'WARS ON TERROR' AND VICARIOUS HEGEMONS: THE UK, INTERNATIONAL LAW, AND THE NORTHERN IRELAND CONFLICT

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I. INTRODUCTION

The hegemonic position of the United States, and its implication for international law, are rapidly emerging as sites of intense scholarly interest.[1] It is a truism that the fall of the Berlin wall has been followed by a period of unprecedented American predominance in the military, economic, and political spheres. Replacing the bi-polar certainties of the Cold War is a world in flux, dominated, to a significant extent, by one remaining superpower, or, in the words of the former French Foreign Minister, Hubert Védrine, by a 'hyper-power'.[2] Some though, have emphasised the continuing importance of other loci of (lesser) power in a 'uni-multipolar' world.[3] That this domination posed critical questions for international law was obvious well before the 9/11 atrocities, as the debate over NATO's use of force in Kosovo illustrated. Since the invasions of Afghanistan and Iraq, and with the global 'war on terror' reaching into ever-increasing spheres, the debate has intensified significantly.

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[1] For an incisive set of explorations of the issue, see M Byers and G Nolte (eds) *United States Hegemony and the Foundations of International Law* (CUP Cambridge 2003) (hereafter *Byers & Nolte, Hegemony*). Individual essays in the collection are referred to further below, as are some further contributions to the debate. See also V Lowe 'The Iraq Crisis: What Now?' (2003) 52 ICLQ 859; MJ Glennon 'American Hegemony in an Unplanned World Order' 5 Journal of Conflict and Security Law (2000) 3; R Foot, S Neil McFarlane, and M Mastanduno (eds) *US Hegemony and International Organizations: The United States and Multilateral Institutions* (OUP Oxford 2003), and D McGoldrick *From 9–11 to the Iraq War 2003: International Law in an Age of Complexity* (Hart Publishing Oxford 2004).

[2] See H Védrine with Dominique Moisi *France in an Age of Globalisation* (Brookings Institute 2001).

[3] S Huntington 'The Lonely Superpower' (1999) 78 Foreign Affairs 35.

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Mapping the effect of these changes on international law has proved far from easy; certainly no consensus has emerged. Contrast the tone at least, of Cassesse's assertion that the 9/11 attacks produced 'shattering consequences for international law',[4] with Achilles Skordas's view that: 'More than a decade after the end of the Cold War, the primary rules of customary international law do not seem to have undergone a radical change as a consequence of the dominant position of the United States. . . .'[5] In part, this can be considered a question of timing: it may too early to make a definitive assessment. Inevitably too, assessment is tied to critical questions of legal conceptualization. Positivist, norm-focused theories of international law will skew analysis in the direction suggested by their a priori assumptions. If however, as Higgins and others have suggested, international law (including international human rights law), is best viewed as a *process*, in which norms play a part, somewhat different conclusions may be arrived at. Viewed in these terms, a key issue becomes that of relating surrounding circumstances to normative developments, since 'context is always important'.[6] This opens the possibility that overall assessment of current international legal development would focus less on a search for linear legal progressions or disjunctions (in a positivist sense), than on more elliptical processes. 'Elliptical' because despite normative inconsistency, the processes may yet have a degree of cohesion—an internal logic—that can only be identified by relating the developments in question to the critical question of changing context.

These issues are of pressing concern to the UK, most obviously because the state is America's closest ally in the 'war on terror'. Britain was heavily involved in the choreographed manoeuvrings with the US at the UN Security Council prior to the invasion of Iraq, and subsequently took a prominent part in the military action that has proved so problematic in international law terms. In all of these actions it was clear who the hegemon was, but that doesn't mean that the UK's role was without hegemonic resonance.

In fact, there are two reasons for suggesting that while the UK was clearly not occupying the position of a hegemon, its actions nevertheless had such a resonance. The first is historical: for much of the 19th century, it was Britain that occupied what was clearly a hegemonic position, just as Spain had in the 16th century.[7] As Keohane points out, the effects of a period of hegemony may continue in quite complex ways, long after the influence of the hegemon has waned.[8] This is not to suggest that important vestiges of direct British hegemony remain; rather the point is that the UK occupies a relatively impor-

[4] A Cassesse 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993.

[5] A Skordas 'Hegemonic Custom' in *Byers & Nolte, Hegemony* (2003) 344.

[6] R Higgins *Problems and Process: International Law and How We Use It* (OUP Oxford 1994) 8.

[7] M Byers 'The Complexities of Foundational Change' in *Byers & Nolte, Hegemony* 1.

[8] R Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press Princeton 1984).

tant place in the world order, and this place owes something to historical circumstances. The story of the 20th century was one of British imperial decline,[9] but the UK still retains its place as a permanent member of the UN Security Council. Regionally, the state was able, at times, to exert a profound influence on the development of aspects of international law, as illustrated by the major role played by the UK in the drafting of the European Convention on Human Rights;[10] it also plays an important role in NATO. All of this means that, in the words of Douglas Hurd, Britain can 'punch above its weight in the world'.[11]

The second (related) reason for suggesting a hegemonic resonance to the UK's actions springs from the 'special' if markedly unequal relationship the state has enjoyed with the US since the Second World War.[12] Particularly after the Suez débacle (1956), a key driver in British foreign policy seems to have been a perceived need to act in concert with the US.[13] The relationship has ebbed on occasion (as when the Wilson Government refused to send British troops to Vietnam), but under the Blair Government it has flowed spectacularly. Thus the UK has (particularly post-9/11) been facilitative of the exercise of American hegemony, and has been keen to project itself as capable of influencing the US in a way that other countries cannot (though whether British input has had much impact on US policy is an open question).[14] The UK's role in the 'special relationship' has been far from dominant, but the state could be said to be experiencing a kind of vicarious hegemony, springing from that of the US, and buttressed by the historical legacy and by regional importance.

All of this means that British approaches may have a complex, if ambiguous impact on developments now at the centre of the global stage: the 'war on terror'. Clearly the UK can certainly claim a wealth of experience in the general area. It opens the 21st century combating insurgency in Iraq, and al-Qaida terrorism elsewhere, just as it began the 20th century fighting the Boer

[9] See R English and M Kenny (eds) *Rethinking British Decline* (Macmillan London 2000).

[10] See AWB Simpson *Human Rights and the End of Empire* (OUP Oxford 2001).

[11] Speech by Douglas Hurd, Foreign Secretary (1989–95) at the Royal Institute for International Affairs (Chatham House) 1993. See <http://news.bbc.co.uk/hi/english/ static/ in_depth/uk_politics/2001/open_politics/foreign_policy/uks_world_role.stm> last visited 18 Nov 2004.

[12] See CJ Bartlet *'The Special Relationship': A Political History of Anglo-American Relations Since 1945* (Longman New York 1992), and WM Roger Louis and R Owen (eds) *Suez 1956: The Crisis and its Consequences* (Clarendon Press Oxford 1989) (hereafter *Louis & Owen, Suez*.)

[13] As Hourani put it in his summing up on the Suez crisis, 'Since World War II a major aim of British policy, in the Middle East as elsewhere, had been to make sure that Britain acted with American agreement or at least friendly acquiescence' (399) Suez, in his view, reinforced the dependence on the US. A Hourani 'Conclusion' in *Louis & Owen, Suez* 393–410. See also, A Nutting *No End of a Lesson: The Story of Suez* (Constable & Company Ltd London 1967).

[14] See 'Britain Needs "Red Lines" in its Dealings with America' *The Times* 21 June 2004; 'Blair Fails to Patch up Transatlantic Feud', <http://www.reuters.co.uk/newsArticle.jhtml;jsessionid=GGXXXV2XUJ3POCRBAEZSFEY?type=topNews&storyID=5562201> 1 July 2004; 'Guantánamo Plea may Signal Deadlock' *Guardian* 26 June 2004.

guerrillas. In between came Ireland, Iraq (1920s), India, Palestine, Malaysia, Kenya, Aden, and Northern Ireland.[15]

In that regard Northern Ireland may offer some particularly important pointers, but not because of an easy equivalence between the 'war on terror' and the Northern Ireland conflict. While Northern Ireland saw appalling violence, large-scale loss of civilian life was the exception, whereas maximizing civilian carnage seems to have been one of the core goals of both the 9/11 and the March 2004 Madrid atrocities. And there is a marked difference between the relatively well-defined and geographically limited political aims of the Northern Ireland actors, and what appears to be the diffuse, fundamentalist, ideology of al-Qaida. In terms of patterns of violence, post-invasion Iraq offers some similarities with 1970s Northern Ireland, but the political contexts are quite different, and lumping the Iraqi conflict seamlessly with the rest of the 'war on terror' provides at best a questionable construction.

A further difference between Northern Ireland and the global 'war' is that while the US places great emphasis on the international nature of the current terrorist threat (hence the perceived justification for overseas operations), the UK, by contrast, spent much of the Northern Ireland conflict emphasising the 'internal' nature of the problem. Apart from a brief interlude in the early 1970s when the UK actively involved the Irish Government in the search for a political solution,[16] it was only with the Anglo-Irish Agreement of 1985 that the 'non-internationalization' approach was seriously dented. The 1985 Agreement, which gave the Irish Government a consultative role in relation to Northern Ireland,[17] paved the way for the current peace process, marked, as it has been, by the heavy involvement of the Republic of Ireland, the United States, and to a lesser extent, of the EU.[18] Out of this came the Good Friday

[15] See C Walker 'Policy Options and Priorities: British Perspectives' in M van Leeuwen (ed) *Confronting Terrorism* (Kluwer 2003) 11, and J Newsinger *British Counterinsurgency from Palestine to Northern Ireland* (Palgrave 2002). Also see generally C Gearty 'Reflections on Civil Liberties in an Age of Counter-terrorism' (2003) 41 *Osgoode Hall Law Journal* 185.

[16] The highpoint of these efforts was represented by the 'Sunningdale Agreement' of December 1973, which in its arrangements for cooperation between the Republic of Ireland and a consociational Northern Ireland Executive prefigured several aspects of the Good Friday Agreement. The Sunningdale Agreement collapsed in 1974 as the result of a strike by the loyalist Ulster Workers Council. See P Buckland *A History of Northern Ireland* (Gill & Macmillan Dublin 1981) 165–73.

[17] See generally T Hadden and K Boyle *The Anglo-Irish Agreement, Commentary Text and Official Overview* (Edwin Higel Ltd and Sweet & Maxwell London 1989).

[18] On the international examples and influences impacting on the Northern Ireland peace process and ultimately on the Good Friday Agreement, see J Dumbrell 'The United States and the Northern Irish Conflict 1969-94: from Indifference to Intervention' 6 Irish Studies in International Affairs (1995) 107; M Cox 'Bringing in the 'International': The IRA Cease-Fire and the End of the Cold War' (1997) 73 International Affairs 671, and A Guelke 'Comparatively Peaceful: the Role of Analogy in Northern Ireland's Peace Process' XI (1997) Cambridge Review of International Affairs 28.

Agreement of 1998[19] (central to which is a UN-deposited British-Irish treaty),[20] with its pronounced Irish dimension.

The non-internationalization point is one aspect of the contested construction of the conflict. As McGarry and O'Leary point out, and as Bell emphasizes, in many conflict situations (including Northern Ireland), there is not only a violent conflict, there is also a 'meta-conflict'—a 'conflict about the conflict'.[21] The story that the state tells is itself a contribution to this meta-conflict and thus to the conflict. Thus the US constantly invokes the rhetoric of a '*war*' against terrorism, as justifying war-like measures. There were echoes of this approach in the early stages of the Northern Ireland conflict. For the British Home Secretary in 1971, the Government was 'at war with the IRA',[22] a categorization also employed by the Northern Ireland Prime Minister ('we are, quite simply, at war with the Terrorist . . .').[23] This language was quickly dropped. For the most part, the UK was careful to create a narrative of its behaviour in terms of a response to terrorist criminality, even if from time-to-time, the rhetoric of 'war' was drawn upon to justify particularly harsh measures.

