast. He was the first Chief Commissioner of the Northern Ireland Human Rights Commission. Dr Jean Allain is a Senior Lecturer with Queens University specialising in international human rights law.

The submission comprises an overview of the experience of emergency powers in Northern Ireland and seeks to extract the lessons that can be learned from that experience. It also includes extensive footnotes for reference.

The article begins by looking at some of the emergency powers that were implemented in Northern Ireland, and acknowledges the fact that for some, these emergency powers were part of the problem rather than the solution. It examines these powers, including stop and search, internment and trial without jury (in so-called Diplock courts), and highlights the potential for and actual abuse of them by the security forces. The broad reaching powers of stop and search, for example, allow police and army to search any premises at random for explosives etc., only needing ‘reasonable suspicion’ if they are searching a dwelling.

By using these emergency powers in instances where ‘ordinary’ criminal law would have sufficed, the authors believe that the emergency powers became normalised. They quote the UN Special Rapporteur on States of Emergency; “(what) was temporary, becomes definitive; what was provisional, constant: and what was exceptional, permanent - which means that exception becomes the rule”2

The normality of this emergency state accommodated and encouraged lower standards of policing by the Royal Ulster Constabulary (RUC), the article states, leading to mistreatment of people in custody, alleged collusion between the RUC

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3 Lawless v Ireland, (1979-80) 1 EHRR 15
and paramilitaries, and inadequate investigations into deaths resulting from such practices. Lethal force by security forces was an area not governed by emergency law, but it was a ‘power’ that the security forces abused but were rarely held to account for.

The article notes too, however, that positive efforts were made to safeguard human rights in Northern Ireland. These safeguards have usually been recommendations by distinguished judges called in to conduct inquiries. Examples include regular reviews by an independent legal expert on the operation of emergency laws (although not on their necessity); statutory codes of conduct for questioning suspects etc; and the appointment of an Independent Commissioner for Detained Suspects to visit detainees, watch interviews remotely and even sit in on interviews.

International human rights supervisory mechanisms have not had such a positive impact, the authors found.\textsuperscript{3} For example the ‘margin of appreciation’ doctrine developed by the European Court of Human Rights allowed the Irish state to derogate from its European obligations in regards to the right to liberty and security of the person. As a result one IRA member was detained for almost five months without judicial supervision. Subsequent attempts to bring Northern Ireland’s emergency state into line with international human rights standards fell short, until the mid nineties. The article defines the decision of the European Court in McCann v UK in 1996 as a turning point, after which a number of important cases, concerning Article 2 and Article 6 of the Convention, took place. The Human Rights Act 1998 has further integrated human rights of an international order into Northern Ireland.

In their conclusion, the authors underline the fact that it is very difficult to say whether Northern Ireland’s conflict would have been any less protracted or serious had different emergency measures been taken. While, the effects of the emergency legislation certainly encouraged some to sign up to paramilitary organisations, the use of lethal force by the security forces prompted even more.
Neil Farris

4 pages

Neil Farris is a practising solicitor in Belfast. In the early 1980s he represented various victims of the Troubles in applications to the European Commission of Human Rights, under Article 2 of the European Convention on Human Rights, the right to life. In his submission, Mr Farris has highlighted what he believes to be the critical issues that have applied or are applying in Northern Ireland, and which may be used to inform a worldwide inquiry on counter-terrorism.

The first issue the submission considers is extradition, specifically extradition from the Republic of Ireland into Northern Ireland, in respect of those who had warrants issued against them for paramilitary crimes committed in Northern Ireland. Considering statistics on such extradition, and a statement from the report by Justice Barron into the Dublin and Monaghan bombings, the submission states that the legal system of the Republic failed in its extradition duties during the conflict. By offering a ‘safe haven’, the Irish government neglected to uphold human rights and the rule of law and respect the proper measures of law enforcement. The author submits that these actions, or lack of action, has “left an enormous residue of bitterness in Northern Ireland amongst victims of terrorist violence” which has been “exacerbated by the failure of the legal system in Ireland to acknowledge their hurt and to apologise for its failure”.

The second issue the submission deals with is the ‘on the runs’ legislation, which the author refers to as ‘release on licence’ for those against whom arrest warrants had been issued, but had never stood trial. The main objection to the proposed legislation is the fact that the accused would not have stood trial in the ordinary courts; instead a tribunal system would have been established. Not only does this system rob the victim of the kind of closure that a trial and conviction provide, it also requires victims to act as witnesses while the accused would not even have to appear. The ‘cold cases’ reviews currently ongoing makes this issue particularly relevant, since new investigative techniques may solve old crimes, and if the perpetrators are identified, then they should face trial.

Mr Farris concludes by advising the Eminent Jurist Panel against brokering ‘deals’ with terrorists in their eagerness to secure political settlements. As can be seen from Northern Ireland, this can quite often pose a serious threat to the rule of law and protection of human rights.
Monsignors Denis Faul and Raymond Murray

Opening comments, 2 pages, April 2006, and enclosures.

Catholic priests, Monsignor Denis Faul and Monsignor Raymond Murray, worked individually and together for the protection of civil liberties in Northern Ireland over the last number of decades. They produced a range of publications on the conflict, two of which were submitted to the Eminent Jurists Panel for consideration in their inquiries.

The submission’s opening comments point to the significant limitations in legal as opposed to administrative or political regulation of abuses. For instance, the wide discretionary powers of stop-and-search, arrest, interrogation and detention contained within emergency or anti-terrorist legislation, can often be found just as easily within ordinary law. The government introduced these measures under the guise of anti-terrorism efforts, to affect public perception, when really the measures do little to ensure actual changes in practice. It is further argued that “it is the decisions on the use of legislation, both ordinary and emergency/anti-terrorist, and the internal rules and practices of security agencies that contribute most to actual or potential abuse”.

Consequently, greater focus should be placed on both internal and external administrative controls and on the general political context of anti-terrorist measures. Formal procedural requirements, such as the recording of arrests and regular inspections of detainees, to more independent monitoring and review of all aspects of the treatment of suspects, are essential to ensure protection against abuse. Many of the most serious violations tend to result from the development of new polices and strategies within existing legislation at a high level of the political or security system, which then produce unexpected or counter-productive results when introduced at a lower level. Furthermore, there is a general tendency for members of the security forces to be drawn from dominant sections of the community, which often results in the development of antagonistic and sectarian attitudes in the implementation of emergency laws and procedures.

The submission concludes by stating; “in many cases the most serious human rights abuses are an integral and unavoidable part of the conflict, and are unlikely to cease until some way is found to resolve the underlying political, ethnic or economic problems”, furthermore “there is a more complex relationship between law and practice than is sometimes understood by lawyers, and that as much attention should be paid to policies, practices and training of security agencies as to formal legislation.”
There were also two publications submitted to the EJP:

- _British Army and Special Branch RUC Brutalities, Dec 1971 – Feb 1972:_ A collection of extracts from statements, containing allegations of grievous psychological and physical brutalities at the hands of British Army and RUC personnel.

- _The RUC – The Black and Blue Book, 1970’s:_ This book looks at the need for reform of the RUC, considering why Catholics do not give general support to the RUC, killings involving the RUC and the role of the RUC in sectarian behaviour.

**Professor Martin Flaherty**

36 pages

Martin Flaherty is chair of the New York Bar Association’s Committee on International Human Rights. He is also Professor and Co-Director of Fordham Law School New York’s International Human Rights Programme.

Professor Flaherty submitted an article from 1994 that was written for the Harvard Human Rights Journal entitled “Human Rights Violations Against Defence Lawyers: The Case of Northern Ireland”.

The article begins by looking at international human rights standards, and examines the protections offered defence lawyers. The author referred to the United Nations Basic Principles on the Role of Lawyers as the best source of binding safeguards in this regard. These principles address the provision of counsel and the effective representation of a client without fear of reprisal – elements which the author believes are essential in tackling the problems defence lawyers face in an emergency state, and in particular Northern Ireland. The article asserts that states should assume more, rather then less, responsibility in the protection of their lawyers.

In looking directly at Northern Ireland’s case, the author examines the political and social setting, and legislative developments that have affected the role of the defence lawyer. He then looks at the personal and professional obstacles Northern Ireland defence lawyers have faced. On a personal level, he found harassment

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4 Volume Seven, Spring 1994, ISSN 1057-5057
and intimidation of defence lawyers by the police, evidence of collusion of the police with paramilitaries, and systematic abuse of the lawyers over the course of their legal careers. The author finds the stance taken by high profile government officials even more distressing. By openly identifying lawyers with their clients, and their client’s causes, they had indirectly contributed to the murder of well known solicitor Pat Finucane, and endangered the lives of countless others. Any complaints procedures put in place to deal with such issues he found to be ineffective. Lawyers had had little or no confidence in the procedures, in large part due to the fact that the Royal Ulster Constabulary (RUC) had little accountability, and an uninspiring track record with recorded complaints. Since only the RUC could investigate the RUC “these procedures do little to overcome the obvious problems that self policing engenders”.

The article claims that the criminal justice system in Northern Ireland of the time systematically impeded the effectiveness of the defence lawyer’s representation. Obstacles included prolonged coercive detention, ready admissibility of confessions and compromise of the right to silence, all of which limit the ability of lawyers to do their job. Impaired access to clients, by rules defended in the name of national security, “puts lawyers under an unwarranted cloud of suspicion, impedes the discharge of their professional duties, and places them at additional risk”.

The author asserts that the importance of protecting defence counsel within Northern Ireland, and other emergency states, lies not only in the benefit it provides the individual lawyer, but also in the advance of human rights in general. He argues that the Northern Ireland emergency framework violated the Basic Principles in numerous ways “failing both to safeguard the lawyers themselves and to protect their core function as agents for the rule of law”. In applying these Basic Principles, he believes that we may uncover possible remedies and prevention from future violations, for example, placing an affirmative duty on the government to protect lawyers, possibly through a system of independent monitoring which may act as a preventative measure. Furthermore, protecting lawyers’ rights would have a domino effect on the rights of their clients.

Human Rights First (various enclosures)

Human Rights First, formerly the Lawyers Committee for Human Rights, is a non-profit, non-partisan international human rights organization based in New York and Washington D.C., who advocate for change at the highest levels of national and international policymaking. Michael Posner, Executive Director, submitted 12 documents to the EJP on behalf of Human Rights First.

Human Rights and Legal Defence in Northern Ireland, February 1993, 100 pages. The report examines allegations of intimidation of defence lawyers in Northern
Ireland, including the 1989 murder of Pat Finucane. Based on a 1992 fact-finding mission to Northern Ireland, the report concludes that lawyers representing persons suspected of engaging in paramilitary activities are routinely the target of official threats and intimidation, which undermine their ability and effectiveness in representing clients. The report calls for an independent, judicial inquiry into the Finucane murder and for an inquiry into all allegations of threats and intimidation of defence counsel.

Choice Without Delay – Interrogation, Legal Advice and Human Rights in Northern Ireland, September 1995, 28 pages. This report is a response to the Independent Commissioner for Holding Centres in Northern Ireland’s report entitled “Delayed Choice or Instant Access”. It addresses in particular the Commissioner’s proposal that detainees should be prepared to appoint their legal representative from amongst a list of solicitors attached to the holding centre. The report looks at this proposal in light of international law and draws the conclusion that it in effect “advances no other purpose other than rendering the job of the security forces easier….and effectively denies the right to counsel of choice”.

At the Crossroads – Human Rights and the Northern Ireland Peace Process, December 1996, 143 pages. This report addresses a series of long-term human rights problems in Northern Ireland, principally the continuation of a series of emergency powers by the UK authorities, as well as limitations on the normal functioning of both the judiciary and the legal profession. Refuting claims that human rights are merely a sideline issue, the report argues that they have been at the heart of the conflict in Northern Ireland and, by the same token, it is only by reasserting the centrality of rights that peace can be achieved.

Comments of Human Rights First on “Legislation Against Terrorism”, March 1999, 16 pages. This report comments on the UK’s proposed counter-terrorism legislation post Good Friday Agreement, and finds the premise on which they are based “fundamentally wrong”, potentially impeding Northern Ireland’s progress toward a normal society. The proposals illustrate the dangers of the imposition of emergency powers. Once granted, those who implement such extensive powers often become accustomed to them and begin to find it convenient to operate without normal legal restraints – tempting them to make emergency powers permanent.

Beyond Collusion – The UK Security Forces and the Murder of Patrick Finucane, 2003, 101 pages. This is a comprehensive account of the Patrick Finucane case, drawing on Lawyers Committee’s investigative missions to Northern Ireland. The report pieces together the extensive evidence of state involvement that has emerged in the many years since the killing. The report asserts that a public inquiry into the murder is an essential element of the peace process in Northern Ireland.
and a number of shorter articles:


Northern Ireland Update, February 2000, 6 pages: this periodic update focuses on the follow-up to the Patten Commission Report and update on the Finucane and Nelson cases.


Statement of Mike Posner to the House Committee on International Relations and Human Rights on ‘Human Rights in Northern Ireland’ , September 1999.

Human Rights Watch

Established in 1978, Human Rights Watch (HRW) is a non-governmental organisation, which conducts regular, systematic investigations of human rights abuses in some seventy countries around the world. The organisation has dedicated a significant number of years of research and advocacy work to the Northern Ireland conflict.

The submission contains a cover letter and a package of some 24 HRW documents which address a range of human rights concerns in Northern Ireland from 1991-2000.
Two of the key documents contained in the submission are:

*Children in Northern Ireland - Abused by Security Forces and Pramilitaries, 1992, 57 pages.* This report is based on a fact-finding mission carried out in April 1992 by the Helsinki division of HRW. The report focuses on the experiences of Northern Ireland’s children in the conflict - caught between the security forces and the paramilitaries: improper detention of youths, and physical and verbal abuse by security forces in and out of interrogation centres, versus the punishment beatings and paramilitary tribunals of a paramilitary style police force. The report found the UK and its agents in violation of international laws and standards of child protection, and that complaints procedures had been ineffective in eliminating this abuse by security forces. It also found that the RUC had largely abandoned normal policing in many troubled areas, with paramilitary groups filling the resulting vacuum with “brutal alternative criminal justice systems”. This had left some children subject to the arbitrary, brutal and cruel punishments of paramilitary groups and denied due process.

*To Serve Without Favor – Policing, human rights and accountability in Northern Ireland, 1997, 181 pages.* This report, based on a fact-finding mission carried out by HRW in November 1996, also examines general policing concerns in Northern Ireland, the policing of parades and marches, paramilitary ‘policing’ and allegations of collusion between members of the security forces and paramilitary organisations. Commenting on the failure of the UK to repeal emergency legislation, the report states that; “emergency laws such as those in force in Northern Ireland often serve to sustain political violence by creating an environment in which individual human rights are routinely violated. Further inaction on the repeal of the emergency laws will sustain the historic climate of distrust and hostility between the government of the United Kingdom and certain segments of its citizenry.”