Rather than offering an easy equivalence, the Northern Ireland example may be worth studying in this context for three reasons. The first is that official British discourse insists that there are applicable lessons from these near-contemporaneous conflicts, and that the UK can provide them.[24] It may be that the appropriate lessons are not quite those suggested by Government[25] but, whether they are or are not, official discourse has forced attention on any lessons that may be applicable. Certainly, elements in the US security apparatus have employed techniques in Iraq and in the wider 'war' that bear a striking resemblance to methods employed early on in Northern Ireland. The most obvious example is the similarity between the heavily criticized interrogation regimes in Guantánamo Bay, Iraq and Afghanistan, and the sensory deprivation

[19] *The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland* (1998) Cmnd 3883.

[20] The text of the international treaty element of the Agreement can be found at 37 ILM 751 (1998).

[21] J McGarry and B O'Leary *Explaining Northern Ireland: Broken Images* (Blackwell Oxford 1995), and C Bell, *Peace Agreements and Human Rights* (OUP Oxford 2000) 2 (hereafter *Bell, Peace Agreements*).

[22] See M Mulholland *The Longest War: Northern Ireland's Troubled History* (OUP Oxford 2002) 92.

[23] Quoted in P Bew and G Gillespie *Northern Ireland: A Chronology of the Troubles, 1968–1999* (Gill and Macmillan Dublin 1999) 36.

[24] See 'Britain to Brief US on Experience with IRA', *Daily Telegraph* 8 Nov 2001, and 'Britain Shares its Lessons of Terrorism', *Washington Times* 14 Feb 2002.

[25] See C Campbell and I Connolly 'A Model for the 'War Against Terrorism?': Military Intervention in Northern Ireland and the 1970 Falls Curfew' (2003) 30 JLS 341; MP O'Connor and CM Rumann 'Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland' (2003) 24 Cardozo Law Review 1657; PA Thomas '9/11: USA and UK' (2003) 26 Fordham International Law Journal 1193.

techniques employed in Northern Ireland (discussed below).[26] Whether this is due to technical exchange (perhaps in both directions and over several decades), parallel development, or copying behaviour, is unclear.

The second reason for focusing on the Northern Ireland example springs from the vicarious hegemony point. The UK is not a negligible actor in international affairs. Examination of the international dimension to its dealings in Northern Ireland may give some clues as to how a true hegemon may fare when its behaviour during a sustained period of insurgency or terrorism faces scrutiny by reference to international standards. The third (related) point is that unlike the 'war on terror', the Northern Ireland conflict has had a beginning, a middle, and something like an end. Each of those phases can be considered to create a different context within which the behaviour of the state can be judged, and in which quite different degrees of leeway may be shown to the state by the international community.

The structure and focus of this paper flows from this latter assertion. Its main concern is with the evaluation by international adjudicatory bodies of the UK's emergency and anti-terrorist powers and practices (*de iure* and *de facto*), in Northern Ireland. Clearly there were other important international law dimensions to the conflict (developments in relation to self-determination being the most obvious),[27] but the approaches in relation to anti-terrorist and emergency powers provide the most straightforward connection to discourses around the 'war on terror'.

Rather than viewing the international law applicable to the Northern Ireland conflict in positivist terms, this paper assumes a process-based, contextual approach. The Northern Ireland example is used to explore the extent to which this view of law-as-process reveals an internal logic in the way international law responds when a leading democracy becomes embroiled in a serious situation of political violence and terrorism. It then seeks to explore whether the insights thus gained have any applicability to the question of the implications for international law of US hegemony in relation to the 'war on terror'.

The three parts of the paper are loosely tied to the main phases of the Northern Ireland conflict: outbreak and militarisation (1969–76); criminalization (1977–94); and transition (1995–2004)—'loosely' because international adjudication is by its nature fluid, with judgments rarely co-terminus with the domestic measures to which they relate. Part 1 explores approaches to the international law dimension of the Northern Ireland conflict during its most

[26] See Anthony Dworkin 'The Roots of Torture: Pre-emptive strikes to Abu Ghraib' *The Daily Star* (Lebanon), 26 June 2004; 'The Truth about Torture and Interrogation' *Independent,* 12 May 2004. See also Kevin Toolis 'Torture: Simply the Spoils of Victory?' *New Statesman* 10 May 2004; 'Iraq Crisis: US Uses Police State Methods, Say Experts', *Independent* 14 May 2004, and 'Too Easy to Blame Bush', *Guardian* 12 May 2004.

[27] See C Campbell, F Ní Aoláin and C Harvey 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 Modern Law Review 317 (hereafter *Campbell et al, Frontiers*).

violent phase, the period of militarization which saw the deployment of British troops, the re-emergence of paramilitary groups (both republican (IRA) and loyalist (UVF and UDA)),[28] and resort to internment without trial. This part explores the process of [negative] definition of the international legal reference points framing the conflict, principally by an exploration of the approaches employed by the British Government in combating Irish Government attempts to raise Northern Ireland at the UN Security Council and General Assembly. Also explored are UK strategies in relation to the possible applicability of international humanitarian law to the conflict in the light of the major developments in this body of law in the 1970s.

Following the 1970s peak, violence in Northern Ireland settled into a kind of bloody equilibrium for much of the 1980s and for the first four years of the 1990s. With the abandonment of internment without trial, the main vehicles for dealing with terrorist-type suspects became the jury-less 'Diplock' courts, in which special rules of evidence applied.[29] The most important of these rules were those lowering the threshold for the admissibility of confessions,[30] thereby facilitating convictions obtained through intensive interrogation in one of three specialized 'holding centres'.[31] Such interrogations involved extended detention, requiring the state to derogate under Article 15 of the European Convention on Human Rights (ECHR). This fact, and the narrowing of possible international law parameters described in Part II left the mechanisms of the ECHR as the main fora in which international legal contestation of Northern Ireland emergency powers and practices took place. Part III is therefore concerned mainly with the jurisprudence of the ECHR relating to derogation in Northern Ireland. Its specific focus is on how the organs of the Convention

[28] See R English *Armed Struggle: The History of the IRA* (Macmillan London 2003); T Harnden *'Bandit Country': The IRA and South Armagh* (Coronet London 2000); P Taylor *Loyalists* (Bloomsbury London 1999); S Bruce *The Red Hand: Protestant Paramilitaries in Northern Ireland* (OUP Oxford 1992).

[29] On the Diplock courts, see K Boyle, T Hadden, and P Hillyard *Law and State: The Case of Northern Ireland* (Martin Robertson London 1975); K Boyle, T Hadden and P Hillyard *Ten Years on in Northern Ireland: The Legal Control of Political Violence* (The Cobden Trust London 1980); D Walsh *The Use and Abuse of Emergency Legislation in Northern Ireland* (The Cobden Trust London 1983) (hereafter, *Walsh, Use and Abuse*); J Jackson and S Doran *Judge Without Jury: Diplock Trials in the Adversary System* (Clarendon Press Oxford 1995); S Greer and A White *Abolishing the Diplock Courts: The Case for Restoring Jury Trial to Scheduled Offences in Northern Ireland* (Cobden Trust London 1986); and S Greer *Supergrasses: A Study in Anti-Terrorist Law Enforcement in Northern Ireland* (Clarendon Press Oxford 1995).

[30] Prior to the Northern Ireland (Emergency Provisions) Act 1973 (EPA), the test for the admissibility of confessions was that of 'voluntariness' contained in the pre-1964 Judges Rules. EPA substituted a test based on Art 3 ECHR (prohibition of torture and inhuman and degrading treatment), thus rendering admissible confessions that would otherwise have been excluded from evidence. See *Walsh, Use and Abuse*; DS Greer 'Admissibility of Confessions and the Common Law in Times of Emergency' (1973) 24 Northern Ireland Legal Quarterly 199; and DS Greer 'The Admissibility of Confessions Under the Northern Ireland (Emergency Provisions) Act' (1980) 31 Northern Ireland Legal Quarterly 205.

[31] In his study of Diplock trials published in 1983 Walsh found that 90 per cent of cases were based solely or mainly on confessions, *Walsh, Use and Abuse*.

grappled with the implications of an international legal paradigm predicated on the temporariness of emergency, when that 'emergency' began to stretch to several decades.

The transition in Northern Ireland beginning with the paramilitary ceasefires of 1994 and continuing with the Good Friday Agreement of 1998 clearly marked a changed political context. Part IV explores the extent to which it also signified a changed international legal context, at a time when discourses around the theme of 'transitional justice' have been gaining an increasing currency.[32] In many instances, these discourses have produced *ex-post facto* judgments at variance with those evident while violence continued. This part locates the most recent jurisprudence of the European Court of Human Rights in relation to Northern Ireland firmly on this transitional terrain. Overall conclusions are then suggested as to the implications all of this may have for the 'bite' of international human rights law in the global 'war on terror'. Thus the paper uses the Northern Ireland example as a case study to explore the implications of a variety of conflicted contexts for international legal adjudication involving a leading western democracy. This exploration relates not only to the period when political violence and terrorism continue, but also in situations involving structured transition from violence.

II. OUTBREAK: NARROWING THE INTERNATIONAL LAW PARAMETERS OF THE DISCOURSE

As Berman points out, international law does not stand above domestic law conflicts; rather 'the power of international law to shape the identity of the protagonists of such conflicts cannot be separated from even its principled activities to remedy them.'[33] The point is related to McGarry's and O'Leary's about the existence of a meta-conflict. Claims as to the appropriate international legal standards framing a particular conflict are themselves claims about the nature of the conflict. They are therefore contributions to the meta-conflict, which in turn may influence the self-definition of the actors, and thus the conduct and outcome of the conflict.

From today's perspective, the international legal reference points framing the Northern Ireland conflict seem relatively well defined (principally by

[32] See generally, Neil J Kritz (ed) *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (US Institute of Peace Washington 1995) (3 vols); Carla Hesse and Robert Post (eds) *Human Rights in Political Transitions: Gettysbury to Bosnia* (Zone Books New York 1999); R Teitel *Transitional Justice* (OUP Oxford 2000), and A Barahona De Brito, C Gonzalézz-Enriquez, and P Aguilar (eds) *The Politics of Memory: Transitional Justice in Democratizing Societies* (OUP Oxford 2001). Northern Ireland-specific material on transitional justice is cited in Part IV below.

[33] N Berman 'The International Law of Nationalism: Group Identity and Legal History' 25–57 at 28 in D. Wippman (ed) *International Law and Ethnic Conflict* (Cornell University Press Ithaca 1998).

reference to the ECHR), but the position at the start of the conflict was much less clear. Most importantly, an assertive Irish Government (which claimed the territory),[34] displayed a willingness to use UN mechanisms (both at the Security Council and the General Assembly) in an attempt to internationalize the issue. A further factor was that militarization in Northern Ireland overlapped with the opening of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflicts, which continued from 1974 to 1977.[35] The conference's concern with non-conventional armed conflicts posed implicit questions about the categorization of the Northern Ireland conflict. This was particularly so as only two years previously armed opposition groups had been visibly controlling territory ('no go areas'), in two of Northern Ireland's cities in support of self-determination claims.