**Law Society of England and Wales**

44 pages

The Law Society’s submission is a report by their International Human Rights Working Party entitled “Northern Ireland: An Emergency Ended?” It was written by Geoffrey Bindman, Jane Deighton and David Jefferson following their visit to Northern Ireland, in June 1995. At this time paramilitaries had called a ceasefire and the focus of the report was on emergency powers and anti-terrorist measures. After hearing from various commentators on Northern Ireland’s emergency powers, the authors considered what impact these powers had had, whether such powers could be justified at all, and what steps needed to be taken to
re-orient the legal system to match the political changes that were happening at that time. In doing so, the report looked specifically at emergency powers, the intimidation of solicitors, the murder of Pat Finucane and the right to silence.

The report considers Northern Ireland’s emergency legislation in terms of the five main areas covered by the Emergency Provisions Act 1991 (EPA) and the Prevention of Terrorism Act 1974 (PTA); proscription of organisations; anti-racketeering; search, entry, arrest, and detention powers; access to solicitors; and the Diplock court system. Issues that the authors reported on, and were particularly concerned about, include the sweeping nature of stop and search powers; the lack of judicial authority for entry and search powers; detention powers that constituted a breach of Article 6 of the European Convention of Human Rights; and the needless use of emergency powers in situations where ordinary criminal law would have sufficed. The report also expressed deep concern that prisoners could be delayed access to their solicitor for up to 48 hours under S45 EPA, arguing that “this power in itself impugns the integrity of solicitors”.

The report then moved on to examine the direct and indirect intimidation of solicitors by the RUC and police, particularly in Holding Centres like Castlereagh. Such intimidation was found to be widespread, and directed at solicitors representing both loyalist and republican clients. The report found the RUC’s failure to investigate complaints of intimidation particularly unacceptable. Indeed the RUC themselves stated that the system created by the emergency legislation “requires the absence of solicitors”. The authors argue this has the effect of pitting lawyers, who fight for access to their clients, against the system, which is “a qualitative distortion of the role of defence solicitors in the administration of justice”. The report goes so far as to say “the RUC hover on the brink of impugning the integrity of the solicitors’ profession”.

The report draws special attention to the murder of Patrick Finucane as an example of the breakdown in the administration of justice in Northern Ireland. Following a thorough examination of the facts of the case, and interviews with some of those involved, the authors concluded that the government and the RUC’s failure to adequately investigate the murder, or make any prosecutions, has left a cloud hanging, “not just over the legal profession, but over the system of justice itself”. The UK government did nothing to alleviate the fear and consternation lawyers felt following the murder of Pat Finucane, nor did it uphold its obligations under the UN Basic Principles on the Role of Lawyers. The report recommends a judicial enquiry with subpoena powers as the only way to resolve these issues for the Finucane family, the legal community and for Northern Ireland as a whole. They quote the Human Rights Committee of the UN in conclusion: “Specific efforts (need) to be made to enhance, in Northern Ireland, confidence in the administration of justice by resolving outstanding cases and putting in place transparently fair procedures for independent investigation of complaints”.
London Metropolitan University

74 pages

The submission by London Metropolitan University consists of the proceedings of an International Conference held in May 2005 at the university, entitled “Suspect Communities: The Real “War on Terror” in Europe”. It was submitted by Douwe Korff, a Dutch human rights lawyer and professor at the London Metropolitan University.

The conference report includes speeches by contributors from a variety of countries, in an attempt to identify common lessons that could be learnt on terrorism and antiterrorist measures, all of which are of direct relevance to the Eminent Jurist Panel's inquiries.

Amongst the many interesting presentations, the opening address by Professor Hillyard was of particular relevance to the debate in Northern Ireland. Hillyard identifies four sociological effects of the emergency legislation, on individuals and the institutions that governed them:

a. Emergency legislation led to widespread alienation of the very communities from whom the authorities wished to draw support. Internment, the powers of stop, search and detention, and the abuses of those powers created ‘suspect communities’. Hillyard notes the emergence of similar ‘suspect communities’ in post 9/11 Britain, with the focus on the Arab and Muslim communities. These problems are emerging in response to policies such as control orders, bans on proscribed organisations, and broadcasting bans on members of illegal organisations, all of which were tried and consistently failed in Northern Ireland to stamp out terrorism.

b. Emergency legislation transformed and corrupted the ordinary criminal justice system. ‘Diplock’ courts, changes to the rules of evidence, widespread use of super-grasses and informers, as well as brutal interrogation techniques, created in effect two criminal justice systems in Northern Ireland - one for suspected terrorist crime, and one for ‘ordinary’ crime. The ‘terrorist’ criminal justice system began to encroach on the ‘ordinary’ criminal justice system, with the inclusion of emergency powers and procedures in ordinary criminal law, and the use of emergency legislation to deal with ordinary criminal behaviour.

c. Emergency legislation placed the security services above the law on the grounds of national security: ‘Bloody Sunday’, brutal methods of interrogation, and widespread collusion all went unaccounted for because there was no independent or democratically accountable organisation to investigate them.
d. Far from preventing terrorism, emergency legislation sustained it and extended it; actions taken under this legislation were at best ineffective, and at worst served to increase levels of violence and alienation and prolong the conflict.

The report includes workshop reports on topics such as - terrorism lists; intelligence agencies - their changing role and accountability; policing, ID, accountability, and discriminatory practices; detention – comparisons between Northern Ireland, Guantanamo Bay and Abu Ghraib, and the parallels between the techniques used to criminalise the Irish community 30 years ago now being used on the Muslim community today; asylum and migration - including the targeting of migrants, refugees and asylum seekers as ‘suspect communities’; and global politics - examines the concept of national security as justification for the restriction of civil liberties and attacks on human rights.

Dermot Nesbitt (Ulster Unionist Party)

22 pages

Dermot Nesbitt is a senior member of the Ulster Unionist Party, MLA for South Down, and former Junior Minister in the Office of the First Minister and Deputy First Minister.

Mr Nesbitt’s submission concentrates on the political policy responses to the conflict in Northern Ireland and their impact on the protection of human rights, stressing the fact that the causes of terrorism must be defeated alongside defeating the terrorists themselves. His submission begins by identifying the ‘democratic deficit’ created by over thirty years of Direct Rule, that has left NI trailing behind the international community in terms of human rights standards.

The author identifies the concept of minority, and the connotations it may bring, as a key element in prolonging the conflict in Northern Ireland, for example, the minority of those who identify themselves as Irish versus the majority of those who identify themselves as British. There has been an increased level of attention in recent years on the rights, and protection of rights, of minorities at an international level. The demise of the USSR has had a destabilising effect in Europe, with a renewed search for identity for minority groups, leading governments to believe that international norms on minorities could contribute towards stability. It is submitted that by following the principles outlined in the Charter of Paris for a New Europe and the Council of Europe’s Framework Convention for the Protection of National Minorities, NI can secure lasting peace. The examples given by the Austrian community in the South Tyrol region of Italy, and the inhabitants of the Spanish enclave of Ceuta in Morocco, in avoiding conflict, are ones that NI could and should follow.
The failure of Northern Ireland to follow these examples and recognise the value in following the European model of conflict resolution is central to the problems here. The “pretence” that our situation is unique, that it requires complicated or innovative measures to tackle it, only serves to prolong instability. The author submits that Northern Ireland’s situation is very similar to experiences all over Europe, of different allegiances within a state, all of which have adopted the European model of guaranteeing political rights to the minority community within the existing borders, but because this model does not satisfy the demands of republicanism, our situation must be treated as ‘unique’.

What Northern Ireland is missing, is a framework devised in accordance with international standards. The principles that underlie such a framework must balance majority rights and secure borders, with minority rights and democratic inclusion. The author believes the claims of nationalism to an all-Ireland solution, are illogical and unsupported. It has been the failure of nationalists to accept governmental structures based on international human rights that has prolonged the conflict. It is submitted that what Northern Ireland needs, and what nationalists have to accept, is the same rights, stability and principle of government that operate elsewhere in the democratic world. Unionism has demonstrated its commitment to inclusivity and has moved to the centre of international best practice, but this has not been met with a commitment by the other side to end aggressive nationalism. This, coupled with the British and Irish governments’ “blind-spot” when it comes to international norms, is the reason for continued instability in Northern Ireland.

New Lodge Six: Time for Truth Campaign

4 pages

The New Lodge Six: Time for Truth Campaign, is a collection of family members who have come together to support each other in their desire for justice for their deceased family members, the New Lodge Six, who were killed by British armed forces in February 1973.

This submission was originally a submission to the Northern Ireland Affairs Committee Inquiry entitled ‘Reconciliation: Ways of Dealing with Northern Ireland’s Past’ in 2005. The submission addresses seven keys issues around the timing and formation of the Inquiry. In the view of the submission these issues were, and

still are, relevant to any discussion on emergency legislation and counter-terrorism, and may be useful to the Eminent Jurist Panel in drawing lessons from Northern Ireland’s experience.

The key element of the submission is the British government and security forces’ lack of accountability and their central role in the conflict. The submission argues that it is the responsibility of the state to protect its citizens from human rights abuses, and the government has continually failed to do so in Northern Ireland. The role of the security forces in the New Lodge murders, the Pat Finucane murder, and subsequent investigations into them, combined with continual allegations of collusion, has eroded any confidence the people of Northern Ireland had in the government and the security forces. The government has never acknowledged any responsibility for their role in the conflict or in the factual, economic and political mistreatment of the nationalist community.

New York City Bar Association

The Committee on International Human Rights made a submission on behalf of the New York City Bar. The aim of the Committee is to make a useful contribution to the promotion of human rights in foreign countries. A primary function is to undertake missions to countries where there are problems relating to human rights, the effectiveness of legal institutions and the rule of law. Over the last twenty years they have taken a special interest in Northern Ireland, conducting three human rights missions covering the use of emergency laws and reform of the criminal justice systems among other issues.

The Committee submitted various reports to the Panel. These are:


   This mission report looks at a range of issues prevalent at the time, including security provisions, arrest, detention, interrogation, the Diplock courts and the Anglo-Irish Agreement. The report raised concerns that the period of ‘emergency’ in Northern Ireland had been of an especially long duration, creating the danger that it had become normal or institutionalised. The report noted the scepticism within the Catholic/nationalist community surrounding the fairness of trials meant the courts were actually counter-productive, but also noted the absence of any “factually erroneous conviction(s)”.


This follow-up mission report looks at Northern Ireland's administration of criminal justice in light of the government's proposed White Paper on Terrorism (the basis of the Terrorism Act 2000), the changes following the Good Friday Agreement and the role of defence lawyers following the murders of Pat Finucane and Rosemary Nelson. The report welcomes changes made following the Good Friday Agreement, and proposed by the White Paper, and acknowledges the genuine progress they represent, but it identifies the continued distinction between the rights accorded to suspected terrorists and those accorded to other suspected criminals as particularly troubling.

c. *Northern Ireland: A Report to the Association of the Bar of the City of New York from a Mission of The Committee on International Human Rights*, March 2004, 53 pages. This report on a 2003 mission to Northern Ireland, focuses on issues pertaining to the Justice Act 2002; the transformation of the Public Prosecution Service; new procedures for judicial appointments; human rights training; compliance with the European Convention on Human Rights (ECHR); the intimidation of defence lawyers; and the investigations into the murders of Pat Finucane and Rosemary Nelson. In examining the changes made since the last report, it concludes that, while some changes have been impressively significant, some agreed reforms have not fully been implemented or even initiated. The reform of the police service is singled as an example of effective reform, with the pace and transparency of the reform described as “striking” in comparison with other reforms. The Office of the Director of Public Prosecutions, on the other hand, has been very slow in the creation of its successor agency, the Public Prosecution Service (PPS). The report is also concerned at the government's failure to implement several important judgements of the European Court of Human Rights that directly impact on Northern Ireland's criminal justice system, and the lack of progress in resolving the cases of Pat Finucane and Rosemary Nelson.

d. *An analysis of the UK Inquiries Bill and US provisions for investigating matters of urgent concern by The Committee on International Human Rights of the Association of the Bar of the City of New York*, January 2005, 16 pages. This report focuses on the potential independence, impartiality and transparency of inquiries under the UK Inquiries Bill, compared with inquiries’ provisions in the US. This comparative was offered to the UK House of Lords and House of Commons in order to shed light on the Bill's strengths and weaknesses. The report looks at the Inquiries Bill as introduced in the House of Lords and concludes that the Bill as a whole should not be passed into law, and that further consultation on inquiry legislation should be taken.
Submission by the NIHRC, April 2006, 11 pages, accompanied by a compilation of 10 documents.

The Northern Ireland Human Rights Commission is an independent statutory body created in 1999 under the Good Friday/Belfast Agreement. Its role is to promote awareness of the importance of human rights in Northern Ireland, to review existing law and practice, and to advise government on what steps need to be taken to fully protect human rights in Northern Ireland.

The Commission’s submission begins by identifying the key lesson that can be taken from Northern Ireland’s experience of emergency and counter-terrorist measures, that is - there must be a close correlation between the powers exerted by the state and the protections available to the citizen. It suggests that “the state’s strategic and tactical response to political violence (in Northern Ireland) was informed by counter-insurgency methods developed by military experts confronting insurgencies in colonies and former colonies”. The use of people in Northern Ireland, ‘who were sponsored by the state but acting outside official lines of accountability’, created the perfect conditions for collusion in criminality and subversion of the rule of law. It is argued that regardless of the military rationale behind any such tactics ‘there can be no acceptable level of state sponsorship of terrorism’.

Northern Ireland’s experience highlights the fact that in an actual or perceived emergency, the state is often too ready to derogate from those provisions that protect the citizen and stand in the way of emergency measures. Emergency legislation in Northern Ireland was quite often a “knee jerk” response to specific events, and once introduced tended to remain in statute far longer than necessary: “special measures came to be used as ‘regular’ measures and the emergency became ‘normality’ for a prolonged period of time”. These emergency powers often facilitated the abuse of human rights, with the UK being found guilty of breaching Article 3 of the European Convention on Human Rights (the right not to be subjected to torture, cruel, inhuman or degrading treatment) for excessive interrogation techniques. The use of informers and the infiltration of terrorist groups led to collusion in criminality and the distortion of the criminal justice system, with evidence that the protection of agents at times took precedence over the protection of the public. It is submitted that in light of these lessons from Northern Ireland, any counter-terrorist measures in the current UK and worldwide situation should “be applied carefully and proportionately”.

The creation of special courts in ‘emergency’ situations, like Northern Ireland’s ‘Diplock’ courts, ultimately leads to the perception that they operate to a different standard of justice than ordinary courts. While the quality of sentencing and
process in the ‘Diplock’ courts in Northern Ireland did not differ greatly from that of the ordinary courts, the perception was that the ‘Diplock’ courts were servants of the state, and confidence in their independence dropped. The submission contends that as a result of the use of such special courts, support for the ‘terrorism’ may be generated and confidence in the ‘ordinary’ courts decreased.