A. Northern Ireland at the United Nations: Neutralizing the Challenge

Interactions between the UK and the Republic of Ireland at the UN at the start of the conflict are best seen as a strategic contestation in which both states sought to use international legal reference points to bolster competing conflict-narratives. In a deteriorating public order situation, the Irish Government, in August 1969, requested an urgent meeting of the Security Council under Article 35 of the UN Charter.[36] The letter of request to the President of the Security Council explicitly called for the despatch of a UN peacekeeping force to Northern Ireland. This request was repeated in the address by the Irish Minister for External Affairs to the Security Council when the procedural question of the possible inclusion of the Irish letter on the Council's Provisional Agenda arose for discussion. In his address, he emphasized the then Irish Government policy in relation to Northern Ireland, which was that the state did 'not in any way concede to them [the UK] the right to exercise jurisdiction there',[37] the implication being that the domestic affairs exception

[34] Arts 2 and 3 of the Constitution of the Republic of Ireland originally contained a somewhat ambiguously worded territorial claim to Northern Ireland. See JM Kelly *The Irish Constitution* (3rd edn by G Hogan and G Whyte Butterworths London–Dublin 1994), and B Doolan *Constitutional Law and Constitutional Rights in Ireland* (Gill and Macmillan Dublin 1984). Following a referendum held in accordance with the Good Friday Agreement, Arts 2 & 3 have now been amended to stipulate that Irish reunification can only come about peacefully and with the consent of a 'majority of the people, democratically expressed, in both jurisdictions in the island' (revised Art 3).

[35] See L Moir *The Law of Internal Armed Conflict* (CUP Cambridge 2002) 89 (hereafter *Moir, Armed Conflict*).

[36] Much of the material in relation to these interactions, at least from the Irish side, is reproduced in Irish Department of Foreign Affairs *Ireland at the United Nations 1969* (Dublin 1969) (hereafter *Ireland at the UN*). See also *O'Brien, Northern Ireland* at 2–13 and R Harvey 'The Right of the People of the Whole of Ireland to Self Determination, Unity, Sovereignty and Independence' (1990) 11 New York Law School Journal of International and Comparative Law 167–74 at 167.

[37] See *Ireland at the UN* at 10.

in Article 2 (7) of the Charter was inapplicable. Alternatively, he suggested, drawing parallels with the UN approach to apartheid, that the UK's objections should be overridden. The British response was to insist that reform was underway in Northern Ireland, and that Article 2 (7) operated to preclude UN involvement. Despite support from the Soviet Union for the Irish position, the meeting was adjourned without taking a decision on whether to adopt the Provisional Agenda (and thus on whether Northern Ireland should be examined), and the matter was not returned to.

The Irish Government then turned its attention elsewhere, seeking to have 'The Situation of the North of Ireland' included on the agenda of the forthcoming UN General Assembly session. In its request, the Irish Government referred to the *UN Declaration on the Granting of Independence to Colonial Countries and Peoples*, and asked that the Northern Ireland situation be examined with a view to ending discrimination and establishing human rights, citing various articles of the Charter.[38] The item made it on to the Provisional Agenda but, following a British objection that debate was precluded by Article 2(7), further discussion was deferred and not returned to. In both instances therefore, procedural devices were used by the UK to foreclose discussion of substantive issues. In effect, the British narrative of the conflict ('an internal matter') won out at the Security Council and General Assembly, and the UK's international standing meant that the state was well placed to ensure that this would be the case.

B. International Humanitarian Law: Closing the Door

Given the sustained and concerted nature of the violence in Northern Ireland, and the high degree of organization of the armed opposition groups involved, humanitarian law might seem an obvious reference point against which the behaviour of participants might have been measured. This was particularly the case in the early 1970s, given the intensity of the violence and the control of 'no go' areas by non-state entities.

In fact, for much of the conflict there was little attempt to view the violence through the humanitarian law lens apart from an occasional airing of the matter in the context of the status of IRA prisoners.[39] There was therefore little examination of the potential applicability of the provisions of humanitarian law governing guerrilla or non-international armed conflicts (principally Article 3 common to the four 1949 Geneva Conventions, and the Conventions' two 1977 Protocols).[40]

[38] Art 1, para 3, and Arts 13, 35, 55, and 60.

[39] See C Walker 'Irish Republican Prisoners: Political Detainees, Prisoners of War or Common Criminals' 19 Irish Jurist (1984 but appearing in 1986) 189. For a technically less convincing exploration of the subject see M Von Tangen Page *Prisons, Peace and Terrorism: Penal Policy in the Reduction of Political Violence in Northern Ireland, Italy and the Spanish Basque Country, 1968–97* (London Macmillan 1998).

[40] *Protocol Additional to the Geneva Conventions of 12 August 1949 and relation to the*

More recently, debate on the issue has been revived as the result of initiatives by international human rights non-governmental organizations to hold paramilitary groups in Northern Ireland accountable for breaches of international humanitarian standards, whether or not the law was strictly applicable.[41] The emerging debate on the value or otherwise of a truth commission for Northern Ireland has also focused some attention on the question (a point explored further below).

The issues that arise under this heading are sufficiently involved, technical and complex to merit a paper in their own right.[42] Suffice to say here that the Northern Ireland conflict is generally viewed as having hovered in the grey area between some form of non-international armed conflict (governed by common Article 3 and perhaps meeting at least some of the requirements of 1977 Protocol II), and the lower intensity category of 'situations of internal disturbances and tensions'.[43] Although the ICRC periodically visited prisoners in Northern Ireland, it fudged the question as to whether this was on the basis of its own 'right of initiative' or by virtue of common Article 3.

The important point is that while the applicability of the law *stricto sensu* during the conflict is an open question, the UK nevertheless took considerable

Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Protocol Additional to the Geneva Conventions of 12 August 1949 and relation to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Useful overviews of the Protocols and of common Art 3 can be found in F Kalshoven 'Constraints on the Waging of War' (International Committee of the Red Cross 1987) 71, and HP Gasser 'International Humanitarian Law: An Introduction' 66–78, separate print from H Haug *Humanity for All* (The International Red Cross and Red Crescent Movement 1993). See also *Moir, Armed Conflict*; L Zegveld *The Accountability of Armed Opposition Groups in International Law* (CUP Cambridge 2002); B De Schutter and C Van Den Wyngaert 'Coping With Non-International Armed Conflicts: the Borderline Between National and International Law' 13 Ga. J. Int'l & Comp. L (1983) 279; F Kalshoven ' "Guerrilla" and "Terrorism" in Internal Armed Conflict' (1983) 33 American University Law Review 67, and D Draper 'Humanitarian Law and Internal Armed Conflicts' (1983) 13 Ga.J. Int'l & Comp L 253.

[41] See, eg, Helsinki Watch *Human Rights in Northern Ireland* (1991); Human Rights Watch *Continued Abuses by All Sides in Northern Ireland* (1994); Amnesty International 'United Kingdom: Amnesty International Condemns Bombing in Omagh' 17 Aug 1998 AI Index EUR 45/15/98.

[42] See F Ní Aoláin *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Blackstaff Press Belfast 2000) 218–47.

[43] The law in relation to 'situations of disturbances and tensions' is in a state of development. For a proposal for the elaboration of standards specific to such situations see HP Gasser 'A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct' (1988) 262 International Review of the Red Cross 38. An alternative approach which aims to elaborate norms applicable in these and all other crisis situations be traced from the adoption of the 'Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence' (1987) to the adoption of the 'Declaration of Minimum Humanitarian Standards' at Turku/Abo, Finland (1990) (sometimes referred to as the 'Turku/Abo Declaration'). See T Meron and A Rosas 'A Declaration of Minimum Humanitarian Standards' (1991) 85 AJIL 375. In 1994 an amended version of the document was adopted which received a degree of validation from both UN and OSCE mechanisms. See O Eide, A Rosas, and T Meron 'Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards' (1995) 89 AJIL 215. See also Jean-Daniel Vigny and C Thompson 'Fundamental Standards of Humanity: What Future?' (2002) 20 Netherlands Quarterly of Human Rights 2 185.

pains to avoid the possibility of creating fresh obligations for itself in this sphere in respect of Northern Ireland. This wariness appears to have been based on a combination of diffuse and quite specific concerns. Discussion of the applicability of IHL opened up the possibility that not only did a liberal-democratic state have an 'armed conflict' taking place on its territory, it also may have been a *participant* in it. 'Criminalization' turned on a projection of the conflict as mere criminality; reference to a possible 'armed conflict' (in its technical sense) sat uneasily with this frame of reference.

At a more specific level, 1977 Protocol 1 granted prisoner-of-war status to combatants captured in what are generally referred to as 'wars of national liberation' where 'peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . .'[44] These provisions may have been perceived as a direct threat to the criminalization strategy, while discussion of 'self-determination' claims would have required engagement with Ireland's territorial claim on the territory.

In retrospect, while self-determination claims were important elements in the Northern Ireland conflict (and in its resolution), it is difficult to see how Protocol I's conditions of applicability could be said to have been met. As regards procedural issues surrounding the question, Britain's influential position at the UN again came into play. When between 1988 and1990 the New York-based Brehon Law Society sought to have the UN Decolonisation Committee interest itself in Northern Ireland, the Committee insisted that its mandate meant that it would require a resolution of the General Assembly or a referral by the Secretary General before it could hold hearings on the region.[45] No such resolution or referral was forthcoming.

Protocol II did not grant prisoner-of-war status, but it did directly impact upon the prisoner issue since it provided that '[A]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict'.[46] These provisions though, were binding only in non-international armed conflicts in which the Protocol's high threshold levels of applicability were met.[47]

[44] Protocol 1, Art 1(4)

[45] See *O'Brien Northern Ireland*, 10 n 35. For an argument suggesting the possibility of extensive UN intervention in Northern Ireland see R Harvey 'The Right of the People of the Whole of Ireland to Self Determination, Unity, Sovereignty and Independence' (1990) 11 New York Law School Journal of International Law and Comparative Law 167.

[46] Art 6(5).

[47] Art 1 of Protocol II defines its 'material field of application' as all internal armed conflicts taking place in the territory of a State Party 'between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.

While the UK signed the two 1977 Protocols at an early date (December 1977), it declined to ratify them for many years, and at the time of signing it made a declaration, two aspects of which appear designed to negative the possibility of applicability to Northern Ireland.[48] In any case, the Government's official position was that violence in the region did not amount to an 'armed conflict' of any sort.

With the passage of time the UK's failure became increasingly anomalous.[49] Eventually, ratification was provided for under the Geneva Conventions (Amendment) Act 1995,[50] enacted a year after the Northern Ireland cease-fires. The legislation was not immediately brought into force, and ratification was eventually accomplished only in January 1998, the IRA cease-fire having ended and having been restored in the meantime. Ratification was accompanied by a number of reservations in respect of Protocol I which, while textually different from the earlier declaration, also seemed designed to exclude any applicability to Northern Ireland.[51] As regards Protocol II (the applicability of which was in any case a more likely bet than Protocol I), while the UK has never indicated that it viewed the conflict as coming within the terms of the instrument, it could, if it felt mindful to do so, make a colourable claim that the early release of prisoners under the Good Friday Agreement, met the amnesty requirements of the Protocol.[52] One effect of the very long delay in the ratification of Protocols I and II seems to have been to divert attention away from even the limited provision of common Article 3.

At one level, the strategies pursed in relation to Northern Ireland at the higher reaches of the United Nations and with respect to international humanitarian

[48] These insisted that a liberation movement bringing the Protocol into effect should be recognized as such by the appropriate regional intergovernmental organization, and that the degree of conflict required to trigger Protocol I should be at least as intense as that required under the (quite high) test in Protocol II. The text of the declaration and of the reservation made upon ratification can be found at the ICRC web site <www.icrc.org/>. See also A Roberts and R Guelff (eds) *Documents on the Laws of War* (Clarendon Press Oxford 1989) 467–8.

[49] The UK voted in the Security Council in a way that had the effect of creating international criminal jurisdiction over breaches of 1977 Geneva Protocol II at a time when it itself had not ratified the protocol. See T Meron 'International Criminalization of Internal Atrocities' (1995) 89 AJIL 554.

[50] See P Rowe and M A Meyer 'The Geneva Conventions (Amendment) Act 1995: A Generally Minimalist Approach' (1996) 45 ICLQ 476.