It is not only the emergency measures themselves that the submission objects to - it is also their application, or misapplication, by the police and government. In Northern Ireland, emergency measures were targeted disproportionately at the Catholic/nationalist community, which added to a sense of alienation and effectively created ‘suspect communities’. A similar pattern is emerging in today’s Britain: the Muslim community has become the primary target for anti-terrorism measures, which is only going to escalate negative relations between the Muslim community and the authorities.

The role of the British army, in supporting and co-operating with the police in Northern Ireland, has also come under a lot of scrutiny. The submission argues that the army’s sometimes excessive use of the powers of stop and search, and their use of lethal force, has not been coupled with adequate measures of accountability. It is submitted that utmost caution should be used when attributing armed forces with policing functions, and where they are called upon to assist the police they should be subject to comparable mechanisms of oversight and control.

The submission also raises objection to the term ‘terrorism’. The lack of any single definition of ‘terrorism’ allows it to mean different things to different people, and to be interpreted as widely or narrowly as is needed. It is argued that ordinary law is capable and wide enough to address most manifestations of political violence, so the creation of special ‘terrorist’ offences is unnecessary. Further, while labelling an offence as ‘terrorist’ changes the actual offence very little, it leads to substantial differences in sentencing and potentially creates a ‘hierarchy of victims’.

The submission concludes that Northern Ireland’s experience, and all the lessons that can be drawn from it, highlights and reinforces the fact that human rights protections are an effective and essential tool in the fight against terrorism. The Human Rights Act in 2000 has made access to European Convention rights much easier, which is hugely important in the context of the serious violations that have happened in Northern Ireland. It is hoped that the Bill of Rights, currently under discussion in Northern Ireland, “will assist in establishing a context within which terrorism is much less likely to arise, and where the state’s response to terrorism will be constrained within a legal framework of respect for human rights”.

65
Northern Ireland Policing Board

The Northern Ireland Policing Board (NIPB) is an independent body made up of 19 members to ensure for all the people of Northern Ireland the delivery of an effective, efficient, accountable and impartial police service which will secure the confidence of the whole community. Part of their role is to hold the Chief Constable and his staff to account for their actions. The Board is also responsible for monitoring if the police act in line with the Human Rights Act 1998.

The submission by the Policing Board had been made by Keir Starmer QC and Jane Gordon, Human Rights Advisors to the NIPB. They enclosed their first report (2005) on the Police Service of Northern Ireland’s (PSNI) performance in complying with the Human Rights Act 1998 (272 pages). They also enclosed the PSNI’s response to the report and its recommendations, entitled “Human Rights Programme of Action 2005-2006” (50 pages). It is intended that these publications can provide lessons on the steps that have been taken to engender peace and security here, for the Eminent Jurist Panel to include in their inquiry (the reports will be up-dated annually).

The Policing Board annual human rights report looked at 12 key areas in their examination of the police’s compliance with the Human Rights Act 1998, and identified what areas needed improvement and what could be done to achieve it. The report examines in turn, the extent to which the police:

- Comply with their own Human Rights Programme for Action;
- Integrate human rights into all police training;
- Audit all policies against human rights standards;
- Integrate human rights into the planning and carrying out of operations;
- Implement their Code of Ethics;
- Learn from the complaints lodged against them;
- Undertake public order operations in a human rights compliant manner;
- Ensure covert policing, the treatment of suspects, and the response to the needs of victims are all human rights compliant.
Pat Finucane Centre

7 pages

The Pat Finucane Centre advocates human rights and encourages political development and social change in Ireland. The centre promotes a non-violent ethos and actively works to build alliances with groups and individuals within the radical and progressive wings of Irish politics. The centre believes that the attainment of human, political cultural and economic rights can only be achieved within the context of active self-determination involving all the Irish people.6

The PFC’s submission is entitled “From the Bogside to Basra: British State Violence in Ireland and Iraq”. It was published following a 2004 vigil in Derry, held to show solidarity with Iraqi families who have lost loved ones. The submission is based on the belief that “the British government has disregarded the lives of Irish civilians and uses its experience in Northern Ireland to perpetrate human rights abuses in southern Iraq”.

The publication lays out the testimony of a victim from Northern Ireland, immediately followed by the testimony of a victim from Iraq, covering 20 victims in all. The most recurring concern of the testimonials, from both countries, is the failure of the British army to adequately investigate deaths, leaving the families of the victims without closure or redress. The implication is that little or nothing has been done to alleviate the sense of grievance and injustice felt by the families of the victims, which has eroded the people of Iraq’s confidence in the British government, as it has in Northern Ireland. The similarity of the stories, of innocent civilians killed by the British army, suggests that the British authorities have not learned from their experience in Northern Ireland.

 Relatives for Justice

Relatives for Justice is a human rights NGO supporting the bereaved and injured of the conflict in Northern Ireland. They are committed to human rights, social justice and equality and offer legal and advocacy support to the many people affected by the conflict. RFJ aim to provide a safe space for the bereaved and injured of the conflict to meet together to share experiences and support each other, and in doing so hope to “raise public awareness and to pursue legal and political acknowledgement and redress”. Relatives for Justice believe that remembering and telling the truth are essential in the restoration of social order and healing victims.

6 http://www.serve.com/pfc/
The RFJ submission includes four publications, the first of which charts the history of the organisation and the work that they have been involved in, including family support, training, intervention in policy debates and peace building.

The second publication is the Winter 2001 edition of the Relatives for Justice newsletter, ‘Justice’. The newsletter contains articles such as; “Children’s Rights in a Sectarian State”; “Human Rights Must Become a Policing Priority”, looking at the issue of plastic bullets; and “Policing and Human Rights”.

The third publication by Relatives for Justice is “Collusion”, which the authors describe as “an insight into the arming and directing of Loyalist death squads, over three decades of conflict in Ireland, by successive British Government administrations”. The publication itself aims to give a voice to victims through disclosure, truth, acknowledgment and recognition. The development of a collusion policy throughout the 1970’s, 80’s and 90’s, is examined and in particular the roles of Colonel Gordon Kerr and loyalist informant Brian Nelson. It is alleged that such collusion is still ongoing in Northern Ireland, and can only be combated by a full international judicial inquiry.

The fourth publication is entitled ‘Consultation Paper on Truth and Justice: A Discussion Document’. It was produced in 2003 by the Eolas Project based on the need for public acknowledgement of the suffering endured by all victims of the conflict, with the aim of developing the discussion on truth and justice in the context of conflict resolution. The paper considers global approaches that have been taken in Ireland, South Africa, Guatemala and Haiti, including “truth and reconciliation commissions”, ‘commissions on historical clarification’, formal justice mechanisms and justice inquiries. It considers these approaches in the context of Northern Ireland’s history and presents three possible discussion models that may be used to facilitate investigation into the conflict, its causes and the truth and justice issues arising out of it.

Sinn Fein

The 5-page submission begins by examining the causes of Northern Ireland’s conflict and identifies the “repressive nature of British rule in Ireland” as being directly responsible for the protracted conflict that followed. The denial of nationalists’ right to self-determination, equality and social, economic and cultural rights effectively created a second class citizenship and a status quo, that was reinforced by successive unionist governments. The civil rights movement that ensued was a peaceful attempt by nationalists to assert their rights, but was met with a “violent over-reaction” by the unionist state police (the RUC). Such “political policing”, it is submitted, eroded the confidence of the nationalist community in the police, and consequently effected the emergence of the IRA.
Throughout the conflict that ensued, the submission alleges that the British government has continually abused human rights, and that this claim is substantiated by Britain’s record as the nation who has been found guilty in the European Court of Human Rights more times than any other signatory to the European Convention on Human Rights. The use of internment, sensory, sleep and food deprivation techniques on detainees, abuse of stop and search powers, use and abuse of lethal weapons such as plastic bullets, and collusion with loyalist paramilitaries, aggressively repressed the nationalist community. Equally as oppressive was the “systematic sectarian discrimination” in housing allocation, employment and public life. While some of these issues have been addressed, the submission argues that the status quo continues to act as a barrier to equality and human rights for all in Northern Ireland. Some recommendations for progress in Northern Ireland, which could also be applied internationally:

- a strong and comprehensive Bill of Rights;
- an all-Ireland poverty strategy to set realistic targets and budgets to eradicate poverty;
- an all-Ireland economic strategy to address disparities between the north and the south of Ireland;
- effective mainstreaming of equality and human rights;
- an end to all emergency legislation;
- an end to political policing, and
- a fair, impartial and representative justice system

Peter Smith QC

8 pages

Peter Smith QC is a leading lawyer in Northern Ireland with more than twenty years of experience at the Bar. He was appointed as a Deputy Judge in the High Court of Northern Ireland in 2002, and has been a Judge of the Courts of Appeal of Jersey & Guernsey since 1996. Between 1998-1999 he was a member of the Independent Commission on Policing. This submission is a paper Mr Smith originally prepared for a US group in 2003, which attempts to use the experiences learnt from Northern Ireland to help inform US policy in combating terrorism.

The submission begins by saying that “as far as controlling terrorism is concerned, the dilemmas that faced Britain in relation to Northern Ireland and those facing the US in the world today are essentially similar, and that the problems inherent in the deployment of the available remedies are much the same”
The author identifies the most important lesson that can be learned from Northern Ireland as the recognition that, in a situation where violence is linked to politics, any measures to deal with the violence will be unsuccessful, if they do not also deal with the politics. Furthermore, there must be awareness that methods used to deal with this violence, will have political implications. For example, in Northern Ireland, measures taken by the state in its own defence were perceived as unjust, and misconduct by state agents stimulated political support for terrorism that, in turn, exacerbated the violence. The author submits that “the means utilised to stem the violence may impact negatively on that very end”.

The use of trials without juries in so-called ‘Diplock’ courts was, the author believes, “reasonably successful” as a solution to the intimidation of jurors in Northern Ireland. The unrestricted right of appeal, in these courts, and the requirement of the judge to produce a written judgement, offered added safeguards to counteract the absence of the jury. The success of the ‘Diplock’ courts is especially true in comparison to England, where trials by jury for terrorist suspects resulted in several high profile miscarriages of justice.

Internment, or detention without trial, as a counter-terrorist policy, was not so successful however, and according to the submission it was abandoned relatively quickly in the face of hostility from the nationalist community and public opinion in the Republic of Ireland and the United States. While the author believes that internment, as a policy, may be a legitimate weapon in fight against terrorism, it needs to be furnished with adequate safeguards to ensure it is not abused, or administered with “unnecessary brutality” as it was in Northern Ireland.

The paper continues that while there is little evidence that the British government officially sanctioned a “shoot to kill” policy, many believe that the security forces in Northern Ireland operated on this basis and have colluded with loyalist paramilitaries in the killing of republican terrorist suspects. Allegations and evidence of these activities, the author argues, proved hugely embarrassing to the British government, and was of great propaganda value to political elements linked to terrorism.

In light of these policies, the author submits that anti-terrorist methods designed solely to increase conviction rates will always be counterproductive, because they usually also increase the risk of miscarriages of justice. While they may be immediately effective, they increase the sense of grievance and injustice felt in targeted groups, leading to a consolidation of support between these groups and those sympathetic to their cause. A balance needs to be struck if terrorist activity, and political support for terrorists, is to be effectively suppressed. The author believes that it was the relatively modest departures from the traditional
Madeline Swords lived and worked as a social worker in Northern Ireland for thirty years. She now lives in Edinburgh, Scotland. Her submission is a personal account of the effects of terrorism, counter-terrorism and emergency powers.

Apart from outlining her personal story, the submission highlights the inability of elected representatives to address issues such as education, health and transport, without it turning into a nationalist/unionist debate with no compromise and no surrender. Terrorism has killed political debate and emergency powers have created a “tin pot dictatorship”.

Terrorism is reflected through our systems: no alternative medical model and a lack of counselling and mediation. The voice of women was so much suppressed that they felt the need to found the Women’s Coalition party, who were faced, when they spoke in the Assembly, with grown men singing with their fingers in their ears. Terrorism and counter-terrorism has, according to the author, left Northern Ireland in a time warp. This is a country with no abortion, where homosexuality is openly berated, with the leader of the Democratic Unionist Party, Ian Paisley, leading a ‘Save Ulster from Sodomy’ campaign. We hate everyone: Travellers, the Chinese, Muslims, Roman Catholics, everyone, because we are afraid to change. The author argues that terrorism and counter-terrorism has created in Northern Ireland “a dysfunctional dumbed down subjugated, subdued people devoid of diversity:- subjugated, and vulnerable to exploitation.”

People want answers so that they can lay their grief to rest, to have closure, but the failure of the government to carry out adequate investigations has denied them this. The submission argues that terrorism and counter-terrorism are one and the same, it is the abuse of ordinary people by those who hold the power.
Transitional Justice Institute at the University of Ulster

The Transitional Justice Institute is a leading academic research institution based at the University of Ulster, which specialises in the law and politics operative in, and suitable to, societies emerging from violent conflict and/or political repression.

The submission lists fourteen publications/research reports relevant to the submission. The submission begins by highlighting the fact that jurisdictions such as Northern Ireland have extensive experience of emergency laws as a response to internal disorder and terrorism, and as a result provide “a substantial basis upon which to assess the efficacy and merit of emergency laws”. Out of the Northern Ireland experience has come a significant amount of academic reporting and commentary, examining the exercise of emergency legislation and the lessons learnt here, which can be used in a “comparative application to the widespread proliferation of emergency powers post 9/11 across multiple jurisdictions”. The authors argue that Northern Ireland has a particularly valuable contribution to make to the Panel’s inquiry as a western liberal democracy emerging from conflict into a transitional stage, calling it “an ideal context in which to probe some of the more problematic dynamics of the current ‘war on terror’ and in particular its effect on democratic states”. The abuses of emergency powers that have been experienced here, highlight the tendency for such abuses to happen when the rule of law is constrained, as well as showing the effectiveness of national and international responses to it.

Ulster Human Rights Watch

3 pages

Ulster Human Rights Watch is a local NGO, (not to be confused with the international NGO Human Rights Watch), whose vision is for “human rights, based on fundamental principles, to be equally enjoyed by all people, whatever their class, creed or political opinion, in Northern Ireland, the whole of the United Kingdom, as well as in other European countries”.

This submission did not make any substantive comment on the EJP’s mandate. Instead Ulster Human Rights Watch suggested that the Eminent Jurists Panel address eighteen questions that they set out. Their questions focus initially on terrorism; terrorism as a concept, its consequences for human rights, and its effects in Northern Ireland and the UK. For example:

7 http://www.humanrights.uk.net/main.php4
Since the EJP was constituted on Terrorism, Counter-Terrorism and Human Rights, why is the inquiry restricted to counter-terrorism laws, policies and practices?

How would the Panel define terrorism?

Does the Panel consider terrorism in NI to be activities segregating people within society, with detrimental consequences for the economy of the Province and the social welfare of its people?

They then move onto the issue of emergency powers:

Is the Panel opposed to emergency powers in principle?

Does the Panel believe that emergency powers protect the human rights of the people of Northern Ireland?