[51] The reservation in relation to Art 1, para 4 and Art 96 para 3 reads 'It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation. The United Kingdom will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the United Kingdom shall have expressly recognized that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the time to which Article 1, paragraph 4 applies.'

[52] Arts 1–5 of the section of the Good Friday Agreements headed 'Prisoners' provides for the early release of prisoners convicted of scheduled offences other than those belonging to organizations 'which have not established or are not maintaining a complete and unequivocal ceasefire'. These arrangements were legislated for in the Northern Ireland (Sentences) Act 1998.

law, functioned as quite straightforward shielding devices for the UK. At another, they can be considered as effective strategic contributions to the meta-conflict. As such, they confirm that particularly at a conflict's outbreak, leading Western states such as the UK are well placed to define international legal frameworks and contexts in ways that are favourable to their interests.

III. TERRORISM AS CONTEXT: DEROGATING FROM SCRUTINY

The international humanitarian law concept of an 'armed conflict' overlaps but is not co-terminous with that of 'public emergency threatening the life of the nation' found in derogation articles of human rights treaties.[53] While the occurrence of an armed conflict in a particular area would amount to such a public emergency, violence at a level not technically amounting to an armed conflict might yet constitute an emergency. It was this distinction that allowed the British Government to claim that although there was no armed conflict in Northern Ireland, there was a 'public emergency' under Article 15 ECHR and Article 4 ICCPR. Under these articles, some (though not all) rights can be formally derogated from 'to the extent strictly required by the exigencies of the situation'.[54]

Conceptually, the term 'emergency' is locked in a dichotomous relationship with the norm by reference to which it is located. Implicit in this relationship is the temporariness of the emergency. Were it not a temporary phenomenon, there could be no norm in contradistinction to which it is defined. This relationship has been variously described in terms of a governing paradigm of 'normalcy-rule, emergency-exception',[55] or of the 'implicit counterpoint between emergency and normality',[56] producing the 'emergency/normality' antimony.[57]

[53] On the relationship between international humanitarian law and international human rights law, see Y Dinstein 'Human Rights in Armed Conflict: International Humanitarian Law' in T Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (OUP Oxford 1989), and F Ní Aoláin, 'The Relationship Between Situations of Emergency and Low-Intensity Armed Conflict' (1998) 28 Israel Yearbook of Human Rights 97–106.

[54] Art 15(1) ECHR. The corresponding (though not identical) provision in the ICCPR is Art 4(1), and in the ACHR it is Art 27(1). On derogations see J Oraá *Human Rights in States of Emergency in International Law* (Clarendon Press Oxford 1992), and J Fitzpatrick *The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press 1994) (hereafter *Fitzpatrick, Human Rights*); Jaap A Walkate 'The Human Rights Committee and Public Emergencies' (1982) 9 Yale Journal of World Public Order, and C Grossman 'A Framework for the Examination of States of Emergency under the American Convention on Human Rights' (1986) 1 American University Journal of International Law & Policy 35.

[55] O Gross ' "Once More into the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 Yale Journal of International Law 440.

[56] S Marks 'Civil Liberties in the Margin: the UK Derogation and the European Court of Human Rights' (1995) 15 Oxford Journal of Legal Studies 85 (hereafter *Marks, Civil Liberties*).

[57] *Marks, Civil Liberties* at 86.

Northern Ireland fits uneasily within this conceptual framework since, from its foundation onwards, the state has been in a condition of permanent emergency.[58] Thus having ratified the ECHR in 1951, the UK entered a derogation under Article 15 in 1957,[59] and from then until 1984 continuous derogations were in force.[60] The withdrawal of the derogation in 1984 was not marked by an abandonment of emergency legislation, and when in 1988 the detention provisions of this legislation were found to be in breach of the Convention,[61] further derogations were entered[62] which were kept in place until 2001.[63] Although fresh derogations were entered later in the year (in force at the time of writing), these were focused not on the Northern Ireland problem, but on international terrorism.[63a]

The early failure to interest the UN Security Council and the UN General Assembly in the Northern Ireland issue suggested a need to find alternative fora if human rights issues affecting the region were to be aired internationally. Under its '1503' procedure which investigates allegations of 'gross and persistent violations of human rights' the [former] UN Sub-commission on the Prevention of Discrimination and the Protection of Minorities began consideration of the situation in Northern Ireland in 1972, apparently focusing on the treatment of internees following the introduction of internment. But the confidentiality surrounding the procedure puts a significant question mark over its effectiveness; indeed it was only in 1984 that limited details of the 1972 examination got into the public domain.[64]

At the Council of Europe the Irish Government launched the interstate case *Ireland v UK*[65] which also focused on the treatment of those detained without trial. While conceding that a public emergency existed at the time, the Irish

[58] See C Campbell *Emergency Law in Ireland*, 1918–1925 (OUP Oxford 1994), and T Hadden, K Boyle and C Campbell 'Emergency Law in Northern Ireland: the Context' in A. Jennings (ed) *Justice Under Fire* (1st edn 1988, 2nd edn 1990 Pluto Press London) 26.

[59] Notice of derogation of 27 June 1957 the text of which is included in *European Commission of Human Rights, Documents and Decisions, 1955–1956–1957* (Martinus Nijhoff The Hague 1959).

[60] The dates of the notices are as follows: 25 Sept 1969, 20 Aug 1971, 23 Jan 1973, 19 Sept 1975, 12 Dec 1975, 18 Dec 1978. The text can be found in the appropriate yearly volume of the *Yearbook of the European Convention on Human Rights* (Martinus Nijhoff The Hague).

[61] In *Brogan v UK* (1989)11 EHRR 117. The case is discussed further below.

[62] Letters of derogation of 23 Dec 1988, *The British Year Book of International Law* (OUP Oxford (1989) 469–71, and of 23 Mar 1989, *Yearbook of the European Convention on Human Rights* (Martinus Nijhoff The Hague 1989) 8.

[63] The derogation was withdrawn on 19 Feb 2001 as the Terrorism Act 2000 came into force. The Act's detention provisions differed from those in the PTA which preceded it, and were considered not to require a derogation.

[63a] See the House of Lords decision in *A (FC) and others (FC) v Sec of State*, and *X (FC) and another (FC) v Sec of State* [2004] UKHL 56, in which the Law Lords ruled the indefinite detention of a number of non-nationals under the Anti-Terrorism, Crime and Security Act 2001 incompatible with the State's obligations under the ECHR given domestic effect by the Human Rights Act 1998.

[64] H Tolley 'The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications' (1984) 6 Human Rights Quarterly 420.

[65] 25 ECtHR (ser A) (1978).

Government claimed *inter alia* that the scale of the detentions was not strictly required, and that the five sensory deprivation techniques to which some of the detainees had been subjected (hooding, wall-standing, food deprivation, sleep deprivation, and use of 'white noise'), amounted to torture, and therefore to a breach of a non-derogable right (Article 3).

The decision of the European Court of Human Rights has been extensively analysed elsewhere; rather than reproduce this criticism here, two aspects of the judgment will be highlighted. The first is the degree of deference shown to the state's estimation of the situation. While the Court asserted its duty to decide whether an emergency justifying resort to derogation existed, it accompanied this assertion with a strong validation of the 'margin of appreciation' doctrine initially articulated by the European Commission in the (first) *Cyprus*[66] case, and carried through in *Lawless v Ireland*.[67] For the first time, the Court explicitly validated the doctrine not simply in relation to the existence of the emergency, but also in relation to the question of whether the measures taken were strictly required, holding that: 'It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation" to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency.'[68] This withdrawal paved the way for the finding not only that an emergency existed, but that detention without trial on the scale involved was justified, and that there was no discrimination in its operation.

The second notable feature of the case was the finding by the Court in relation to the five techniques, that the state had inflicted inhuman and degrading treatment upon the detainees but that, unlike the earlier finding of the European Commission, this did not amount to torture. This result was arrived at by an examination of each of the techniques individually rather than by a consideration of their cumulative effect, an evaluative process that has attracted pointed academic criticism.[69] Further examination of the ill-treatment issue in a parallel case involving claims of extensive physical beating and forced administration of drugs and electric shocks was stymied by a rigid application of admissibility rules.[70]

The structure of argumentation in *Ireland v UK* was clearly predicated upon

[66] *Greece v UK*, 1958–1959 *Yearbook of the European Convention on Human Rights* 174.
[67] (1961) 1 EHRR 15.
[68] *Ireland v UK* 25 ECtHR (ser A), 207, at 78–9.
[69] See F Ní Aoláin 'The Emergence of Diversity: Differences in Human Rights Jurisprudence' (1995) 19 Fordham International Law Journal 116–17.
[70] *Donnelly and Others v UK*, Application 5577, 5583/73, Decision of the Commission, 5 Apr 1973. See K Boyle and H Hannum 'Ireland in Strasbourg: An Analysis of the Northern Irish Proceedings Before the European Commission on Human Rights' (1972) 7 Irish Jurist at 337. See also, K Boyle and H Hannum 'Ireland in Strasbourg: Final Decisions in The Northern Irish Proceedings Before the European Commission of Human Rights' (1976) 6 Irish Jurist 243, and Boyle and Hannum 'The Donnelly Case: Administrative Practice and Domestic Remedies Under the European Convention on Human Rights, One Step Forward and Two Steps Back' (1977) 71 AJIL 316.

the viability of the emergency-normality dichotomy. This was perhaps understandable given that the case arose from the early stages of the current Troubles, but by the 1980s, increasing entrenchment of the emergency begged the question as to its continuing appropriateness. The issue was revisited in *Brannigan and McBride v UK,*[71] which saw a challenge to the provisions allowing detention of terrorist suspects for up to seven days under the PTA, a power that relied upon a derogation from Article 5(3) ECHR.

The roots of the case lay partly at least in the decision by the UK to withdraw its derogations from the ECHR and the ICCPR in 1984, apparently in the belief that there was no incompatibility between its emergency and anti-terrorist powers and the substantive provisions of the human rights treaties in question. The potential for fresh challenge was exploited in *Brogan v UK*[72] (discussed below), in which the European Court of Human Rights held that detention for four days and six hours without derogation was incompatible with the Convention. Rather than bring the legislation into line with the Convention, the Government's response was to issue a fresh derogation in respect of the seven-day power. It was this move that was challenged in *Brannigan and McBride*[73] by a number of suspects released without charge after being held in one of Northern Ireland's three specialist interrogation centres for a minimum of four days, 6 hours and 25 minutes.

Given that the Northern Ireland emergency was in at least its 20th year when the detentions complained of took place, an obvious question mark arose over the viability of the kind of analytical and evaluative approaches evident in *Ireland v UK,* premised as they were on the temporariness of the emergency. While permitting a wide margin of appreciation may be understandable in the turbulence of a sudden onset of emergency, and for a limited period, such a rationale largely disappears in an entrenched and relatively predictable (though violent) situation. Accordingly it was argued before the Court that if a state were to be allowed a margin of appreciation, that margin should become narrower the longer the 'emergency' continued.[74]

Rather than engage meaningfully with this argument, the court fell back on stock phrases, validating a 'wide margin of appreciation', being granted to the state in the assessment both of the existence of the emergency and of measures taken on foot of it. The assertion of the viability of the second leg of the margin of appreciation—the measures taken on foot of the derogation—prepared the ground for the validation of the regime in the interrogation centres:

> [h]aving regard to the nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the *existence of basic safeguards against abuse*, the Court takes the view that the

[71] (1994) 19 EHRR 539. [72] (1989) 11 EHRR 117. [73] (1992) 17 EHRR 539.
[74] Amicus brief submitted by Liberty, Interrights and the Committee on the Administration of Justice, mentioned in para 50 of the judgment.