Does the Panel believe that implementation of emergency powers resulted in the partial suspension of terrorist activities in Northern Ireland?

They also want the Panel to discuss the role of the Republic of Ireland and ask the Panel to consider the duties of the state to protect law abiding people.
Oral Testimony to the Eminent Jurists Panel
CHAPTER FOUR
Oral Testimony to the
Eminent Jurists Panel

The Eminent Jurists Panel received extensive oral testimony in a series of sectoral and thematic seminars (19-21 April 2006). CAJ has sought to give a flavour of the debates in the following text, and has sought not to edit the material too closely. Some of it, especially the testimony from those who suffered directly from human rights violations, is very raw; none of it was assessed for accuracy; but it provides, in our view, an invaluable resource into the concerns of many people who were very directly involved in, and affected by, the conflict.

4.1 Sectoral seminars

In addition to a range of thematic seminars devoted to particular topics and a public meeting (see on), a number of specialist roundtables with different sectoral interests was organised for the Eminent Jurists Panel. Some of the discussions (with the Bar Council, and members of the judiciary) were not tape-recorded, but most sessions were, and the following account provides a general synthesis of the main issues that arose in the course of the specialist roundtables. Sessions were organised with:

4.1.1 non-governmental organisations (mainly international);
4.1.2 legal academics;
4.1.3 legal practitioners
4.1.4 members of the Northern Ireland Human Rights Commission;
4.1.5 representatives of the Law Society of Northern Ireland;
4.1.6 the Director of Public Prosecutions (and staff);
4.1.7 and the Chief Constable and senior members of the Police Service of Northern Ireland.

4.1.1 Briefing by non-governmental organisations (NGOs)

The role of international human rights groups in scrutinising human rights abuses in Northern Ireland has always been important in securing advances locally. Accordingly, invites were extended to groups such as Amnesty International, the International Federation of Human Rights, Human Rights First, Human Rights Watch, the Human Rights Committee of the New York Bar Association and others to testify. Whilst not everyone was able to make the trip to Belfast (some submitted written material), several did, and they were joined by local groups such
as British Irish Rights Watch (London) and the Irish Council for Civil Liberties (Dublin).

The key issues identified during the international NGOs roundtable:

A state of emergency? Participants highlighted the fact that “emergency” is a concept that needs clear definition and parameters. It was claimed that the situation in Northern Ireland did not constitute an emergency; while there was a lot of violence people were still able to function in a democratic society and the ordinary criminal justice system still functioned. The suggestion was put forward that the government used this emergency status to justify derogation from certain provisions of international human rights instruments. With the ensuing abysmal record of human rights protection, the Northern Ireland experience of emergency highlights how careful one must be in allowing the term “emergency” to be applied to any situation.

Definition of “emergency”:
The UN standard of emergency is a situation that ‘threatens the life of a nation’. Once this has been established the response to that emergency must be short, sharp and brought to an end as quickly as possible. Participants expressed anxiety however, at the close proximity of emergency to war when considering exactly what does “threaten the life of a nation”, especially with the US currently advancing a war metaphor internationally and domestically. It was suggested that one revisit the origin and interpretation of Article 4 of the Covenant on Civil and Political Rights, the derogation clause, and try to define the UN standard more clearly: specifically examining when there is a state of emergency, who should decide there is one, how long it should last and how it is going to be implemented. There then needs to be a uniform application of these guidelines to ensure that governments are not using emergency status to suit their needs.

“An emergency law situation creates the reality or at least perception that the state is partisan and is not applying the rule of law impartially”:
In both the north and south of Ireland people were identified as either “for us or against us”. It was suggested that this partisan attitude by state actors “undermined both the credibility and integrity of the system for many years”. Institutions operating emergency powers tend to exacerbate the problems of political division.

“The emergency law regime encouraged state actors to cut corners”:
With the standard for arrest greatly reduced, prolonged detention without access to a lawyer, and the admissibility of confessions made easier, it was felt that wide emergency powers in Northern Ireland created a recipe for the abuse of detainees. Reports were cited that found upwards of 80 percent of convictions in the Diplock courts were based either wholly or in part on a confession. It was suggested that these emergency provisions coupled with the absence of effective remedies or
oversight, provided an institutional incentive on the security forces to cut corners, coerce evidence and round up the usual suspects. It encouraged a generally sloppy approach to policing. Yet the point was made that in any system where you diminish the standards or expectations of the criminal justice system, making someone's job easier for them to do, you will find these diminished standards embraced across the board, even without the sectarian element. This kind of effect is very difficult to reverse.

“The emergency law system corroded the general criminal law system”: Commentators observed how the authorities in other jurisdictions saw the benefits of the emergency law system in Northern Ireland and wanted those kinds of benefits for themselves. For example, the lower standard of admissibility for confessions in Northern Ireland was later adopted in England and Wales. In that sense the emergency system was not contained within Northern Ireland but in some cases used as an example. “A typical emergency law system has a pernicious effect on the criminal justice system from start to finish”.

“The emergency law system politicised public institutions”: The office of the Director of Public Prosecutions (DPP) was identified as the most striking example of a politicised institution. In theory, the DPP made independent decisions on how and when to prosecute, when in fact, it was suggested, the DPP were paralysed when it came to pursuing the prosecution of public officials. One participant went so far as to say; “(their) hands were so tied behind their backs by the political context in which they operated that they became, essentially, ineffective in what they were doing”. Similarly, the Law Society’s capacity to operate as an independent institution was hindered by polarisation and politicisation. The Society proved incapable of acknowledging, or dealing, with the fact that both Protestant and Catholic members of their own profession, who were defending alleged paramilitaries, were under threat. The Society advanced the reasoning that it was not appropriate for them, as a representative body, to speak out on such issues. NGOs present dismissed this reasoning, arguing that it was the Law Society’s role to lead by example.

Reviews of emergency legislation: While a number of prominent barristers undertook reviews of Northern Ireland emergency legislation, it was felt that these were essentially white-washes, ignorant of the real issues involved.

“The Diplock courts corrupted the criminal justice system”: With a very small pool of judges operating in the Diplock system, they became case hardened. Participants commented that since the judges all knew how each other thought, and the legal profession knew how they thought, lawyers quite often knew how a judge would react to a certain line of defence and based their case on what defence a judge would view favourably - ultimately cases were not heard properly.
The emergency detention regime in general affected the ability of lawyers to do their jobs: members of the legal profession encountered the difficulty of being identified with the beliefs of their clients. This resulted in the murder to two practising lawyers, Patrick Finucane and Rosemary Nelson, and understandably put other lawyers off such hazardous work in the Diplock courts. It was commented that this had a damaging effect on both the courts and the legal system.

“The police have not been held accountable for their role in the conflict”: There was collective agreement that the police have not been held accountable for their role in the murder of unarmed persons during the conflict. Participants also cited police statistics for one particular year (1997) in which some 5,500 complaints were made, but only one complaint from a member of the public was upheld.

“Police resistance to accountability”: The government and police have consistently resisted attempts to accept accountability for their roles in the conflict. The government has spent 18 years trying to deny an honest and transparent inquiry into the murder of Patrick Finucane, while the police spent years during the conflict resisting the introduction of any meaningful audio and video taping of interrogations in Holding Centres. The opinion was expressed that the judiciary failed to monitor this situation effectively, or enforce any accountability, and in fact fed into the system by upholding denial of access to lawyers by detainees and drawing inferences from silence in court. Participants referred to this as a “circle the wagons” mentality - continually passing the buck to prevent any meaningful accountability.

“The ‘embattled’ mentality of the police rendered them incapable of operating like a normal police force”: According to one participant, this mentality formed part of a wider sense of embattlement by the government. It encompassed a sense that you should protect your own, permitting an exceptional degree of latitude to those acting outside normal procedures. Once this type of behaviour begins it is not only very hard to contain, it also makes it virtually impossible to run a professional and impartial police force.

Militarisation of police: Participants spoke about the “unholy alliance” between the police and security forces in Northern Ireland. It was felt that together they worked as an army rather than a police force. On the other hand the close proximity of the intelligence services, or Special Branch, at times effectively prevented the ordinary police officers from carrying out proper criminal investigations. The gathering of intelligence was given such a high priority that these ordinary police officers were denied access to vital intelligence relevant to their investigations.
“Lack of confidence in the police created a vacuum for paramilitaries”: The suggestion was made that the antagonism towards the police by one side of the community was rooted, to an extent, in the operation of the RUC as “a Protestant police force for a Protestant people”. Throughout much of the conflict, Northern Ireland’s police force was 92% Protestant. Almost half of the population, therefore, did not easily identify with the police, and some turned to paramilitary style policing to fill the vacuum.

Suspect communities: By identifying one group or section of the community as the enemy or target, and allowing that to inform policing or legislative reform, creates a recipe for disaster. The experience of suspect communities in Northern Ireland, being identified as terrorists against whom a war is being fought, is one that is mirrored today by the experience of the Muslim community in the US and Europe. It was submitted that the lesson we can take from the Northern Ireland experience is that this type of approach does not reduce the size of a threat, it in fact encourages a culture of human rights abuse and this ultimately adds fuel to an already inflammatory situation.

Definition of “terrorism”: It was claimed that “terrorism” is simply a number of crimes lumped together because of the motivation for the crime. It was further suggested that if these crimes had been dealt with under the ordinary criminal justice system, a lot of the problems associated with special courts and an atrophied criminal justice system would not have arisen.

Using fear as a motivating factor: It was claimed that politicians promote the idea that when dealing with terrorism “you have to take the gloves off”. By using fear as a motivating factor it makes it all the more easier for the general population to succumb to the notion that we must do whatever it takes to address violence without a legal framework or basic human rights protection. The whole concept of emergency laws, it was suggested, is a feature of political leadership that says we have to play by completely different standards to what is acceptable under normal circumstances. Participants suggested that we need to question the level of threat and not allow the authorities to pander to fear.

There must be absolute clarity on the rules of interrogation and treatment: There was agreement during the hearing that the right to not be subject to cruel, inhuman and degrading treatment must be absolute, not relative. Standards of accountability must remain in even the most extreme situations and there must be some measure of transparency in public discussion so that people know what the rules are and how they are being applied. Such measures can help dispel suspicions of secret policies.
International input into conflict situations can have a positive impact: Until the early 1990s the Northern Ireland was a very insular enclave. With little contact or input from the outside world, the situation in a way fed on itself and it became difficult to break out of the impasse. Participants cited the internationalisation of the conflict and debate as being key to bringing peace to Northern Ireland. They argued that by expanding the discussion to Europe, the UN and having a US component, it changed the dynamic, and highlighted the lessons that could be learnt from other jurisdictions.

Human rights protection is the key element in counter terrorism: “The biggest protection against terrorism is a strong framework of human rights protection. If you have a society where people’s rights can be vindicated, wherever the marginalised can get what they are entitled to, you are less likely to face a terrorist threat, and you are more likely to be resilient enough to deal with it if it comes in from outside.”

Security and rights do not have to be in conflict: Participants urged the Panel to resist the dichotomy that there is a conflict between rights and security because abuse of power and violation of individuals’ rights undermines the very security that is being sought.

4.1.2 legal academics

Different legal academics were invited to give the Eminent Jurists Panel their insights into experiences from Northern Ireland that might be useful to other jurisdictions.

Key issues identified during this session included:

The role of law in conflict resolution: It was suggested by participants that the Panel need to look at what the law is about, when the law is used as another theatre of war, or when law is stretched to accommodate and technically legalise breaches of human rights. They should then look at the effect that this has on the legitimacy of power structures and the difficulties it leads to in terms of rebuilding society and peace. It was commented that “when the law is used by the state… as another means of putting forward a state agenda or an arm of state repression, then the law loses any morality or any moral authority in terms of those who do not see that state as legitimate in the first place”. Furthermore, when the law has been in part responsible for grievances and the eruption of conflict in the first place, it cannot then act as a benign force. It does need to engage, but there needs to be acknowledgement that its engagement is not innocent and that it will impact on how the conflict plays out and how quickly it is resolved. Northern Ireland is an example of how the law can erode human rights initially for a
supposed emergency, but how those laws and human rights abuses then become normalised. It was further suggested that we should not automatically assume that counter-terrorism legislation and derogations from international human rights instruments are necessary, rather, we need to have a societal conversation on what the role of the law role is in conflict situations, and how it should be used.

“There is a need to control the state’s reaction to political violence”: It was suggested that governments always feel increased political pressure when dealing with terrorism or political violence, as opposed to purely criminal violence. One commentator proposed accepting that governments are going to increase their powers and concentrate instead on how to control it. This can be done through effective legal controls and also through discussion with policy makers at the highest levels to influence the way they think and react to these situations.

“The disastrous effect of police casting a wide net of suspicion over the whole community”: As police discretion becomes wider so too does their net of suspicion, extending beyond clearly legitimate suspects, to their families, friends, associates etc. It was felt that while it may be a good idea to encourage members of terrorist organisations to give evidence against their colleagues, the NI experience of super-grass trials, where even the peripherally involved were called on for evidence, had a disastrous effect on the community.

Normalisation of the emergency system: Experience in Northern Ireland shows that when an emergency system is in place for long enough, it eventually becomes part and parcel of the criminal justice system, and that culture is very difficult to challenge. Actors in the criminal justice system believe that they are doing the right job, with law and human rights standing in the way of their effectiveness, and once that attitude is developed, they can become a law unto themselves. It was suggested that we need to look at how to break that psyche apart, and stop the “institutional DNA mutating”. This is not just a Northern Ireland phenomenon, but merely typifies the kind of things that happen when you broaden the discretion of security forces, without putting in place adequate safeguards.

There needs to be effective review of emergency laws: All laws need to be reviewed to assess whether they are effective and whether they are doing the job they were intended for, but emergency laws need particularly close scrutiny. Northern Ireland’s emergency laws were reviewed but it was more an examination of how they operated in a given year rather than their necessity. As a result, it was suggested, we lapsed into a permanent state of emergency by default.

Is there a need for anti-terrorist laws generally? Some participants suggested that it is necessary to develop specific counter-terrorism laws, because on the whole the actions of terrorists are very different to ordinary criminal actions,
their motivation makes it very hard to counter their activities. There is a need for a system to prevent terrorism in a way that you wouldn’t necessarily need for ordinary crime. Furthermore, the serious, wide-scale consequences of terrorism make it more imperative to prevent. That does not necessarily mean, however, that the special courts, detention arrangements and the panoply of special laws brought in in Northern Ireland were the most effective approach.

Do we need to look at ‘acts of preparation’ which the criminal law does not traditionally recognise as a crime? While there is little support for emergency powers of arrest, some participants wondered if legal systems should allow for information-gathering detention. Maybe this would be a more honest way of proceeding than was used here? However, it could then become an offence not to disclose information, with the possibility of arrest on suspicion that you have not disclosed relevant information. While we don’t want knee-jerk responses to terrorism, nor do we want normalisation of emergency laws, as happened here. This is why prevention is crucial – and we should not merely be thinking of legal remedies, but also developing preventative efforts in educational, economic and social domains.