> Government have not exceeded their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation. [emphasis added][75]

While the finding that the level of violence in Northern Ireland was such as to threaten the life of the nation might be considered unremarkable, the validation of the safeguards in the interrogation centres is quite another matter, and was out of step with the approach taken in some other international fora. In its consideration of the first periodic report of the UK under the Convention Against Torture in 1991 (where the state was careful to assert that terrorism in Northern Ireland was 'without parallel elsewhere in Europe'),[76] members of the UN Committee Against Torture subjected the regime and particularly the safeguards in the interrogation centres to scathing criticism, with the Country Rapporteur asserting that the 'implementation of the Convention in Northern Ireland is far from satisfactory'.[77] These criticisms continued, though with diminishing intensity in view of a number of UK reforms,[78] at the consideration of the second and third periodic reports in 1995[79] and 1998[80] (the UK insulated itself from individual applications under the Convention by declining to recognise the competence of the Committee against Torture to hear such complaints under Article 22). The persistence of the problem, particularly in the early 1990s, had also been confirmed in allegations of abuse listed by the successive UN Special Rapporteur on Torture in annual reports to the UN Commission on Human Rights.[81]

At the end of 1991 the European Committee for the Prevention of Torture had been sufficiently concerned at the situation in the holding centres that it judged a visit to Northern Ireland 'to be required in the circumstances'.[82] The ensuing report (the visit took place in July 1993), was heavily critical of the regime in the holding centres concluding that 'persons arrested in Northern Ireland under the PTA run a significant risk of psychological forms of ill-treatment during their detention at the holding centres and that, on occasion, resort

[75] Para 66.

[76] *Committee Against Torture, Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Initial State Reports Due in 1990, Addendum United Kingdom*, para. 67, UN Doc. CAT/C/9/Add.6.

[77] *Committee Against Torture, Summary Record or 92nd Session*, UN Doc. CAT/C/SR.92, para 61. See also other parts of the Summary Record at UN Doc CAT/C/SR.91, and the UK's report at UN Doc CAT/C/9/Add.6.

[78] The reforms were the appointment of a Commissioner to oversee the Holding Centres, the introduction of silent video recording (rather than simple video monitoring) in the holding centres in 1998 and of (non-synchronized) audio-recording in 1999.

[79] See UN Doc CAT/C/XVI/CRP.1/Add.4.

[80] See UN Docs CAT/C/SR.354, 355 and 360, and CAT/C/44/Add.1.

[81] See for instance the Special Rapporteur's Report for 1989 UN Doc E/CN.4/1989/15, paras 101 and 104, the 1992 report, UN Doc E/CN.4/1993/26, paras 540–1, the 1994 report, UN Doc E/CN.4/1994/31, paras 650–5.

[82] Art 7, para 1, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*.

may be had by detective officers to forms of physical ill-treatment'.[83] A further visit from the Committee took place in November and December 1999. Concerned that the physical conditions in the main Holding Centre at Castlereagh had not improved from the earlier visit, the Committee took the unusual step of issuing an immediate observation calling for the closure of the Centre,[84] a call which on this occasion was swiftly answered.[85] Again, the eventual report, while noting improvements in some areas, made some significant criticisms.[86]

Thus in *Brannigan and McBride* the European Court afforded a degree of deference to the views of the UK government that other international human rights bodies were unwilling to display. The judgment is notable as much as for the issues not addressed as for those that were, pointing to inadequacies in a judicial methodology which avoided cross-referencing to other international norms germane to the question at issue. Despite its having been brought to its attention, the Court made no reference to the 1991 hearings of the UN Committee Against Torture.[87] In its description of the domestic legal framework governing detention under the PTA, the Court likewise failed to mention the limitation on the right to silence contained in the Criminal Evidence Order 1988, an issue which quite obviously impacted upon the question of the adequacy of safeguards. Nor did the Court make reference to the recent attempts at international standard-setting in the area of derogations represented by the formulation of the Paris Minimum Standards[88] and the Siracusa Principles.[89]

It is also notable that the Court made little attempt to consider the question of the domestic legal framework governing detention in the light of a possible procedural dimension to Article 3 ECHR, rather than simply in the light of the derogable provisions of Article 5 ECHR, (although this may have turned at

[83] *Report to the Government of the United Kingdom of the Visit to Northern Ireland Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT), Para 110, CPT/Inf (94) 17 [EN].

[84] *Report to the Government of the United Kingdom on the Visit to Northern Ireland Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Para 119, CPT/Inf (2001) 7 (hereafter the '2001 CPT Report').

[85] Castlereagh was closed on 31 Dec 1999, followed on 1 Oct 2000 by the closure of Strand Road. On 30 September 2001 Gough was due to close, but whether it finally did is unclear as it was still being used as late as November 2003 when an alleged al-Qaida suspect was held for questioning there. See 'Al-Qaida Suspect Arrested in Ulster' *The Guardian* 6 Nov 2003.

[86] 2001 CPT Report, see esp paras 26, 33, 119–27.

[87] The UNCAT hearings were referred to in pp 11–13 of the *amicus* brief (in the possession of the author) referred to at n 74 above.

[88] 'Paris Minimum Standards of Human Rights Norms in a State of Emergency', adopted at the 61st Conference of the International Law Association, Paris, 1984, reprinted at 79 AJIL (1985) 1072. For a discussion see V Iyer *States of Emergency: The Indian Experience* (Butterworths New Delhi 2000).

[89] *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* were adopted at a conference of experts convened by a number of non-governmental organizations in 1984. The text of the Principles can be found at (1985) 7 Human Rights Quarterly 3. For a discussion see *Fitzpatrick, Human Rights* at 68–70.

least partly on the fact that neither of the applicants claimed a breach of Article 3). The closest the Court came was in the consideration of the assertion by Amnesty International in an *amicus* brief that the right of a detainee to have the lawfulness of his or her detention considered speedily by a court under Article 5(4) ECHR should be considered non-derogable as a vital safeguard against ill-treatment.[90] This the Court dismissed quickly by reciting that *habeas corpus* was available, and that detainees had an absolute right to consult a solicitor after 48 hours.

Although in the extract from the judgment quoted above the Court had affirmed its general satisfaction with safeguards against 'abuse', its more specific examination led the court to conclude more narrowly that 'safeguards do exist and provide an important measure of protection against arbitrary behaviour and incommunicado detention'.[91] The latter statement might be taken to refer to such abusive behaviour as arbitrary arrest and incommunicado detention rather than to abuse of the right to be free from torture and inhuman and degrading treatment in general. The general deference to state claims displayed by the Court was also much greater than that afforded to the Turkish Government in *Aksoy*,[92] in which the safeguards applicable to extended detention of terrorist suspects were found to be inadequate. This suggests that the liberal-democratic character of the British state (to be contrasted with Turkey's flawed democratic record), may have been implicitly factored in to the European Court's assessment. Even more marked (though more obviously justifiable), are the differences in the approaches evident towards derogation claims in Northern Ireland, and those by Greece at the time of the Colonels' rule.[93]

As recognized and formalized through the derogation mechanism, terrorism can provide both the context and the justification for the limitation of certain rights. Nor is this formalisation an exclusive one; accommodation clauses in particular articles provide another. Thus terrorist violence might provide the context in which restrictions aimed against terrorist groups on freedom of expression might be justified under Article 10(2) ECHR as being 'necessary in a democratic society, in the interests of national security'. But in *Brogan* the European Court went beyond these devices to provide a further route through which terrorism could be recognized as a ground for the limitation of rights. Although, as noted above, it ultimately held that a period of detention of 4 days and 6 hours without appearance before a judge was not permitted, it nevertheless stated, when examining the requirement under Article 5(3) ECHR that suspects be brought 'promptly' before a judge, that:

[90] In the *Judicial Guarantees* case 9 Inter-Am Ct HR (ser A) at 40 a similar argument was accepted by the Inter-American Court of Human Rights. For an analysis contrasting the approach of the Inter-American Court with that of the European Court of Human Rights see *Ní Aoláin, Emergence* at 126–33.

[91] Para 62.

[92] *Aksoy v Turkey*, 23 EHRR 553 (1996)

[93] *The Greek case (1969) 12 YB 1*.

> The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 para. 3, keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.[94]

This is problematic in that the encapsulation of the terrorism context in the derogation article and in accommodation clauses is constructed as declaratory rather than as exhaustive; another route—that of interpretation—is provided. In effect, terrorism was taken to be a privileged context in which Convention provisions are to be reinterpreted in a manner deferential to the state, producing a result equivalent to the creation of an accommodation clause. That this approach should have been taken in relation to Article 5 is particularly significant, given that Article 5 is generally taken to enjoy a relatively entrenched status.[95]

The permissive contextualization of *Brogan* is indicative of a trend also manifest in the derogation cases: the relatively uncritical approach taken during the conflict by the organs of the European Convention where terrorist violence related to the Northern Ireland conflict has been presented by the UK as a justification for its emergency and anti-terrorist powers. Another example is *McVeigh, O'Neill and Evans v UK*[96] where what was at issue was the use of anti-terrorist powers to question travellers at ports (which did not rely upon a derogation). The applicants in question were detained for 45 hours for questioning, but were neither formally arrested nor questioned about specific offences. The majority of the European Commission took the view that this treatment fell within the boundaries of Article 5(1)(b) which permits detention in order to 'secure the fulfilment of any obligations prescribed by law', and thus there was no breach of Article 5(1). It did find, though that Article 8 had been breached because the applicants had not been permitted to contact their wives during their detention, though while doing so, the Commission was careful to acknowledge that the context of terrorism may justify a greater degree of intrusion than would normally be the case.[97] While occasionally a more stringent approach to the use of emergency powers has been evident from the Commission,[98] subsequent case law has tended to dampen expectations that such cases opened a route to innovative challenge to state action (at least while violence continued).[99] In keeping with this general pattern, nothing came of Strasbourg challenges either to Northern Ireland prison conditions[100] or to

[94] Para 61.
[95] See *Harris et al, European Convention* at 96 and 164.
[96] (1981) 5 EHRR 71.
[97] For a criticism, see S Livingstone 'Reviewing Northern Ireland in Strasbourg 1969–1994' in G Quinn (ed) *Irish Human Rights Yearbook 1995* (Sweet & Maxwell Roundhall 1995) 17 (hereafter *Livingstone, Reviewing*)
[98] See *Fox, Campbell and Hartley v UK* (1990)13 EHRR 157.
[99] Contrast *Fox, Campbell & Hartley v UK* (above) with the subsequent decision in *Margaret Murray v UK* (1994) 19 EHRR 193. See also *O'Hara v UK* (2002) 34 EHRR 32.
[100] *McFeely v UK* (1980) 3 EHRR 161.

electoral rules and practices,[101] though where an issue unrelated to the conflict arose for examination, the European Court on occasion displayed a much sharper edge, refusing to allow the state to shelter behind the margin of appreciation doctrine.[102]

Thus the overall picture was that considerable deference tended to be shown by the European Court of Human Rights to government claims in cases arising out of the Northern Ireland conflict, at least while violence continued. Whether the context of terrorism was encapsulated in derogation provisions or otherwise, the thrust of decision-making was similar (though the degree of latitude afforded to the state was obviously greater where it relied upon a derogation). It is distinctly arguable that this deference came at a cost to international human rights law, and that this degree of deference is related to the nature of the state against which the claims were brought. Specifically, there can be said to have been a damage to derogation norms arising out of the failure of the European Court of Human Rights to deal adequately with the implications of the emergency/normality antimony in the case of Northern Ireland's semi-permanent emergency, and damage to the prohibition against torture, springing from the evaluative approach taken by the European Court to the 'five techniques' of in-depth interrogation.

IV. JUSTICE IN TRANSITION?: ACCOUNTING IN THE INTERNATIONAL ARENA

If the broad picture of ECHR jurisprudence on Northern Ireland up to the end of 1994 was one of considerable deference to conflict-related state claims, that in the last decade or so has been markedly different. Of the 12 cases in which conclusive rulings are available at the time of writing, all resulted in findings of violations on the part of the state.[103] Most of these cases fall into three categories: those relating to deaths caused by direct security force action or where it was alleged that the security forces had acted in collusion with loyalist paramilitaries; those relating to the interrogation centres ('right to silence' and 'access to lawyers' cases); and those relating to security-vetting.

Given the extent of the sea-change in European adjudication, any worthwhile explanation is likely to be multi-factorial. The changing composition of

[101] *Mallon v UK* application No 10316/83. See *Livingstone, Reviewing* at 26.

[102] *Dudgeon v UK* (1982) 4 EHRR 149. For a general account of the European Court's and Commissions jurisprudence on Northern Ireland see B Dickson 'Northern Ireland and the European Convention' in B Dickson (ed) *Human Rights and the European Convention* (Sweet & Maxwell London 1997) 143.

[103] *McCann and Others v UK* (1996) 21 EHRR 97; *John Murray v UK* (1996) 22 EHRR 29; *John Tinnelly & Sons Ltd and Others and McElduff and Others v UK* (1999) 27 EHRR 249; *Averill v UK* (2001) 31 EHRR 36; *Magee v UK* (2001) 31 EHRR 35; *McKerr v UK* (2002) 34 EHRR 20; *Shanaghan v UK*, Appl no 37715/97; *Kelly and Others v UK*, Appl no 30054/96 (4 May 2001); *McShane v UK* (2002) 35 EHRR 23; *O'Hara v UK* (2002) 34 EHRR 32; *Brennan v UK* (2002) 34 EHRR 18; *Finucane v UK* (2003) 37 EHRR 29.

the European Court following the East European accessions may have made a difference. Another factor may have been that the case law involved not only emergency provisions, but also 'ordinary' powers of various sorts. Precedents from other jurisdictions also probably made a difference; recent European jurisprudence on the use of lethal force in Northern Ireland owes an obvious debt to case law from Turkey. Perhaps most importantly though, there is the question of timing: all of the judgments were handed down after the start of the transition in Northern Ireland begun by the paramilitary ceasefires of 1994, and continuing to the present day by way of the 1998 Good Friday/Belfast Agreement. Although the language of 'transition' and 'transitional justice' has not been explicitly invoked by the European Court, it is difficult to avoid the conclusion that the changed Northern Ireland context has been factored in at some level.[104]

Paradigmatically, societies in transition from violent conflict are faced with a challenging legacy: that of serious violations of human rights and humanitarian standards by state and non-state actors.[105] Some have championed prosecution as the most appropriate response;[106] others (Nagel amongst them) have pointed to the importance of official 'acknowledgement' of past wrongdoing.[107] But preceding either, there is need for a *recognition* that there may be something to acknowledge or otherwise deal with. As Méndez puts it: 'The primary task is to recognize that there is a past to be reckoned with.'[108]

Inevitably, any moves in this direction will face resistance and obfuscation in the face of 'states of denial'.[109] This denial can be linked in large measure to the degree to which the laws and institutions of the state are implicated in

[104] For explorations of the 'transitional justice' aspects of the Northern Ireland peace process, see Bell, Peace Agreements; Campbell et al, Frontiers; C Campbell and F Ní Aoláin 'Local Meets Global: Transitional Justice in Northern Ireland' (2003) 26 Fordham International Law Journal 871–92, and the following articles from the special issue of the same journal: K. McEvoy and J. Morison 'Beyond the 'Constitutional Moment': Law, Transition, and Peacemaking in Northern Ireland 961–95; CJ Harvey 'On Law, Politics and Contemporary Constitutionalism' 996–1014; M O'Rawe 'Transitional Policing Arrangements in Northern Ireland: The Can't and the Won't of the Change Dialectic' 1015–73; B Hamber 'Rights and Reasons: Challenges for Truth and Recovery in South Africa and Northern Ireland' 1074–94; C Bell 'Dealing With the Past in Northern Ireland' 1095–147; A Hegarty 'The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland' 1148–92. See also, C Bell, C Campbell and F Ní Aoláin 'Justice Discourses in Transition' (2004) 13 Social and Legal Studies 1 305–28, and F Ní Aoláin and C Campbell 'The Paradox of Transition in Conflicted Democracies' (2005) 27 Human Rights Quarterly.

[105] See P Hayner *Unspeakable Truths: Facing the Challenge of Truth Commissions* (Routledge New York 2003).

[106] See Diane F Orentlicher 'Settling Accounts: the Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 Yale Law Journal 2537.

[107] For a discussion see C Campbell 'Peace and the Laws of War: The Role of International Humanitarian Law in the Post-Conflict Environment' (2000) 82 International Review of the Red Cross 627.

[108] See Juan E Méndez 'In Defense of Transitional Justice' in A James McAdams (ed) *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press Notre Dame 1997) 3.

[109] S Cohen *States of Denial: Knowing about Atrocities and Suffering* (Polity Cambridge 2001).

abusive behaviour during the conflict. The degree of implication in turn helps to explain how within communities at the sharp end of conflict, there is likely to be a significant loss of legal legitimacy.

In the complex transitions of the contemporary world, in which there has been no 'winner' capable of imposing its will on others, there is likely to be no across-the-board dissolution of abusive institutions. Instead, there is likely to be a perceived need for the new (post-conflict) dispensation to accommodate the institutional legacy of the old, to a greater or lesser degree. From this springs a host of debates around institutional 'transformation' and 'lustration' (weeding out the 'bad apples').[110] In such transitions, as Teitel points out, domestic law must play a paradoxical role: it must preserve order while facilitating transformation; it must produce change, while itself being changed.[111]

International law points may provide a particularly important reference point in transitional situations by virtue of its externality to the parties to the conflict. Moves to bring domestic legal provisions into line with leading international standards can play an important role in contributing to the relegitimation of the law in communities in which its legitimacy is fractured or contested. Yet claims as to the appropriateness of particular international standards are not 'value-free'. Rather they are assertions as to what the nature of the conflict was, and as to the scale of transformation required. Returning to a point made at the outset: claims and counter-claims in the international arena are themselves a way of prosecuting the meta-conflict. Rulings by an appropriate international body can be of particular importance in this transitional context because they can provide something like definitive answers to some of these claims. The political significance of such rulings can therefore have a particular intensity (as evidenced by the furore surrounding the advisory opinion of the International Court of Justice on the legality of the wall Israel is constructing in the West Bank).[112]

At a basic level, the recent series of rulings by the European Court on the use of lethal force during, or related to, the Northern Ireland conflict, tell a story about the planning and/or the investigation of particular security force killings, and of killings in which members of the security forces are alleged to have colluded with loyalist paramilitaries. More generally, the failings they identify in institutional behaviour provide markers for a broader examination of security force killings and those allegedly involving collusion with loyalist paramilitaries.

[110] See, eg, R David 'Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989–2001)' (2003) 28 Law & Social Inquiry 2 387; M Los 'Lustration and Truth Claims: Unfinished Revolutions in Central Europe' (1995) 20 Law and Social Inquiry 1 117, and Arthur L Stinchcombe 'Lustration as a Problem of the Social Basis of Constitutionalism' (1995) 20 Law and Social Inquiry 1 245.

[111] See *Teitel, Transitional Justice* at 6–7.

[112] Public hearings in the case concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (request for advisory opinion) concluded on 25 Feb 2004. On 9 July 2004, The International Court of Justice ruled that the separation fence being built by Israel in the West Bank was in breach of international law. See <http://www.icj-ij.org/icjwww/idocket/imwp/imwpframe.htm>.

In at least five respects this jurisprudence marks a break and/or an advance from previous European case law on the use of lethal force in Northern Ireland. The first relates to the question of contextualisation. *Mc Cann and others v UK* (the *Gibraltar* case), involved the killing of three members of an IRA unit suspected of being on a car-bombing mission, but who turned out to have been unarmed. In finding that their right to life had been breached, the Court was careful to insist that Article 2 'enshrines one of the basic values of the democratic societies making up the Council of Europe'.[113] Because of the priority of this right, provisions allowing its limitation (when 'absolutely necessary')[114] were to be tightly construed: a 'stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" '.[115]

It was not that the context of terrorism was entirely ignored. While the Court stated that the soldiers' 'reflex action' in using lethal force '. . . lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society', it added '*even when dealing with dangerous terrorist suspects*' [emphasis added]. This approach was clearly different from the kind of permissive contextualisation found in *Brogan*. On the face of it, the difference is to be explained by reference to the priority attaching to Article 2 rather than to changed estimations of context.[116] But the approach was also markedly different from that taken by ECHR organs in earlier lethal force cases from Northern Ireland, where considerable leeway had been afforded to the state.[117] This suggests that the primacy attached to Article 2 (whereby primacy trumped the terrorist context), itself reflected a changed broader context—a point returned to further below.

[113] At para 147.

[114] Art 2 ECHR provides: '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a.) in defence of any person from unlawful violence; (b.) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c.) in action lawfully taken for the purpose of quelling a riot or insurrection.'

[115] Para 149.

[116] In Ní Aoláin's view, the case 'signalled an equality approach, whereby the status of the victims, in this case as terrorists, was not a means to lessen the value of the right [to life] to them *per se'*, F Ní Aoláin 'Truth Telling, Accountability and the Right to Life in Northern Ireland' EHRLR [2002] at 576 (hereafter, *Ní Aoláin, Truth Telling*).

[117] In *Stewart* (1985) 7 EHRR 453, a claim arising from a plastic bullet death was found to be manifestly ill-founded. Likewise in *X v UK*, a case taken by security force families, a claim that the state had failed adequately to protect their right to life were rejected as ill-founded. An indication of potentially a more stringent approach came in *Farrell* (1983) EHRR 466) when a case involving the killing of a suspected terrorist who was later discovered to have been a non-politically motivated bank-robber, was declared admissible. But owing to a friendly settlement being reached, no ruling was given on the merits. That this case did not represent the a new beginning was confirmed by the rejection as 'manifestly ill-founded' of the *Kelly* case (application no 17579/90, decision of the Commission of 13 January 1993) 16 EHRR 20, in which the victim was a non-political 'joyrider' who had driven a car through an army checkpoint.

The second advance marked by this case law is the shift in focus away from the instant of killing towards structural and procedural issues, either proceeding the killing, or in subsequent investigations. Thus in the *Gibraltar* case a substantive breach of Article 2 was found where the authorities were judged to have committed errors in planning, control, and organization, well before the killings. A critical effect of this is that the focus of responsibility is shifted away from the direct perpetrators of killings towards those higher up the chain of command. This chimes with an issue of increasing concern in general transitional justice discourse: the need for accountability of the 'big fish'.[118]

The other cases, with the exception of two involving alleged collusion (discussed below), and one relating to a death during a street disturbance, all involved killings of terrorist suspects in Northern Ireland by specialist security force units.[119] In these instances the Court found it impossible to decide on the available evidence whether there had been substantive breaches of Article 2 (thus leaving the issue open). Instead it focused on procedural questions, insisting that the combined effect of Articles 2 and of the imperative on the state under Article 1 to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', was to require an effective investigation where individuals were killed as a result of the use of force. On this basis it found that breaches of the procedural dimension of Article 2 had occurred after the deaths, variously because of flaws in the inquest process, in the operation of the DPP's office, and in the police investigation (specifically a lack of independence of the police officers investigating the incident from the officers implicated). A similar approach was taken in respect of a death caused by an army vehicle's crushing an individual during street disturbances.[120]

The third advance is the extension marked in this jurisprudence from concern with killings caused directly by security force personnel, to killings alleged to have resulted from collusion between security force personnel and loyalist paramilitaries. The political sensitivity of such killings cannot be underestimated, given their 'dirty war' resonance. The legal basis for the exploration of the implications under the ECHR of such collusion allegations lay in the application of the procedural principles set out above (ie in the combined effect of Articles 1 and 2 ECHR). In a judgment delivered contemporaneously with the cases on direct security force killings, the Court also

[118] For a good example of the 'big fish' argument (though one with limited applicability to Northern Ireland), see P Akhavan 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' (1998) 20 Human Rights Quarterly 4 737.