“Should we accept that torture is going to happen, and attempt to regulate it?”
There was disagreement between participants as to whether the academic human rights community should focus on regulating torture as opposed to questioning it. It was argued that governments are going to use torture, in the context of the War on Terror, regardless of international human rights law, and we therefore need to engage with that practical and political reality, and regulate it. However, it was countered that this becomes a slippery slope argument, that it should not be acceptable to concede ground on emergency laws. It is the professional responsibility of human rights advocates to uphold firmly fundamental standards “what you concede at the beginning…actually then sets the agenda for where you go”; “we can’t concede, as lawyers, that law can be used in a way which actually takes away fundamental rights, except in clearly defined circumstances and in accordance with legal principles of proportionality, and necessity”.

What controls need to be in place to mitigate against the possibility of torture? Audio and video recording of interviews and allowing solicitors and other independent observers to be present at all interviews with the police, were cited as some of the most basic and fundamental controls that should be in place. In Northern Ireland there have been no criminal prosecutions for malpractice in police interrogations, despite fairly substantial evidence. We did eventually secure these safeguards for interrogations, but it is clear that the normal criminal process for abuses may not work well when it is the forces of the state that are violating the law. All over the world criminal prosecutions against the police rarely come to a satisfactory conclusion, so it was argued we need effective safeguards. It is
also important to give more open access to interrogation centres – unannounced visits, written custody records documenting and correlating times, and the use of independent doctors since there is a risk of agency capture with police doctors (getting on well with police and turning a blind eye as a result). Detainees ought to be entitled to a doctor of their own choosing.

**Financial aspect of terrorism:** Paramilitaries have been so successful in what they do in NI because they were able to raise money for their activities. This led to certain organisations being proscribed. Although this suggests a curtailment of the right to freedom of association it does indirectly make it more difficult for organisations to raise money. It was suggested that there also does need to be examination of government spending on anti-terrorism. In Northern Ireland, as well as all over the world today, the security agenda has been used to justify spending millions of pounds on security apparatus, when it is obvious that prevention is better than cure. Participants argued that money needs to be aimed at different levels of the problem; parenting, diversion, or community programs to tackle the grievances that prompt terrorism.

**Members of the elite anti-terrorist units need to be representative as much as the police do:** Usually they are drawn from one section of the community, and this fuels the "us against them" mindset.

### 4.1.3 legal practitioners

Several retired and currently practising solicitors were able to accept an invitation to brief the Eminent Jurists Panel on their experiences as legal practitioners. The key issues that they explored included:

"**The most important component in any jurisdiction for safeguarding human rights is an effective legal system and independent solicitors.**" Practitioners recalled their experience acting for clients during the conflict. They referred to cases heard before the Diplock court system in which there was no right of jury during a trial, so the judge was the sole arbiter of law and fact. It was well known that certain judges were more likely to convict one side or the other. In the absence of a jury in the vast majority of cases, it was felt that the judiciary was not independent. While certain lawyers were courageous enough to put their heads above the parapet and defend people robustly, some members of the profession developed relatively cosy relationships with the police, sometimes at the expense of the interests of their clients.

"**Many people have criticised the ‘Diplock’ (no jury trial) system, but the real problem was the cumulative effect created by a failure of a series of**"
safeguards”: Looked at in isolation, a trial may have looked as though it adhered to all legal standards, but participants said the problems began much earlier in the process. Practitioners recalled for example:

- defending clients who, at the time of their arrest, were not told exactly why they were being arrested, only that they were under suspicion of being involved in terrorism;

- persons who were detained in holding centres for up to 7 days without being brought before any judicial authority, and being kept incommunicado during that time with no right of visitors, phone calls, letters in or out, and limited access to their solicitors;

- many clients experienced assaults and threats, endured terrible conditions of detention and were interrogated without (until recently) audio or video recordings;

- while doctors were available at Holding Centres, they were not regarded by detainees as independent;

- the removal of the right to silence and the right not to incriminate oneself was abrogated, since judges were entitled to draw an adverse inference for a failure or refusal to give evidence;

- a reduction of the opportunity to secure bail - during the Troubles anyone charged with a serious offence under emergency provisions was invariably denied bail, so there was no adjudication on whether or not there was sufficient evidence to remand that person in custody;

- no limits were imposed on the length of time between arrest and charging, and getting to trial - long delays became known as “internment by remand”, since a person charged could be held in custody for many years before being tried;

- an absence of a duty on the prosecution to provide incriminatory evidence, they only had to serve the prosecution case and were not obliged to make available to the defence all and any evidence that might assist the defence case.

“A major danger with emergency laws is that they are introduced as temporary measures but then become permanent”: Participants felt that it was difficult to determine the impact of the emergency legal system on Northern Ireland simply because it has become so normalised; we don’t know what it is like to be without it. They identified how emergency laws seeped into ordinary criminal law. Furthermore, legislation introduced under the auspices of terrorism is quite often used by government to respond to any civil protest.
“The criminal justice system suffers when it is split between a normal legal system and an emergency legal system”: It was argued that when judges are asked to deal with one type of case one day, and another type of case the next, it creates problems, both in terms of public perception of the judiciary and of their own perception of themselves.

“The close relationship between the police, the state and the judiciary tends to undermine the critical independence that judges should have”: Participants felt that the judiciary in Northern Ireland have begun to recover somewhat, but there is still a way to go.

“One of the most important safeguards lost by suspects in Northern Ireland is the right to silence”: This right was taken away as a temporary measure but has not been given back. If a person in custody fails to say anything, their silence can be used against them. Some people were not even told what they were being questioned about, and were asked to make a statement when they didn’t know what they were being charged with. Solicitors were not permitted to be present during such interviews, and usually therefore felt obliged to instruct their clients to remain silent. If a solicitor had been present he or she, on occasion, may well have advised their clients to co-operate, but in the abstract, they had to advise their clients not to respond to police questioning.

Lack of accountability: A pattern was identified in Northern Ireland where the police were allowed to get away with things which they would not normally get away with in a democratic society. It was suggested that this lead to a poisoning of the relationship between the police and the community because when people looked to the criminal justice system to protect them, it repeatedly failed. There were hundreds of successful civil claims on behalf of ill treated clients, yet no police officers were disciplined or held responsible. This became a continuum of a lack of accountability right through the system.

“Muslims have become the new target as a result of the abuse of emergency powers”: There appears to be a growing public readiness in Britain and elsewhere to believe that – in the face of real or potential terrorist threat - perhaps the police cannot always be expected to follow the rules. The participants expressed their fear that Muslims were now being questioned and having their houses searched without good reason, and that the PR line being spun about the need for draconian measures is not being adequately resisted.

Emergency powers need to be subjected to external, independent, international scrutiny: It was noted that domestic internal scrutiny in Northern Ireland proved to have had little effect during the conflict, however, when matters were raised with the UN, and when the UK were brought to task about certain
matters, they invariably listened to that international pressure. The Northern Ireland Office and the government brought in external police officers on occasion to conduct certain investigations. Participants at this session suggested that external people should similarly be used in monitoring a government’s declaration of emergency, and in monitoring how the powers during the state of emergency are exercised. While true that the government in the past – and still currently – have appointed independent adjudicators of emergency legislation, such reports have rarely led to substantive changes. These “independent” reviews have largely failed since they confined themselves to exploring the operation of the legislation rather than challenging whether emergency legislation was justified by the threat posed. Often the reviewers failed to meet with, or gave insufficient credence to submissions received from non-state sources (NGOs, defence lawyers etc). Over time, the reviewers lost credibility as their reports were seen as merely providing cover for state action, rather than effectively rendering such action accountable.

“One of the greatest safeguards in Northern Ireland was the ability to secure pressure on government from outside the jurisdiction” – from the US, Britain, Ireland, the UN, European Court etc. When domestic safeguards either did not exist, or did not work adequately, the intervention by politicians, public opinion, international human rights scrutiny bodies all played a very important role.

“The Law Society of NI did very little to protect its solicitors”: The practitioners present felt that the Law Society (the representative body for all solicitors in Northern Ireland) chose not to get involved in discussions about emergency legislation, the laws, or the needs of solicitors trying to defend victims of these laws. For many years, the Society refused to call for an independent inquiry into the murder of solicitor Pat Finucane, on the basis that it would be “divisive”. This of course was to disregard the fact that a decision not to call for an inquiry could be seen as equally divisive, and one which left the relatively small group of criminal defence solicitors feeling isolated.

4.1.4 Northern Ireland Human Rights Commission (NIHRC)

The Northern Ireland Human Rights Commission was established as a result of the Good Friday/Belfast Agreement “with an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human Rights”. As such, the NIHRC did not operate during the periods of the most serious human rights abuses in Northern Ireland but, drawing on personal experiences, and institutional human rights expertise, Commissioners and staff were able to brief the Panel about a number of important issues:
Definition of “terrorism”: The NIHRC see “terrorism” as politically motivated violence. It was suggested however, that any definition of “terrorism” should expressly exclude expressions of dissent, discontent and civil disobedience.

“Human rights protections are paramount in the development of counter-terrorism”: In Northern Ireland the government initially took a military, or counter-insurgency, response to the violence. This approach was not productive and in fact gave rise to a whole other set of complications, such as allegations of torture against the military. Participants agreed that regardless of the threat that is facing the state, there can be no acceptable level of state sponsored terrorism.

A Bill of Rights can be a useful tool in countering terrorism: The NIHRC is currently working towards a Bill of Rights as a means to ensure protection for the fundamental human rights of all in Northern Ireland. As part of the bedrock of society the Bill of Rights was identified as a way through which “we can create a society in which terrorism would not be the first resort, or indeed, the last resort of anybody”.

“States should not just use legislative weapons to respond to terrorism, they need to address the underlying causes”: The firm belief was expressed that issues such as social exclusion, and the marginalisation of communities within society need to be dealt with, so that the underlying causes of the conflict may be dealt with. While this type of response is costly it is as important as developing new legal, technological, policing or security responses. It was felt that politicians too easily turn to legislative measures in response to terrorism merely to look as if they are doing something, when in reality a lot of this new legislation is not needed and is ineffective.

Importance of social and economic rights: The conflict has negatively impacted on economic and social rights as well as civil and political rights both from the direct result of terrorist activity and through the diversion of resources to respond to terrorist threats. It was suggested that issues of social deprivation had been one of the reasons for the conflict in the first place.

Long term effects of emergency legislation and current counter-terrorism legislation: Emergency legislation in Northern Ireland has left a legacy of difficulties and problems, especially in dealing with the investigation of deaths that occurred during the Troubles, and the rights of victims. As we move into a period of normalisation, however, it was suggested that current UK-wide counter-terrorist legislation is actually hindering that normalisation process. While Northern Ireland cannot be immune from such legislation, participants expressed anxiety about “an over-blanketing application of terrorism legislation in the UK working against what we’re trying to do”.

**Longevity of emergency legislation:** Emergency legislation is quite often easy to introduce but difficult to get rid of. There need to be time limits set on emergency legislation and constant monitoring to ensure that it is relevant and operating in the way intended.

**The role of international human rights instruments:** The NIHRC stressed that since international human rights instruments reflect what should be permissible in a democratic society, the development of emergency legislation and counter-terrorism measures should be measured against them. The response of the government to the emergency situation in Northern Ireland clearly lacked this element, resulting in the UK being taken to the European Court of Human Rights on numerous occasions and being found to have been in violation of the European Convention. It was acknowledged that post Human Rights Act 1998 there is much more awareness by the government that they must adopt a human rights framework when tackling terrorism. However it was felt that the most recent counter-terrorism legislation does not seem to have complied sufficiently with human rights standards. Emergency law needs to be tailor made, proportional and measured against human rights standards.

**Special courts:** In emergency situations there may be a demand for special courts to be set up to deal with certain situations, but it is the experience of Northern Ireland that these courts too often are associated with the state and - in a contested state - are therefore viewed as partisan and oppressive.

**Policing:** The police in Northern Ireland became enmeshed with the security forces. This ultimately led to the creation of suspect communities and the use of the police primarily for dealing with security situations rather than 'normal' policing. It was felt that this experience was compounded by the under-representation of Catholics in the police force, an issue that is currently being dealt with through radical changes in police recruitment. It was commented, however, that there had been difficulty in transforming the mindset of existing police personnel with some participants feeling that the police continued to operate in a way that was more suited to emergency situations. Police reform has to put a great emphasis on increasing accountability, transparency and oversight.

**Army:** Use of the army affected the ability of police to do their jobs and negated the primacy of civil powers. That primacy needs to be protected and where the army is used in such situations there needs to be adequate oversight and control.

**Lessons for Britain or further afield?** It was felt that there had been a marked reluctance on the part of the government to learn lessons from the Northern Ireland experience and apply them in Britain, still less in their foreign policy.
4.1.5 Law Society for Northern Ireland

The Law Society was invited to send representatives to provide a briefing for the Eminent Jurists Panel. The official delegation explained that the main responsibility of the Society was to support the concept of an independent judiciary, to give support and expression to the need for a free legal profession, and to see what can be done to make the system work better.

The key issues raised included:

“What is the Law Society’s role in speaking out on certain issues?” The Law Society took no official view on internment during the conflict, reasoning that its members were divided on the issue and any statement, no matter how neutral, would invariably alienate one side or other of the community. Participants were in agreement, however, that internment certainly did not work in Northern Ireland and the personal view was expressed that the Law Society should have spoken out on internment or on any other situation in which they saw injustice being perpetrated. It was argued however, that the Law Society did take a strong view on allegations of collusion, especially those that touched upon the lives of Law Society members, such as lawyers Patrick Finucane and Rosemary Nelson.

“Internment can only be justified in the most extreme circumstances”: It was suggested that internment can only be justified in the most extreme circumstances with adequate safeguards, namely: it cannot be selective; it must apply equally to all sides of the community: it must be short term; people must be able to challenge their internment in a reasonable timeframe before a judicial tribunal; and finally it must be part of a wider agenda of responses to political conflict.

“Counter-terrorist legislation has made the role of the criminal solicitor in Northern Ireland very difficult”: It was felt that this legislation makes representation in the criminal courts onerous and difficult, especially where it is seen to erode the individual liberties of the accused. The delegation believes that the Law Society has been foremost in advocating the rights of fair trial and international standards.

Difficulties operating as a solicitor: Difficulties lay mainly with clients brought in on terrorist offences. Solicitors dealing with such clients were routinely intimidated and harassed by the police. Participants recalled their fears that when representing clients from one side of the community, they would be identified as a supporter of that community, their beliefs and their causes, and that action would be taken against them accordingly. Difficulties also arose when solicitors came from an alienated community that was anti-police - if they had to deliver documents to the police they were afraid that people would think they were involved with the police.
It was believed that solicitors representing “ordinary decent criminals” did not suffer the same level of difficulties or police harassment. The delegation did not, however, believe that these problems were still relevant currently, and they cited research carried out by the Police Ombudsman in 2003 which they claimed found that a relatively small number of practitioners had been harassed.