[119] *Jordan v UK* (2003) 37 EHRR 2 *McKerr v UK* (2002) 34 EHRR 20, and *Kelly and others v UK*, application no 30054/96, all judgments of 4 May 2001.

[120] In *McShane v UK* (2002) 35 EHRR 23, a breach of the procedural obligations of Art 2 was found because of flaws in the inquest process, because of lack of independence of the police officers investigating the incident from those implicated, and because of a lack of expedition in the police investigation.

found a breach of the procedural dimension of Article 2 where it was claimed that the circumstances of the death pointed to security force collusion.[121] In addition to the kind of procedural failings identified above, the Court listed as shortcomings giving rise to a breach of Article 2 the lack of a prompt or effective investigation into the allegations of collusion; the lack of independence of the police officers investigating the incident from the security force personnel alleged to have been implicated in collusion; and the exclusion of the collusion issue from the scope of the inquest. The most recent re-iteration of this jurisprudence came in the *Finucane* case, which involved well-documented allegations of collusion in relation to the murder of a leading defence lawyer.[122] In this instance, the European Court found that defects in earlier investigations were not cured by subsequent special police inquiries, the most recent of which was held ten years after the murder, and the full version of the report of which was not made public.

The fourth break marked by this case law with earlier Northern Ireland jurisprudence lay in the willingness of the Court to draw upon international standards beyond the ECHR,[123] in marked contrast to the approach evident in *Brannigan and McBride*. This shift coincided roughly with the emergence of significant criticism of the UK's record in relation to the right to life in Northern Ireland in other international fora.[124] Correspondingly, other international bodies have been displaying an increasing degree of reciprocal cross-referencing to the European Court in evaluating Northern Ireland material.[125]

A final point of departure from past approaches is to be found in the 'fit' between the Northern Ireland and Turkish cases. The divergent approaches in *Brannigan and McBride* and *Aksoy* have already been noted; by contrast the jurisprudence evident in cases such as *Shanaghan* and *Kelly* meshes virtually

[121] *Shanaghan v UK*, Appl no 37715/97 (4 May 2001).

[122] *Finucane v UK* (2003) 37 EHRR 29.

[123] The documents drawn upon by the European Court in *Jordan* and the other cases of May 2001 included the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions,* and the *Minnesota Protocol (Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*). The Court also made reference to the work of the European Committee on the Prevention of Torture in relation to the need for independent investigation of police wrong-doing in the UK

[124] In 1998 a detailed report by the UN Special Rapporteur on the Independence of Judges and Lawyers which followed a fact-finding mission to the UK, raised serious concerns about allegations of security force collusion in the murder of Pat Finucane, a leading defence lawyer, and called for an independent judicial inquiry to investigate the matter. See Report on the Mission of the Special Rapporteur to the United Kingdom of Great Britain and Northern Ireland, which formed an addendum to the annual report of the Rapporteur to the Commission on Human Rights, UN Doc E/CN.4/1998/39/Add.4, 5 Mar 1998.

[125] The Human Rights Committee listed the implications of *Jordan* and the other right to life cases of May 2001 (which it explicitly referred to), as an issue which it wished to raise with the UK in its consideration of the state's fifth periodic report under the ICCPR in 2001. See List of Issues: United Kingdom of Great Britain and Northern Ireland, 25/7/2001, CCPR/C/L/UK, para 12.

seamlessly with *Kaya* and similar rulings[126] from Turkey. The significance of this lies in the erosion of perceptions of the 'exceptionality' of the Northern Ireland experience.

The rulings have both a qualitative and a quantitative significance, given that the record of official investigations of deaths in many other cases of direct or indirect alleged security force involvement is unlikely to have been of a higher quality than the investigations that were the subject of recent European scrutiny. The total number of security force killings during the conflict amounted to 363 or 10 per cent of the total. Killings attributed to Loyalist paramilitaries totalled 1020 or 29 per cent.[127] Of these, an indeterminate number involved allegations of security force collusion.

The thrust of the rulings is to force official recognition that there is a 'past to be reckoned with' in the Northern Ireland transition.[128] They therefore contribute to Méndez's 'primary task'. Partly too, they represent a move to the next stage in dealing with the past, in that they constitute a degree of 'acknowledgment' at the European level of substantive wrong-doing during the conflict.

Even if the judicial approach at the domestic level to the Article 2 jurisprudence has been muted (the House of Lords refused in March 2004 to order fresh investigations),[129] this response should nevertheless be viewed in the context of a growing official acceptance that the conflict has left legacies that demand examination. The most striking evidence of this kind of recognition can be found in the establishment of the Saville Inquiry into the Army's 1972 'Bloody Sunday' killings.[130] Another example is the initiative (with the Irish Government), under which a former Canadian judge (Peter Cory), was given the task of investigating allegations of security force collusion in eight high

[126] *Kaya v Turkey* (1999) 28 EHRR 1; *Salman v Turkey* (2002) 34 EHRR 17; *Cakici v Turkey* (2001) 31 EHRR 5; *Ertak v Turkey*, Application no 20764/92 (May 9 2000); *Timurtas v Turkey* (2001) 33 EHRR 6; *Yasa v Turkey* (1999) 28 EHRR 408.

[127] These and the other statistics in this paper on conflict fatalities come from Malcolm Sutton, 'An Index of Deaths from the Conflict in Ireland', covering the years 1969–2001. This is available on the CAIN website at <http://cain.ulster.ac.uk/sutton/tables/Organisation_Summary.html> last visited 16 Aug 2004.

[128] In response to the Art 2 judgments of the European Court, the Government presented a package of proposals to the Committee of Ministers of the Council of Europe which, under Art 46(2) ECHR has responsibility for supervising execution of Court judgments. These fell short of plans for full reinvestigations. The Committee of Ministers in an interim resolution of 23 Feb 2005 reiterated its position that '. . . there is a continuing obligation [on the UK] to conduct . . . investigations inasmuch as procedural violations of Article 2 were found in these cases'. Committee of Ministers Interim Resolution ResDH (2005) 20.

[129] In a test case exploring the implications of the recent Art 2 rulings of the European Court, the House of Lords rejected an application for an order compelling the Secretary of State for Northern Ireland to hold an effective investigation into one of the deaths in question. In *Re McKerr (AP) (Respondent) (Northern Ireland)* [2004] 2 All ER 409. See also decision of the Northern Ireland Court of Appeal in *PSNI v McCaughy & Grew* [2005] NICA 1.

[130] See A Hegarty op cit.

profile deaths on both sides of the Irish border.[131] Following Cory's critical reports, the Government announced that inquiries would be held into the Northern Ireland cases in question, although movement on one of these cases (Pat Finucane) was delayed, ostensibly on the grounds of pending prosecutions.[132] Subsequently it was announced that the latter inquiry could proceed, but only once new legislation was on the statute books designed to take account of 'the requirements of national security'.[133]

These initiatives have contributed to a broader debate, with the Chief Constable of the Police Service of Northern Ireland suggesting a South African-style Truth and Reconciliation Commission (TRC).[134] The truth commission option was also canvassed by the Prime Minister in his response to the Cory recommendations.[135] Doing so displayed some continuity with previously voiced concern with dealing with the past, evident in his 2 June 1997 expression of regret for some historic British wrong-doing in Ireland.[136]

While the rationale articulated by the Chief Constable lay largely in the need to deal with the legacy of the conflict's unsolved murders (which he numbered at 1,800), the truth commission option could also be considered, in part, as a vehicle for dealing with implications of the Article 2 ECHR jurisprudence. The situation in this regard is not without its ambiguities and uncertainties. On face value, the initiative seems designed to lead to some kind of engagement with the legacy of past abuses (and thus potentially to promote some kind of diffuse accountability). But if the truth commission option were to be used to evade rather than to engage with the international legal obligations flowing from recent European case law, the proposal could point in precisely the opposite direction.

[131] In the 2001 'Weston Park' discussions, the British and Irish Governments agreed to 'appoint a judge of international standing from outside both jurisdictions to undertake a thorough investigation of allegations of collusion in the [named] cases.' The text of the Weston Park statement of 1 Aug 2001 can be found at <http://www.cain.ulst.ac.uk>.

[132] On 1 Apr 2004, the Secretary of State Paul Murphy announced the British Government's response to the Cory Reports. See <http://www.nio.gov.uk/media-detail.htm?newsID=8547>. On 16 Nov 2004, the British Government announced the terms of reference and the panel members for three inquiries. The inquiries into the murders of Rosemary Nelson and Robert Hamill will be held under Section 44 of the Police (Northern Ireland) Act 1998, and the inquiry into the murder of Billy Wright will be held under section 7 of the Prison Act (Northern Ireland) 1953. For a full text of the announcement see <http://www.nio.gov.uk/media-detail.htm?newsID=10521>.

[133] For a full text of the statement, made by Secretary of State Paul Murphy on 23 Sept 2004, see <http://www.nio.gov.uk/media-detail.htm?newsID=10299>. On 25 Nov 2004 an 'Inquiries Bill' providing for restrictions on public access to inquiries was introduced.

[134] See 'Police Chief Calls For Truth and Reconciliation in Ulster' *The Guardian* 23 Feb 2004.

[135] In his monthly press conference at Downing Street on 1 Apr 2004. See <http://www.number-10.gov.uk/output/Page5606.asp>.

[136] Tony Blair's view of the 19th Century Irish Famine (when all of Ireland was part of the UK) delivered in a public message in 1997 was: 'That one million people should have died in what was then part of the richest and most powerful nation in the world is something that still causes pain as we reflect on it today. Those who governed in London at the time failed their people through standing by while a crop failure turned into a massive human tragedy . . .' The full text of Prime Minister Blair's message is available at < http://www.britainusa.com/nireland/articles_show.asp?SarticleType=21&Article_ID=179>.

While no single global truth commission model exists, the general pattern is for such bodies to concern themselves with violations across the spectrum of perpetrators and, therefore, frequently with the activities of both state and non-state actors (in Northern Ireland, republican paramilitary groups accounted for 2054 or 58 per cent of the total killings). The need to find an appropriate international legal standard for non-state actors in particular (both Loyalist and Republican), is likely to compel reference to international humanitarian standards (as was the case with the South African TRC). Thus even though such standards may have had little more than a spectral impact in Northern Ireland while violence continued, the need to deal with the legacy of the conflict may have given them a kind of *ex-post facto* importance.

As regards some other implications of the Article 2 decisions for Northern Ireland, it was suggested above that international legal standards can play a particularly important role in transition because the approximation of domestic to international standards can play an important role in building the legitimacy of domestic law in communities that have been at the sharp end of conflict. In that regard, the rulings have buttressed the process of change in relation to police reform/transformation, the independent investigation of police wrongdoing, and inquests, all sites of profound attrition during the conflict.

Other recent European rulings from Northern Ireland follow a similar pattern. The domestic provisions allowing a detainee's right to access to a solicitor to be delayed,[137] and permitting inference to be drawn from an accused's silence,[138] have been the subject of increasing international criticism. The 'right to silence' provisions attracted pointed criticism during consideration by the UN Committee Against Torture in 1991, with the Country Rapporteur expressing the view that 'The arguments put forward to justify the refusal of the right to silence were all the less acceptable because the suspect was deprived of the assistance of a solicitor'.[139] Likewise the Human Rights Committee in its concluding observations on the fourth UK periodic report under the ICCPR in 1995 noted 'with concern' that the limitation on the right to silence 'violates various provisions in Article 14 [right to fair trial] of the Covenant'.[140] Further criticisms followed in the concluding

[137] Provisions allowing access by a detainee to a lawyer to be deferred for up to 48 hours at a time are to be found in s. 15 EPA 1987, s 47 EPA 1996, and Schedule 8, para 8 of the Terrorism Act 2000.