“Solicitors and barristers should have no inhibitions in talking freely to their clients” - there must be assurances that all such legal discussions can be conducted in private.

“There should be clear guidelines on the use of informers and getting suspects to assist the authorities”: There cannot be a “blank cheque” to do anything in return for evidence. This is an area in which there is a need for international guidelines and monitoring.

“Counter-terrorist legislation that may be enacted for one purpose can quite often be used for purposes which were not envisaged”: In Northern Ireland the Diplock courts were established to try terrorist offences, but the authorities used them to try offences unconnected with terrorism. There are indications that a similar situation is emerging in Britain today. At the Labour Party Conference, an elderly man heckled Home Secretary Jack Straw during his speech, and was subsequently forcibly removed under anti-terrorist legislation.

“Protections need to be put in place to ensure that emergency legislation does not become the norm”: The delegation admitted that it is very difficult to balance public security and individual liberty but suggested constant review of emergency legislation as a way of ensuring that emergency measures do not become the norm. In Northern Ireland we have seen that the normalisation of such emergency measures have eroded important values.

“What changed the situation in Northern Ireland?” It was felt that the change was very gradual, and law was an important building block in the change process. International interest and pressure was similarly a great help. Change also occurred in Britain – after 20 or 30 years of the authorities trying to contain the problem to Northern Ireland, there was a decision in the early 1990s to develop a more inclusive view of Northern Ireland. This culminated in the 1998 Agreement. Another major change that was identified by participants was how the law was used. During the conflict, the British government had used the law politically to solve the problem of violence – accordingly, political opponents lost any confidence in or respect for the law. In more recent times, participants suggested there has been an increasing recognition that the law should not be used as a political weapon but that political solutions were needed.
“Counter-terrorism laws should be proportionate to risk”: It was commented that the level of control imposed by the law should always be proportionate to the level of risk, yet only the government, through their intelligence, can know what the level of risk is and this leaves a difficult situation. Participants felt that it is still too early to pass judgement on the effectiveness of the current Terrorism Act (2000), which groups international and domestic terrorism together, but it was suggested that powers required for international terrorism are not necessarily the same as those needed for domestic terrorism.

“Police respect for human rights, police accountability and transparency have all improved in general”: The delegation agreed that the general oversight of policing has dramatically increased, yet it was felt that Special Branch have still not been placed under adequate scrutiny. Since Special Branch deals primarily with issues of national security and intelligence, it is difficult to ensure transparency for their actions.

Recommendations:

- The law can only protect the average citizen if they have access to the law, therefore it is vital that affordable legal services are provided to everyone: there should be a duty on the state to provide such services and make them as widely available as possible.

- Legal professional bodies need to take responsibility for effectively supporting their members, especially at times of crisis.

- Whenever allegations are made, the truth needs to come out through an exhaustive and fully supported inquiry.

- The legal system needs to be alert to the continual problems of maintaining a free, independent system, and this needs constant monitoring.

- The use of international codes and laws are crucial.

4.1.6 Public Prosecution Service

The Public Prosecution Service is a new entity created pursuant to the criminal justice reforms arising from the Good Friday/Belfast Agreement. The Service (the PPS) replaced the Directorate of Public Prosecutions (DPP) in June 2005, though the former Director of Public Prosecutions and other senior staff took leadership positions in the new institutional arrangements.
The key issues identified in relation to the prosecutorial process by the Director of the Public Prosecution Service included:

**Diplock courts:** The PPS outlined the role and procedures within the Diplock court system, including the requirement of the sole judge to deliver a written judgement at the end of a trial, an automatic right of appeal for the defendant, admissibility of confessions, the standard and onus of proof.

“Were the new criminal offences introduced in recent months additional to ones already there?” The PPS argued that new offences were necessary because they were not covered in existing law, e.g. extension of existing list of proscribed organisations, new offence of possessing information likely to be of use to terrorists in planning or carrying out an act of violence, and new offences concerning the funding of terrorism.

**Possession of information likely to be useful to terrorists:** surely this could be practically anything? No, the information must be ‘likely’ to be useful to terrorists. Prosecution for this offence can only be by approval of the director or deputy and the onus is on the prosecution to prove beyond reasonable doubt.

“Human rights have always been part of the court system”: According to the PPS delegates, justice in Northern Ireland has always been of “the highest order”. Even before the Human Rights Act 1998, human rights formed part of court cases on issues such as admissibility and access to solicitors.

**Admissibility of confessions:** Based on earlier hearings, the Panel asked if there have been court cases in the past in which a conviction was based solely on confession evidence? The PPS commented that a confession could be the primary evidence but that other elements of the case would have to be established first and then the weight of that confession considered in the context of the case by the judge. A confession alone, therefore, could not be the basis of a prosecution. The delegates further argued that today there is more forensic evidence available to the police investigators, as well as a reduction in violence allowing police to collect more evidence from the scene of a crime, so reliance on a confession as primary evidence is unnecessary.

**Fear of giving evidence within the community:** The Panel enquired how the PPS countered this problem. The PPS admitted that it is a very difficult issue to redress. Witnesses can seek witness protection but since this a very small community, this provides limited reassurance. People are reluctant to leave families and friends or put them in danger by providing evidence. There are also legal measures allowing the prosecution to apply to the court to read into evidence the statement of a witness who can be shown to be in fear. The judge decides on this
and will not allow it if this is the sole or principal evidence. This statement may also conceal the identity of a witness if it is deemed appropriate.

4.1.7 Chief Constable and colleagues from the Police Service of Northern Ireland (PSNI)

Unfortunately, due to technical reasons, this session could not be transcribed; the summary of key points is therefore more schematic than for other sessions.

The Chief Constable Hugh Orde (accompanied by his Deputy Chief Constable Paul Leighton, and Assistant Chief Constable Peter Sheridan) commented on the major changes brought about to policing as a result of the Patten report. This report had provided a clear benchmark for human rights compliant policing. The police thought that an independent Police Ombudsman (to investigate complaints against the police) was proving very important, as were the reforms more generally to police oversight, which had been crucial to building up public confidence.

In a discussion of past practices, it was felt that some laws had proved negative: practices like internment and censorship achieved little, and were on occasion counter-productive. The situation is very different now with more of a focus on proportionality, and moving from a police force to a police service. Of course, in part the problem in the 70s and 80s was the fact that the police were almost entirely responsive, and record-keeping was not comprehensive, with oversight seen as an inconvenience, relatively easily set aside on grounds of “national security”. The human rights ethos nowadays is one of greater transparency and openness.

When questioned about the operation of stop and search powers in the past, the Chief Constable said problems often lie more in how the powers are exercised, not in the powers themselves. The powers are often necessary. The Assistant Chief Constable also noted how the practice of stop and search was experienced differentially by communities – with Catholics often thinking of the practice as threatening, alienating and abusive, and Protestants as reassuring them that everyone’s security was being safeguarded. The delegation noted that any and all power can be abused, and the solution lies more in ensuring public accountability over the exercise of the powers. The “national security” reason given in the past is not enough. Obviously, accountability is secured in different ways, and examples were cited of the routine monitoring by senior officers of the stop and search power, and the creation of a more representative police service reflecting the community served.

In response to a question about complaints heard from other witnesses about extended periods of custody, access to lawyers etc., the police argued the value
In terms of sharing their experiences with the UK generally and further afield, the police recognised that there were some issues particular to Northern Ireland. Patten was intended to fundamentally change policing culture and structures, but in essence it also offers an excellent model for policing anywhere, putting human rights centre-stage whilst recognising the complexity of modern policing. The Human Rights Act was cited as the single most important change for policing throughout the UK. In response to a direct question, the Chief Constable asserted that human rights is beneficial and not a burden on policing. Human rights law does not stop you doing anything, but rather tells you how to do things properly. Human rights standards provide clarity and this can be very reassuring for the police on the ground.

In terms of the impact on the relationship between the police and the community served, the delegation believed that community respect was growing as a direct result of the human rights reforms underway. The Assistant Chief Constable said that it was much clearer to all since the passage of the Human Rights Act that, as a police officer, he was no longer expected to uphold the state, but rather to uphold the rights of the individual.

4.2 Thematic seminars

In addition to hearing evidence from legal professionals and human rights advocates, it was thought vital that the Eminent Jurists Panel would hear directly from a number of victims of human rights abuses. Accordingly, small seminars were organised on three distinct themes: lethal force and collusion; internment and ill treatment, and the treatment of suspect communities. As indicated, CAJ has not sought to overly edit this material, from the point of view of accuracy or tone, but instead sought to retain the style and tone of the exchanges as they happened.

4.2.1 Lethal force and collusion

A large number of family members who had lost loved ones to incidents of lethal force by members of the security forces, and those who had lost relatives as a result of collusion between paramilitary groups and the security forces (together
with some local human rights groups) attended this session. In an emotional 90 
minute meeting, the participants raised the following key issues:

**Personal stories:** Participants recalled their personal experiences of the Troubles 
for the Panel. Their accounts included allegations of a victim killed by state 
forces without explanation; a victim killed by loyalist gunmen with Special Branch 
weapons; a victim killed by prison inmates with state collusion; victims of Bloody 
Sunday; two solicitors killed by loyalist forces with state collusion, and many others.

**Bloody Sunday:** During this single event in 1972, 14 people were killed and 14 
people seriously injured. The first (Widgery) inquiry was described a whitewash. On 
the 20th anniversary there was a successful campaign to get the case reopened, 
and this was initiated in 1998. Throughout this second inquiry a lot of obstacles 
have been encountered, primarily from the Ministry of Defence, the army and other 
government departments. Murder weapons that had been preserved since the 
event were destroyed days before the inquiry and 1000 photographs went missing.

**A unionist family:** One family, describing itself to be unionist in politics, lost a son 
when he was murdered by loyalist paramilitaries. The family, who had faith in the 
police service, believed that the killers would be caught and brought to justice, but 
this never happened. They had never previously believed the allegations from the 
nationalist community of police collusion with paramilitaries, but having uncovered 
such collusion in their own case, they recognised the wide-scale existence of this 
policy in Northern Ireland. The family feel that they have had to do the work of 
the RUC (police) for them but every time they got a result, the goal posts would 
be moved, there would be another loop to jump through. They were granted an 
Article 2 inquest but were met with an uncooperative police force who allegedly 
blacked out the wording of crucial statements and threatened to apply for a Public 
Immunity Certificate. The unionist community turned their backs on the family 
because they were criticising the police and the government, and the family felt 
that they had to turn to the nationalist community for support.

**Plastic bullets:** One woman whose husband was killed by a plastic bullet 
recalled her experience - the RUC officer involved was brought to trial for her 
husband's murder but was never put on the stand or asked to give evidence. 
The widow herself was not even told the trial was happening and was out of the 
country at the time. She has requested and been refused an inquest into the 
death of her husband; she believes a trial defined and run by the perpetrators 
can never serve justice.

"Northern Ireland is nowhere near settlement because the truth still has not 
been told": There was general agreement from participants that the people of 
Northern Ireland cannot move on, cannot find closure, until the government hold
their hands up and accept responsibility for their role in the conflict; they need to
tell the truth around the circumstances of the deaths of many people. This was a
recurring theme throughout the hearing.

“The lack of independence and transparency in the government eroded
confidence in it”: Independence, integrity, openness and transparency are the key
principles of any democratic society, and they have been absent from here for three
and a half decades. Examples of this included; the use of things like Public Interest
Immunity Certificates to prevent evidence coming to light about state sponsored
killings; the DPP (PPS) was described as a “black hole” - a get-out-of-jail-free
clause for the state because it is seen as being unaccountable; stop & searches,
arrests, and detention all personified “a government that was at the heart of the
conflict in one hand and controlling the administration of justice in the other”.

“People in Northern Ireland want a society of justice and equality”: The
families, during the hearing, described how they were working towards this goal,
using their shared experiences to highlight the problems in our society and to
change things; to change the criminal and judicial system and change the nature
of how we are governed.

Ineffective inquiries: Experiences were recalled of earlier inquiries that produced
no real outcome and where no one was held to account. Participants talked of
obstacles constantly being placed in the way, alleging that the Northern Ireland
Office, Ministry of Defence and the government destroyed and ‘lost’ evidence,
and delayed the inquiries for so long that witnesses and suspects have since
died. It was felt that the Inquiries Act has reinforced these problems, since it takes
ultimate control of an inquiry and puts it into the hands of a government minister. It
was suggested that it wouldn’t matter who the judges to an inquiry are - because
their hands will be tied from the start.

“If you allow human rights violations to take place in one jurisdiction you
will soon find the same human rights violations being replicated elsewhere”: Only
four soldiers have ever been convicted of murder in Northern Ireland; all of
them were released within a short period and all of them rejoined their regiment.
Two of those soldiers, until recently, were serving in Iraq. The Pat Finucane Centre
compared the situation in Northern Ireland with that in Iraq and a pattern emerged,
a pattern that was also obvious when the British army fought the Mau-Mau in
Kenya. It was suggested that soldiers who worked in multiple jurisdictions, with
a culture of immunity from prosecution, replicated the same culture wherever
they went. Iraqi civilians today are in the same position as the people of Northern
Ireland during the conflict - fighting to have their cases heard and their human
rights upheld. There are people in high ranks of the British army today who have
witnessed and said nothing about the torture and murder of people in Northern
Ireland, and some of these are the same people whose subordinates have murdered innocent people in Iraq today.

4.2.2 internment and ill-treatment

A number of former internees, and legal representatives, testified to the Panel about Northern Ireland’s experience of internment and ill-treatment.

The key issues they raised in discussion included:

“There needs to be a wider understanding of what constitutes internment”: It was suggested that while internment as a policy is completely unacceptable, the definition of internment still needs to be widened to ensure that the “effective internment” is prevented. The international definition of internment is that there are no charges or hearing, but “the effect of internment can be achieved by an ineffective judicial system that takes away the protection of rights”. In Northern Ireland, even after the official policy of internment ended, “effective internment” continued through internment on remand. There was no enforceable right to a speedy trial, so persons were held on remand for long periods without bail (sometimes as long as the equivalent of being found guilty and sentenced to a five or six year prison sentence).

Prevention of ill-treatment during interrogation and detention: It is fairly easy to develop a package of measures for prevention. It should include the police not having access to suspects for long periods on their own (during the conflict we had 48 hours incommunicado detention here), immediate access to family, a lawyer present at all times during interrogations, and audio and video taping of the questioning.

“People will only carry out torture or ill-treatment if they think they won’t be held accountable for it”: By putting measures in place to ensure that torture or ill-treatment cannot go unnoticed or unaccounted for, people will think twice about engaging in serious human rights violations.