[138] The Criminal Evidence (Northern Ireland) Order 1988 (which applied in both terrorist-type and ordinary cases), permitted a court to draw such inferences as it thought fit (including adverse inferences) in four sets of circumstances: from the failure of the accused to testify when called upon to do so by the court; or from the accused's earlier failure during police questioning to explain marks on clothing; or to account for his or her presence at the arrest location; or to mention 'a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention. . . .' .

[139] *Committee Against Torture, Summary Record of the 92nd Meeting*, para 62, UN Doc CAT/C/SR.92

[140] *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, UN Doc A/50/40 3 Oct 1995, para 24.

observations on the fifth periodic report in 2001[141] (Britain shielded itself from individual complaints by refusing to ratify the optional protocol to the ICCPR.) Issues surrounding deferral of access have been among several difficulties faced by defence lawyers in Northern Ireland that have led in their own right to expressions of concern by, amongst others, the UN Special Rapporteur on the Independence of Judges and Lawyers.[142]

In assessing the compatibility with Article 6 ECHR of the use of the provisions governing access to solicitors and the 'right to silence', the European Court and the former Commission have been careful to avoid condemnation in the abstract. Following their well-established pattern in relation to national approaches to the treatment of evidence, they have emphasized that compensating safeguards can be offset against restrictions imposed on the defence. Nevertheless breaches of Articles 6(3)(c) and 6(1) ECHR were found in a series of decisions delivered during the transition, involving various combinations of the 'right to silence' and 'deferral of access' legislation. As the European Court put it in the lead case (*John Murray*) 'the scheme contained in the ['right to silence'] Order is such that it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation'.[143] This stream of jurisprudence was further developed with findings of breaches of the same provisions where convictions had been obtained on the basis of confessions obtained when access to a solicitor had been denied,[144] and where access had been granted only within hearing of a police officer.[145]

It was also Article 6 ECHR that was primarily at issue in the third tranche of recent case law: that relating to a security-vetting mechanism built into fair employment legislation.[146] The statute in question made a Minister's certificate shielding a security-vetting procedure 'conclusive' that the process was 'done for the purpose of safeguarding national security or of protecting public safety or public order',[147] thus limiting the possibility of domestic judicial scrutiny. In the instant cases, this was held to be a disproportionate restriction on the applicants' right of access to a court or tribunal, thereby giving rise to a breach of Article 6.

In both tranches of cases the Court explicitly drew upon international stan-

[141] See para 17, Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, 5 Nov 2001, UN Doc CCPR/CO/73UK, CCPR/CO/73/UKOT.

[142] See 'Report on the Mission of the Special Rapporteur to the United Kingdom of Great Britain and Northern Ireland', which formed an addendum to the annual report of the Rapporteur to the Commission on Human Rights, UN Doc E/CN.4/1998/39/Add.4, 5 Mar 1998.

[143] Para 66. See generally, C Campbell 'Two Steps Backwards: The Criminal Justice (Terrorism and Conspiracy) Act 1998' 1999 Criminal Law Review 941–59.

[144] *Magee v UK* (2001) 31 EHRR 35.

[145] *Brennan v UK* (2002) 34 EHRR 18.

[146] *John Tinnelly & Sons Ltd and Others and McElduff and Others v UK* (1999) 27 EHRR 249.

[147] Section 42 Fair Employment (Northern Ireland) Act 1976.

dards beyond the ECHR, including the American Convention on Human Rights and EU law.[148] Both are also notable for an absence of attempts by the Court to contextualise the contested procedures in terms of Northern Ireland terrorism, in a way favourable to the state. This is despite the fact that, although the judgments came during the transition, the incidents complained of occurred while violence continued. One possible explanation is that the rights guaranteed in Article 6 ECHR are sufficiently entrenched to be considered 'context-proof'. But Article 5 ECHR rights are likewise considered entrenched, yet in *Brogan* the context of Northern terrorism was taken to grant an important degree of leeway to the state.

Related to the question of context is that of the sensitivity of the provisions in question. The security-vetting cases focused on a particular mechanism designed, it was claimed, to protect the most prized commodity in the anti-terrorist armoury—the intelligence source. The 'right to silence' and 'access' cases all related to the operation of specialist anti-terrorist interrogation centres. As such, these centres functioned as feeder-mechanisms for the Diplock Court system—the centrepiece of the criminalization strategy pursued for most of the 'Troubles'. The effect of the rulings was to cast doubt on significant elements of this system, thus damaging the general credibility of convictions obtained in the anti-terrorist courts. This in turn fed into the broader transitional debate, resonating with calls for an amnesty for troubles-related offences (and a truth commission), from the chairperson of the Policing Board established under the Good Friday Agreement.[149]

It is difficult therefore to avoid the conclusion that the transition in Northern Ireland has created not only a new political context, but also a new context for the application of international human rights law. Crucially, this is true not only in relation to the evaluation of events during the transition, but also in relation to *ex post facto* assessment of state behaviour during the conflict—to the question of 'policing the past'.[150] Whereas ECHR jurisprudence during the conflict was shaped by one dominant contextualization (that of terrorism in a liberal democracy), that during the transition displays a double contextualization. The context of terrorism is articulated in varying degrees, but the transition provides a second, implicitly recognized context, which seems to affect the weighting given to the first: the context of terrorism is implicitly sited in the context of transition. This analysis therefore confirms that as Ní Aoláin has asserted in relation to the Article 2 cases, the broad

[148] In *Tinnelly* the European Court of Human Rights made explicit reference to the judgment of the European Court of Justice in *Johnstone v Chief Constable of the RUC* [1986] ECR 1663 in which, in a preliminary reference, the ECJ had taken the view that the then existing security exemption provisions in relation to sex discrimination (which paralleled those complained of in *Tinnelly*) were incompatible with Community law (paras 46–8).

[149] 'Amnesty and NI Truth Commission Proposed' *Irish Times* 19 Feb 2004.

[150] S Cohen 'State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past' (1995) 20 Law and Social Inquiry 7.

patterns of recent ECHR jurisprudence should be conceptualized in terms of the 'transitional legal landscape in Northern Ireland'.[151]

V. CONCLUSIONS

Viewed simply as a set of norms, there has been little consistency in the way in which international human rights law has been applied in relation to the Northern Ireland conflict by international adjudicatory bodies. One interpretation might be that international human rights law displays a high degree of inconsistency. Perhaps a better approach lies in a process-focused, contextual, view of international law (with context being defined in terms of both the nature of the state and of the challenges it faces).

The example of Northern Ireland suggests that at the point of conflict's eruption, leading Western states are well placed to define context in a way that is favourable to their interests. The 'shock' effect of the eruption of violent conflict and terrorism tends to produce an environment in which international human rights mechanisms may display a high degree of indulgence to state claims. For as long as violence continues, the threat it is seen to pose to a liberal-democratic state contributes to a context where at least some of this indulgence is likely to persist. With the passage of time though, a gradually more stringent approach may be evident, particularly from thematic mechanisms focusing on patterns of abuse.

Northern Ireland also suggests that a peace process, marking the beginning of a transition from violence, creates a new context in which a much more critical approach may be evident from international adjudicatory bodies, even in the absence of a rhetoric of 'transitional justice'. This may be true not only of judgements in relation to the state's conduct during the transition, but also of retrospective evaluation of action taken during the violent conflict. Thus the 'past' may be policed in a way in which it was not when it was the 'present'.

This focus on international law as *process* is not intended to dismiss discussion of the law's normative content. Rather, it seeks to explain how seemingly contradictory approaches to certain norms may yet display an internal logic of sorts. It is also consistent with a view that the processes in question, even if displaying a degree of cohesion (and therefore predictability), may nevertheless inflict damage on the norms *qua norms* that they encompass. The best example from Northern Ireland is the damage done to the derogation mechanism of the ECHR (Article 15), by the failure of the European Court of Human Rights to take seriously the implications of the normalcy-exception paradigm for an 'emergency' stretching to several decades. Another crucially important example from the region is the damage done to the prohibition against torture by the European Court decision in *Ireland v UK*.

[151] *Ní Aoláin, Truth Telling* at 573.

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None of this is to suggest that there can be any automatic transposition of the analysis of the UK's record in Northern Ireland to the US's 'war on terror'. The two conflicts are quite different, and the US is a true hegemon, in a manner in which the UK is not. Some elements of the analysis though, may be applicable. Viewing international law as in process-focused rather than norm-focused terms helps to explain why, in the immediate aftermath of the 9/11 atrocities, international mechanisms were so facilitative of US approaches.[152] This insight also helps to explain why criticism of the manner of the pursuit of the 'war on terror' by the US and its allies by reference to international human rights standards was initially so muted. But it also assists in explaining why, as the 'war' has continued, increasing friction in international mechanisms has become evident.[153]

If this analysis is correct, it may suggest that a transition from violent conflict may produce quite critical *ex-post facto* judgments on how the 'war' was pursued (whether in relation to the treatment of Guantanamo Bay detainees, or that of detainees or civilians in Iraq and Afghanistan). This assumes, of course, that the 'war' will end at some point (more or less), and at present it is difficult to see how a clear end might be possible.

It also runs into the counter-argument that the extent of Ameican pre-eminence is such that the US may, if it wish, act with little regard to international norms it views as 'unhelpful', or may have regard to such norms only on its own terms, without any meaningful accountability, either now or in the future. Put crudely, if the US decided to ignore certain norms, there is little in the way of an obvious mechanism that might compel it to do so. In any case, it may be claimed that the area of international law most in focus in the 'war on terror' is not international human rights law, but the law on the use of force. Even if Northern Ireland may offer some pointers on the reach of international human rights law, it may be wrong to transpose such arguments to the law on the use of force.

It may be though, that the processes and mechanisms underpinning international law and international relations are more subtle and more complex than such counter-arguments might suggest. The example of Northern Ireland demonstrates that the application of international human rights law to a violently conflicted democracy is not simply a question of measuring the state's behaviour against a set of norms in an abstract manner; rather the nature of the state impacts upon the interpretation and therefore the 'meaning' of the

[152] UN Security Council Resolutions passed in the aftermath of the 11 September attacks include UNSC Res. 1368 12 Sept 2001, UNSC Res 1373 (establishing the Counter Terrorism Committee), 28 Sept 2001, UNSC Res 1377 12 Nov 2001.

[153] See, eg, the statements issued by the UN Secretary-General Kofi Annan in relation to the mistreatment of prisoners in Abu Ghraib Prison, SG/SM/9283-IK/432, 30 Apr 2004 and 17 June 2004 see <http://www.un.org/apps/sg/offthecuff.asp?nid=596>. See also the muted criticisms by the UN High Commissioner for Human Rights of some US actions in *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: The Present Situation of Human Rights in Iraq* E/CN.4/2005/4, June 2004.

norms. During the conflict this meaning tends to accommodate itelf to the requirements of the state, thus narrowing the sphere in which compliance is likely to prove an issue. In the post-conflict environment, this kind of accommodation may be much less in evidence, but here compliance is likely to be perceived by the state to be less problematic, precisely because the violent challenge no longer continues. The terrain of compliance-challenges and the conflicted democracy, is therefore a shifting one. Toope makes the valuable point that even in the case of a hegemon, there may be key imperatives pushing against non-compliance.[154] These include the self-perception of the state as a democratic, law-based entity, broader conceptions of international legitimacy, and perhaps, perceptions of long-term self-interest. It may be the case, therefore, that international human rights and international humanitarian law may ultimately 'bite' in relation to the 'war on terror' in a way in which they appear not to do at present, albeit that this bite may be partly retrospective.

[154] S Toope 'Powerful but Unpersuasive? The Role of the United States in the Evolution of Customary International Law in *Byers and Nolte, Hegemony* at 287.

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