“There was a lack of acceptance by the nationalist community of the whole judicial system as well as the police”: The Director of Public Prosecutions was a person or office which had control of what went before the courts and what did not, without effective accountability. The experience of one participant highlights the difficulties this situation creates - after his son was killed, his daughter-in-law was told by CID that they knew who had killed him and that they had some forensic evidence. All looked quite promising. A few weeks later however the same person from CID told her that the DPP had over-ruled the police and had decided
that there was no case to answer. No further explanation was given and there was no way of raising questions with the DPP directly.

**Internment tribunals:** Tribunals were introduced for internees in 1973 in which a sheet of allegations was read out and witnesses (often Special Branch officers) would testify from behind a screen. When barristers and solicitors were allowed to represent their interned clients, they quite often could not question any witnesses, with the judge accepting the witness testimony as reliable, and unwilling to reveal the witnesses’ sources.

**Abuse within internment camps:** Participants recalled their experience of abuse within the internment camps, when the army would beat people up. When this happened there was no protection for internees and no one to complain to. It was referred to by one speaker as a “continual, systematic policy of brutalisation, torture, to break the whole will of the republican community both inside and out… from the politicians right down to the whole judiciary. They were all part and parcel of this policy”. There was an element of acceptance of these abuses within Northern Ireland according to another speaker - the only concern of the internees at the time was getting out of the camp, rather than challenging the whole system.

**Personal long lasting effects of internment:** One man spoke of the devastating personal effect internment had on his life. He applied to adopt a son while he was interned but his application was refused because he was an internee, despite the fact that he had not been, and never was, charged with anything. When he was released he was barred from entering England, where the rest of his family lived, so for 20 years he couldn’t visit his family. He was not even allowed to attend the funeral of his mother and father.

**“Reliance on confessions and informer intelligence leads to over-reliance on political policing, greatly endangers the rule of law and increases the risk of ill-treatment”:** It was suggested that the police in Northern Ireland became obsessed with gathering intelligence and evidence secured on the basis of confessions - rather than collecting independent reliable evidence to bring to court. According to a report done in the early 80’s, 90% of cases that were processed through the non jury courts were based on confession evidence. This ultimately increases the risk of ill-treatment and greatly endangers the rule of law.

**“There are parallels between what happened 35 years ago and what is happening now”:** Guantanamo Bay was identified as a modern example of internment. Like Northern Ireland, Guantanamo has military courts, detention without access to lawyers, and ill treatment. Measures can be put in place to protect human rights but ultimately there needs to be political will to prevent these abuses, and governments today do not seem to have that will.
“Internment is a short-term solution to a long-term problem”: Experience in Northern Ireland shows that if somebody is treated unjustly, whether as a result of internment, ill-treatment or lethal force, this injustice will spur two or three more people to oppose the state, sometimes violently. A solicitor recalled representing internees in the 1970s and then years later representing their sons or nephews - the next generation often felt spurred to join paramilitaries by the injustices perpetrated against their family. It was suggested that the same may happen to the families, friends and communities of those interned in Guantanamo today. History has shown that locking people up is not going to solve the problem; if anything it makes the situation worse. Certainly, while it may stop one attack today, it could well result in five or ten attacks in the future. One has to address, and hopefully cure, the disease - not apply sticking plasters.

“International pressure is a useful tool to compel governments to act within the human rights framework”: A government will do whatever it takes to suppress conflict for as long as they can get away with it. It was felt that international pressure had a positive impact on the government’s response to the Northern Ireland situation and around the world today international pressure should be used to compel a government to act within the international human rights framework.

“Institutionalised disregard of human rights is happening everywhere and needs to be checked”: It is believed that an international watchdog should review emergency powers, the length of time they may last for and the manner in which they are implemented. At present there is no effective international monitoring body with respect to verifying and scrutinising emergency situations. The European Court of Human Rights was seen as effective within its jurisdiction but would it - or an equivalent international body - examine individual emergency situations as they arise?

“Outlaw the use of the word ‘terrorist’”: It is a word that obscures the truth and obscures analysis. Nelson Mandela was at one time labelled a terrorist and there are people who have been awarded medals for dropping bombs on innocent civilians during WWII. Governments today believe they have moral rectitude in the current “war on terror”, and use the term “terrorist” to denote those whom they believe to be evil. That kind of discourse has become prevalent now and merely serves to demonise people and facilitate ill treatment.

4.2.3 suspect communities

In this session, participants informed the Panel of their own, and others’ experiences of stop and search powers, and other daily intrusions that both
created and sustained a sense of “suspect communities”. The key issues they raised included:

“The targeting of ‘suspect communities’ promotes a sense of injustice”: Participants cited a study by Paddy Hillyard (himself a participant in the session) which estimates that in a 15 year period (1970-1985) 75,000 people were arrested out of a population of 1.6 million; that’s 3% of the population. The majority of the arrests were of young Catholic men aged between 16-44, which equals a one in four experience of arrest in that particular group. Similarly, the Irish as a community in England and Wales, were also treated as a “suspect community”.

“The targeting of suspect communities is counter-productive, it actually encourages those not predisposed to violence to get involved”: By treating everybody in a particular community as a suspect, and interfering with the run of their everyday lives, whether going to school, work or even to play football, a negative reaction is likely to be provoked. The participants felt that in Northern Ireland this kind of treatment made people feel resentful and only proved to worsen the conflict situation. If there is injustice and inequality, people will fight back against it, and usually it will be young people who are involved so that will be a whole generation of resentment to live out.

Normalisation of violence: It was suggested that if a person grows up being treated violently then that person becomes violent in their reaction. In Northern Ireland people accepted that they would be hassled on their way home from school, work etc. and it had the effect of radicalising people. In fact, participants believe that hatred for the police was almost a unifying factor within certain communities.

“The gathering of intelligence was used as means of maintaining the status quo and reinforcing the marginalisation of suspect communities”: Participants recalled instances where people were afraid to give their names and addresses to police because there was a lot of experience of misuse of that information. Transparency is the key to overcoming these problems. It is difficult to ensure that legitimate powers are not undermined and abused but safeguards and transparency will help. Principles exist in international law in relation to openness and accountability but protocols also need to be developed in relation to intelligence gathering and national security.

“The past lessons from NI have not been applied to today’s situation”: Muslims in Britain are now being treated in the same way the Irish were 20 or 30 years ago. For every occasion that a member of the Muslim community is stopped and searched for no reason, it encourages two or three more to become more radical. They could become increasingly alienated by any experience of unfairness.
“There has never been a relationship between patterns of criminal activity and suspect communities”: During internment in Northern Ireland, a vast number of those interned were Catholic, at a time when the threat was not solely coming from within the nationalist community. This clearly discriminatory treatment in turn triggered enormous alienation within that community. It was suggested that by making assumptions as to who is a suspect, the authorities started a train of actions that fuelled the very problem they were trying to address. It is important to monitor statistically the operation of such things as stop-and-search operations to pick up on any discriminatory impact of such policies.

Deterrence as justification? Some people have argued that if a person knows he or she is going to be stopped and searched, it may be a useful deterrent, frightening people into not carrying weapons or bombs. If true, the argument runs, conducting widespread stop-and-searches makes criminal or terrorist activity more difficult, and acts as a powerful deterrent. Those present queried if this argument can ever justify the harassment of innocent people? They also argued that the experience of Northern Ireland suggests that criminal and indeed terrorist operations were generally much more sophisticated than the argument implies. Certainly it was the experience of Northern Ireland that stop and search operations rarely produced anything of immediate value. But the policy which was meant to be targeted and act as a deterrent to particular individuals and activities had a detrimental impact on whole communities. Constant harassment of this kind became very counterproductive, alienating a large number of people trying to get on with their daily lives. Participants concluded that, in Northern Ireland at least, deterrence, as justification for certain measures, was not effective.

“The authorities in Northern Ireland alienated the very communities they needed to work with to resolve the conflict”: It was suggested that the actions of the authorities actually prevented them from working with communities that could have helped them to put an end to the violence. Today we are working towards resolving that issue, by trying to create a more representative police service and criminal justice system, and seeking to change the institutional culture of the police. We are also trying to change the way the police work, bringing it back to a more normal way of policing - problem solving, dealing with crime, working alongside local communities.

Monitoring the impact of policies: It was felt that it was vital to continually monitor data so as to assess who is being stopped and searched, who is being arraigned in court, who is going to prison. Are the results of emergency laws falling on certain communities disproportionately? If they are, and there is no objective justification for that, the process of monitoring will highlight a problematic trend, and ensure that it can be addressed speedily.
4.3 Testimony gathered at public meeting

The Eminent Jurists Panel organised a meeting open to the public, so that anyone who wanted to comment on the topic of their global study would have an opportunity to do so. Approximately 50 people attended the event, with representatives of a range of political parties, members of the public, local community groups, and legal practitioners. The key issues identified at the public meeting included:

“Governments need to address the root causes of terrorism”: A number of speakers at the public meeting recommended that the Panel take a step back from counter-terrorist law itself, and instead look at the root causes of conflict situations. At the heart of most conflicts there are issues of fundamental human rights, whether they be economic, social, cultural, political or racial in nature. These issues give rise to grievances and it was argued that the lack of redress for such grievances even on occasion prompts people to turn to terrorism; and once that genie is out of the bottle it is very difficult to put it back in.

What measures are useful in tackling these root causes?

- **A Bill of Rights** was identified as an extremely important building block and a key way to ensure that states adhere to fundamental human rights requirements. By protecting these rights it helps to minimise the causes of conflict.

- Should those human rights be violated, it is then essential that there is an adequate and effective way to **redress** such grievances is available.

- **Press freedoms** were also identified as a means to tackle the root causes of conflict. It was argued that tyranny and evil flourish in the dark, so press freedom encourages transparency and debate on issues within a conflict situation.

**Political responses to violence**: One speaker addressed the current global response to violence. It was suggested that the severity of the current response is due to political considerations which have chosen to pander to the fears of the general populace rather than considering what is most necessary and effective in the situation.

“**Solutions need to be long-term**”: Concerns were raised that the current legislation drafted to deal with the threat of al-Qaeda will not be confined to al-Qaeda. Experience in Northern Ireland has shown how “law that is made for one purpose proceeds across a whole range of things”. It was suggested that short-term solutions, through severe counter-terrorist legislation, can never solve the underlying issues of conflict, they merely provide a sticking plaster. Long-term
measures that address the root causes are the only way to ensure prevention or an end to conflict.

“Political dialogue is essential”: Speakers referred to other conflicts globally and highlighted the fact that it is usually when people take a step back from the conflict situation and start to discuss and debate what is happening, that progress is made. This process encourages both sides to accept that the other side has an issue or grievance, which can be a key building block for peace. By introducing repressive counter-terrorism laws, states are merely legitimising and compounding the grievances that already exist. It was also suggested that such discussions can often best take place on an international setting, to give participants a different perspective.

“Excessive counter terrorist measures undermine democracy”: By failing to recognise the validity of human rights, it was suggested, states that employ excessive counter-terrorist measures undermine democracy, the legal system and the rule of law. Such measures were described as being essentially counter-productive.

“The conflict has made Northern Ireland more sensitive to human rights”: The failure of the state to uphold human rights during the conflict made our jurisprudence more sensitive to human rights issues, according to one speaker. As a result, the judiciary in Northern Ireland has taken to the incorporation of the European Convention in Human Rights (ECHR) like “a duck to water”, and this is enriching for everyone in Northern Ireland.

“Human rights are the bedrock of democracy”: According to one participant it is at a time when there is violence in society that the protection of human rights is most important. Within Europe it is up to the collective to stand up and hold individual countries to account for abuses of human rights.

Problem with the definition of “terrorism”: It was pointed out that with no universal definition of terrorism, one man’s freedom fighter could be another man’s terrorist. It is therefore imperative that a universal definition is developed, to be used by all democratic societies. Another speaker identified the current political agenda associated with the term “terrorism”. It was suggested that it is an attempt to separate state and non-state actors in an attempt to demonise non-state actors for doing the same things that state actors routinely do.

“The conflict in Northern Ireland was a consequence of the denial of rights”: It suggested by one speaker that it was Britain’s denial of fundamental rights to equality and social, economic and cultural rights, that prompted the re-emergence of the IRA. This kind of pattern is evident all over the world today, and it is only
where the social, economic and cultural grievances of citizens are addressed that peace, harmony and stability can ensue.

Truth recovery: the ability of the people of Northern Ireland to move on is consistently hampered by the unwillingness of state actors to be honest about the precise nature of their involvement in the conflict. Only when people know the truth about what has happened will they be able to move on.

“Inclusivity is key”: During the conflict there was a lot of suspicion of those within the legal and security system. Steps have been taken since then to try to deal with this, by increasing accountability and transparency, but it was commented that there is still a large amount of suspicion within Northern Ireland of those in positions of authority. It was suggested that the only way to deal with terrorism is to use measures that have the confidence of as many sides as possible. Until there is inclusivity, there will always be suspicion.

“Accountability is essential”: One speaker talked about the impact of the use of informers on the community. If informers were allowed to act with impunity it increases distrust of the police.
Appendices

CAJ
Committee on the Administration of Justice
Eminent Jurists End Visit to Northern Ireland

Members of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, Justice Arthur. Chaskalson (South Africa) and Justice Raul Zaffaroni (Argentina), concluded their visit to Northern Ireland today.

The hearing, which was organised by the Committee on the Administration of Justice (CAJ), was the fourth in a series of hearings within the global inquiry of the Panel into the impact of terrorism and counter-terrorism on human rights and the rule of law.

The Panelists appreciate that Northern Ireland has a distinct history and that events here must be seen and understood in the context of that history. Lessons can, however, be learnt from what has happened in Northern Ireland.

Those from whom the Panel members heard included academics, legal practitioners, representatives of non-governmental organisations, the Northern Ireland Human Rights Commission and political parties. They also heard directly from members of the public, including victims of terrorist and counter-terrorist operations and their family members. The Panel heard the views of delegations from the Police Service of Northern Ireland, the Courts Service, the judiciary, the Public Prosecution Service, the Law Society and the Bar Council.

It was stressed by various persons who made representations to the Panellists that:

a. The intensity of the violence which marked the conflict put Northern Ireland under great stress;

b. It is necessary to confront and address the causes of terrorism in addition to taking measures to prevent and curtail it;

c. The vesting in security forces of wide and discretionary powers which are not subject to strict control can easily lead to abuse, and this has in fact happened in Northern Ireland;

d. The misuse of exceptional powers is counter-productive, causes resentment within suspect communities and is likely to exacerbate grievances that fuel the conflict;

e. It is important that there should be an institutional culture of respect for human rights within the security forces and that independent bodies with appropriate powers should be established to review the efficacy of, and manner in which the exceptional powers are exercised and to receive and investigate complaints;
f. Abuses by security forces should be dealt with promptly and transparently; if this is not done a culture of impunity is likely to develop, and this can have serious adverse consequences likely to bring the administration of justice into disrepute;

g. Measures which have been introduced in recent years including the use of video and audio recording when taking statements, the appointment of a police ombudsman, a policy of transforming the police service into a body representative of the community as a whole, and encouraging greater transparency in the functioning of the service have had a beneficial impact.

h. Concern was expressed about the absence of legal provisions for full and transparent investigations of deaths where there are suspicions of state involvement. In this regard the recently enacted Inquiries Act, 2005 was criticised as adversely affecting the independence of inquiries that may be carried out under its provisions.

The Panellists met family members of persons who have lost relatives as a result of unlawful killings and who have been struggling for many years to have full and transparent investigations of the circumstances in which those deaths occurred. They have suffered much anguish as a result of the failure to do so. The Panellists urge the authorities to address this real and substantial grievance.

The Panel will study these and other issues brought to its attention in more detail. It will conduct similar hearings in other parts of the world and complete its report when the hearings process in completed.

The Panel would like to thank all those who have made written and oral submissions to the Panel. The information the Panel has received will be of great value in preparation of the Panel's report.
The Council of Europe has adopted two sets of guidelines on the topic of human rights and the fight against terrorism, in 2002 and 2005.

Guidelines adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies

Preamble

The Committee of Ministers,

a. Considering that terrorism seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society;

b. Unequivocally condemning all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed;

c. Recalling that a terrorist act can never be excused or justified by citing motives such as human rights and that the abuse of rights is never protected;

d. Recalling that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law;

e. Recalling the need for States to do everything possible, and notably to co-operate, so that the suspected perpetrators, organisers and sponsors of terrorist acts are brought to justice to answer for all the consequences, in particular criminal and civil, of their acts;

f. Reaffirming the imperative duty of States to protect their populations against possible terrorist acts;

g. Recalling the necessity for states, notably for reasons of equity and social solidarity, to ensure that victims of terrorist acts can obtain compensation;

h. Keeping in mind that the fight against terrorism implies long-term measures with a view to preventing the causes of terrorism, by promoting, in particular, cohesion in our societies and a multicultural and inter-religious dialogue;

i. Reaffirming States’ obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights;
adopts the following guidelines and invites member States to ensure that they are widely disseminated among all authorities responsible for the fight against terrorism.

I  States’ obligation to protect everyone against terrorism

States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States’ fight against terrorism in accordance with the present guidelines.

II  Prohibition of arbitrariness

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III  Lawfulness of anti-terrorist measures

1. All measures taken by States to combat terrorism must be lawful.

2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

IV  Absolute prohibition of torture

The use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.

V  Collection and processing of personal data by any competent authority in the field of State security

Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular:
1. are governed by appropriate provisions of domestic law;

2. are proportionate to the aim for which the collection and the processing were foreseen;

3. may be subject to supervision by an external independent authority.

VI Measures which interfere with privacy

1. Measures used in the fight against terrorism that interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, surveillance of correspondence and use of undercover agents) must be provided for by law. It must be possible to challenge the lawfulness of these measures before a court.

2. Measures taken to fight terrorism must be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force and, within this framework, the use of arms by the security forces must be strictly proportionate to the aim of protecting persons against unlawful violence or to the necessity of carrying out a lawful arrest.

VII Arrest and police custody

1. A person suspected of terrorist activities may only be arrested if there are reasonable suspicions. He/she must be informed of the reasons for the arrest.

2. A person arrested or detained for terrorist activities shall be brought promptly before a judge. Police custody shall be of a reasonable period of time, the length of which must be provided for by law.

3. A person arrested or detained for terrorist activities must be able to challenge the lawfulness of his/her arrest and of his/her police custody before a court.

VIII Regular supervision of pre-trial detention

A person suspected of terrorist activities and detained pending trial is entitled to regular supervision of the lawfulness of his or her detention by a court.
IX. **Legal proceedings**

1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law.

2. A person accused of terrorist activities benefits from the presumption of innocence.

3. The imperatives of the fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to:
   i. the arrangements for access to and contacts with counsel;
   ii. the arrangements for access to the case-file;
   iii. the use of anonymous testimony.

4. Such restrictions to the right of defence must be strictly proportionate to their purpose, and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.

X **Penalties incurred**

1. The penalties incurred by a person accused of terrorist activities must be provided for by law for any action or omission which constituted a criminal offence at the time when it was committed; no heavier penalty may be imposed than the one that was applicable at the time when the criminal offence was committed.

2. Under no circumstances may a person convicted of terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it may not be carried out.

XI. **Detention**

1. A person deprived of his/her liberty for terrorist activities must in all circumstances be treated with due respect for human dignity.

2. The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to:
The regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client;

placing persons deprived of their liberty for terrorist activities in specially secured quarters;

the separation of such persons within a prison or among different prisons, on condition that the measure taken is proportionate to the aim to be achieved.

XII Asylum, return ("refoulement") and expulsion

1_ All requests for asylum must be dealt with on an individual basis. An effective remedy must lie against the decision taken. However, when the State has serious grounds to believe that the person who seeks to be granted asylum has participated in terrorist activities, refugee status must be refused to that person.

2_ It is the duty of a State that has received a request for asylum to ensure that the possible return ("refoulement") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion.

3_ Collective expulsion of aliens is prohibited.

4_ In all cases, the enforcement of the expulsion or return ("refoulement") order must be carried out with respect for the physical integrity and for the dignity of the person concerned, avoiding any inhuman or degrading treatment.

XIII Extradition

1_ Extradition is an essential procedure for effective international co-operation in the fight against terrorism.

2_ The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:

i_ the person whose extradition has been requested will not be sentenced to death; or

ii_ in the event of such a sentence being imposed, it will not be carried out.

3_ Extradition may not be granted when there is serious reason to believe that:

i_ the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment;
ii. the extradition request has been made for the purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions, or that that person's position risks being prejudiced for any of these reasons.

4. When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.

XIV Right to property

The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the lawfulness of such a decision before a court.

XV Possible derogations

1. When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments.

2. States may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law.

3. The circumstances which led to the adoption of such derogations need to be reassessed on a regular basis with the purpose of lifting these derogations as soon as these circumstances no longer exist.
XVI Respect for peremptory norms of international law and for international humanitarian law

In their fight against terrorism, States may never act in breach of peremptory norms of international law nor in breach of international humanitarian law, where applicable.

XVII Compensation for victims of terrorist acts

When compensation is not fully available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State must contribute to the compensation of the victims of attacks that took place on its territory, as far as their person or their health is concerned.

Guidelines adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers’ Deputies

Preamble

The Committee of Ministers,

a. Considering that terrorism seriously jeopardises human rights, threatens democracy, aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society and challenges the ideals of everyone to live free from fear;

b. Unequivocally condemning all acts of terrorism as criminal and unjustifiable, wherever and by whomever committed;

c. Recognising the suffering endured by the victims of terrorist acts and their close family and considering that these persons must be shown national and international solidarity and support;

d. Recognising in that respect the important role of associations for the protection of victims of terrorist acts;

e. Reaffirming the Guidelines on Human Rights and the Fight against Terrorism, adopted on 11 July 2002 at the 804th meeting of the Ministers’ Deputies, as a permanent and universal reference;
f. Underlining in particular the States’ obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life;

g. Recalling also that all measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision;

h. Considering that the present Guidelines aim at addressing the needs and concerns of the victims of terrorist acts in identifying the means to be implemented to help them and to protect their fundamental rights while excluding any form of arbitrariness, as well as any discriminatory or racist treatment;

i. Considering that the present Guidelines should not, under any circumstances, be construed as restricting in any way the Guidelines of 11 July 2002, adopts the following Guidelines and invites member States to implement them and ensure that they are widely disseminated among all authorities responsible for the fight against terrorism and for the protection of the victims of terrorist acts, as well as among representatives of civil society.

I  Principles

1. States should ensure that any person who has suffered direct physical or psychological harm as a result of a terrorist act as well as, in appropriate circumstances, their close family can benefit from the services and measures prescribed by these Guidelines. These persons are considered victims for the purposes of these Guidelines.

2. The granting of these services and measures should not depend on the identification, arrest, prosecution or conviction of the perpetrator of the terrorist act.

3. States must respect the dignity, private and family life of victims of terrorist acts in their treatment.

II  Emergency assistance

In order to cover the immediate needs of the victims, States should ensure that appropriate (medical, psychological, social and material) emergency assistance is available free of charge to victims of terrorist acts; they should also facilitate access to spiritual assistance for victims at their request.
III  Continuing assistance

1. States should provide for appropriate continuing medical, psychological, social and material assistance for victims of terrorist acts.

2. If the victim does not normally reside on the territory of the State where the terrorist act occurred, that State should co-operate with the State of residence in ensuring that the victim receives such assistance.

IV  Investigation and prosecution

1. Where there have been victims of terrorist acts, States must launch an effective official investigation into those acts.

2. In this framework, special attention must be paid to victims without it being necessary for them to have made a formal complaint.

3. In cases where, as a result of an investigation, it is decided not to take action to prosecute a suspected perpetrator of a terrorist act, States should allow victims to ask for this decision to be re-examined by a competent authority.

V  Effective access to the law and to justice

States should provide effective access to the law and to justice for victims of terrorist acts by providing:

i. the right of access to competent courts in order to bring a civil action in support of their rights, and

ii. legal aid in appropriate cases.

VI  Administration of justice

1. States should, in accordance with their national legislation, strive to bring individuals suspected of terrorist acts to justice and obtain a decision from a competent tribunal within a reasonable time.

2. States should ensure that the position of victims of terrorist acts is adequately recognised in criminal proceedings.
VII Compensation

1. Victims of terrorist acts should receive fair, appropriate and timely compensation for the damages which they suffered. When compensation is not available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State on the territory of which the terrorist act happened must contribute to the compensation of victims for direct physical or psychological harm, irrespective of their nationality.

2. Compensation should be easily accessible to victims, irrespective of nationality. To this end, the State on the territory of which the terrorist act happened should introduce a mechanism allowing for a fair and appropriate compensation, after a simple procedure and within a reasonable time.

3. States whose nationals were victims of a terrorist act on the territory of another State should also encourage administrative co-operation with the competent authorities of that State to facilitate access to compensation for their nationals.

4. Apart from the payment of pecuniary compensation, States are encouraged to consider, depending on the circumstances, taking other measures to mitigate the negative effects of the terrorist act suffered by the victims.

VIII Protection of the private and family life of victims of terrorist acts

1. States should take appropriate steps to avoid as far as possible undermining respect for the private and family life of victims of terrorist acts, in particular when carrying out investigations or providing assistance after the terrorist act as well as within the framework of proceedings initiated by victims.

2. States should, where appropriate, in full compliance with the principle of freedom of expression, encourage the media and journalists to adopt self-regulatory measures in order to ensure the protection of the private and family life of victims of terrorist acts in the framework of their information activities.

3. States must ensure that victims of terrorist acts have an effective remedy where they raise an arguable claim that their right to respect for their private and family life has been violated.
IX Protection of the dignity and security of victims of terrorist acts

1. At all stages of the proceedings, victims of terrorist acts should be treated in a manner which gives due consideration to their personal situation, their rights and their dignity.

2. States must ensure the protection and security of victims of terrorist acts and should take measures, where appropriate, to protect their identity, in particular where they intervene as witnesses.

X Information for victims of terrorist acts

States should give information, in an appropriate way, to victims of terrorist acts about the act of which they suffered, except where victims indicate that they do not wish to receive such information. For this purpose, States should:

i. set up appropriate information contact points for the victims, concerning in particular their rights, the existence of victim support bodies, and the possibility of obtaining assistance, practical and legal advice as well as redress or compensation;

ii. ensure the provision to the victims of appropriate information in particular about the investigations, the final decision concerning prosecution, the date and place of the hearings and the conditions under which they may acquaint themselves with the decisions handed down.

XI Specific training for persons responsible for assisting victims of terrorist acts

States should encourage specific training for persons responsible for assisting victims of terrorist acts, as well as granting the necessary resources to that effect.

XII Increased protection

Nothing in these Guidelines restrains States from adopting more favourable services and measures than described in these Guidelines.
Acknowledgements
CAJ would like to thank the large number of people who contributed to making the visit to Northern Ireland of the Eminent Jurists Panel such a worthwhile event, and who – directly and indirectly – have contributed to the production of this report.

We would like to thank the organisations based outside the jurisdiction which sent representatives to testify orally and/or submitted written material to the Eminent Jurists Panel. Included in this category were Amnesty International, the Council of Europe, Martin Flaherty of Fordham University New York, Human Rights Watch, John Kennedy and Michael Finucane of the Irish Council of Civil Liberties, the Law Society of England and Wales, Douwe Korff of the London Metropolitan University, the New York Bar Association, Mike Posner (Human Rights First) and Jane Winter (British Irish Rights Watch).

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Our thanks also go to a number of people who met with the Eminent Jurists Panel as representatives of various official bodies. The Bar Council was represented by Barry MacDonald QC and John Orr, QC; the Law Society for Northern Ireland was represented by - Brian Archer, Kevin Delaney, and Brian Garrett; the Northern Ireland Court Service was represented by Mandy Kilpatrick and Siobhan Broderick; the Lord Chief Justice was represented by Justices Gillen and Weatherup; the Director of Public Prosecutions Office was represented by the Director (Sir Alasdair Fraser), the Deputy Director (Roy Junkin) and an Assistant Director (James Scholes); the Police Service for Northern Ireland was represented by the Chief Constable (Hugh Orde), Deputy Chief Constable (Paul Leighton) and Assistant Chief Constable (Peter Sheridan). Extensive written material was also submitted by the human rights advisers to the Northern Ireland Policing Board.
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Last but not least, we would like to thank the many CAJ members who were involved in one way or another in making the EJP visit such a success. Julie Harris carried out a formidable piece of initial research which formed the basis of CAJ’s preliminary submission; a sub-group of CAJ members and members of CAJ’s executive members were active in many facets of the visit and the report preparation; and they were supported in these endeavours by staff, most especially Maggie Beirne, Aideen Gilmore and Marieanne McKeown.

CAJ
Committee on the Administration of Justice

January 2008
WAR ON TERROR

Lessons from Northern Ireland

The tragic events of 11th September 2001 in New York and Washington unleashed a “war on terror” with serious human rights consequences around the world. In the wake of 9/11, people around the world are asking themselves what is the appropriate response to terrorism? How does one effectively counter terrorist acts? Is the torture of suspects ever allowed?

It was to address these kinds of questions that a global study entitled “Terrorism, Counter-Terrorism and Human Rights” was launched by the International Commission of Jurists. They invited a group of international jurists to travel to more than a dozen countries to learn of past and current experiences of terrorism and counter-terrorism, and to produce a report with recommendations as to how the international community can best respond to these global challenges. The Eminent Jurists Panel visited Northern Ireland in April 2006 to learn what, if any, lessons could be shared with others.

The visit was facilitated locally by the Committee on the Administration of Justice (CAJ), a human rights organisation working to uphold human rights in Northern Ireland since 1981. This report, prepared by CAJ for the Panel, brings together much of the testimony heard by the Panel, and draws out key lessons. The report concludes that human rights abuses fed and fuelled the conflict in Northern Ireland, and may do the same elsewhere.

January 2008