

# Human Rights and Political Resolution in Northern Ireland

Kevin Boyle†

At its heart, the Northern Ireland problem concerns the constitutional and political fate of territory in dispute between the Irish and British states. Reluctantly but from necessity, the two governments must now face the implications of that fact. If there has been any progress during the last decade of violence, it has come in the form of a better understanding of the political and constitutional issues by both governments and peoples. No longer is the situation presented as exclusively one of archaic religious animosity between Protestants and Catholics still fighting the religious wars of the seventeenth century. Nor do the psychological theories that interpret community divisions between majority and minority as simple prejudice enjoy the currency they once did. The problem is now correctly interpreted as a highly complex conflict of identities and nationalisms which implicates both states in its genesis and in its possible resolution.<sup>1</sup>

It is difficult to decide whether the economic crisis or the political crisis is more acute in Ireland today. The economy of Northern Ireland is feared by many to be in irreversible decline due to the combined effects of the political violence and worldwide economic recession.<sup>2</sup> The economy of the Republic of Ireland is also in serious difficulty due to large external debt and rising unemployment. Recession is something the island shares with the rest of the world and, with the rest of the world, Ireland hopes for economic improvement. However, Northern Ireland's post-colonial political crisis is a unique burden which permits little optimism. Since the Irish "troubles" entered a violent phase

† Professor of Law, National University of Ireland; Director, Irish Centre for the Study of Human Rights, University College, Galway.

1. This definition of the problem underlies the latest British policy document. *See* NORTHERN IRELAND: A FRAMEWORK FOR DEVOLUTION, CMD. 5, No. 8541 (1982).

2. For detailed economic assessments and forecasts, see *THE NORTHERN IRELAND ECONOMY: THE CURRENT ECONOMIC SITUATION AND PROSPECTS* (Coopers & Lybrand Assocs. 1982) and *ECONOMIC SCENARIOS TO 1990: TECHNICAL APPENDICES* (Coopers & Lybrand Assocs. 1982). *See also* R. HUTCHINSON & J. SHEEHAN, *A REVIEW OF SELECTED INDICATORS OF ECONOMIC PERFORMANCE IN NORTHERN IRELAND AND THE REPUBLIC OF IRELAND DURING THE 1970'S* (1980); *ECONOMIC ACTIVITY IN IRELAND* (N. Gibson & J. Spencer eds. 1977); Gibson, *Political and Economic Integration*, in *POLITICAL COOPERATION IN DIVIDED SOCIETIES* 97 (D. Rea ed. 1977).

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over a decade ago, 2,000 people have died in Northern Ireland and property destruction has been enormous.<sup>3</sup>

In a conflict as protracted as that in Northern Ireland, human rights concerns can no longer be treated separately from the issue of the political fate of the territory. The safeguarding of human rights requires a stable political process, and a political structure can only endure if it is consciously built around respect for the rights of individuals and minorities.

Northern Ireland has never been an effective political democracy and little time remains to make it one. The alternative is a widening of the violence and the extraordinary prospect of a civil war in a part of Western Europe in the last decades of the twentieth century.

The purpose of this paper is not to account for the Northern Ireland conflict or to propose particular resolutions.<sup>4</sup> Its more limited purpose is to isolate and comment upon those features of the Northern Ireland experience relevant to the protection of human rights by law in conditions of serious internal strife.<sup>5</sup> The paper first examines the concept of an "emergency" in international law and its application to the situation in Northern Ireland. The contrasting roles played by international judicial bodies and the domestic common law courts have been a major feature of the emergency. The paper then considers the impact of security measures on human rights. Interrogation powers, the political status of detainees, and the use of lethal force by security officers are explored as examples of infringement of human rights during the emergency.

### I. Emergency Conditions in Northern Ireland

An incontestable emergency continues in Northern Ireland. The I.R.A. has declared its aim of forcing a British withdrawal and overthrowing the Republic's Government. Loyalist paramilitary groups re-

3. For general accounts of the period, see K. BOYLE, T. HADDEN & P. HILLYARD, *LAW AND STATE: THE CASE OF NORTHERN IRELAND* (1975) [hereinafter *LAW AND STATE*]; SUNDAY TIMES INSIGHT TEAM, *ULSTER* (1975); J. DARBY, *CONFLICT IN NORTHERN IRELAND: THE DEVELOPMENT OF A POLARISED COMMUNITY* (1976); Palley, *The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution*, 1 *ANGLO-AM. L. REV.* 368 (1972).

4. See, e.g., R. ROSE, *GOVERNING WITHOUT CONSENSUS: AN IRISH PERSPECTIVE* (1971); Whyte, *Interpretations of the Northern Ireland Problem: An Appraisal*, 9 *ECON. & SOC. REV.* 257 (1978); N. MANSERGH, *THE IRISH QUESTION, 1840-1921* (rev. ed. 1965); H. CALVERT, *CONSTITUTIONAL LAW IN NORTHERN IRELAND* (1978).

5. See *LAW AND STATE*, *supra* note 3; see also K. BOYLE, T. HADDEN & P. HILLYARD, *TEN YEARS ON IN NORTHERN IRELAND* (1980) [hereinafter *TEN YEARS ON*]. The conflict has been reported on regularly by the Northern Ireland Civil Rights Association and by the U.K. National Council for Civil Liberties.

act violently against Catholic citizens and their property. The cycle of alternative crisis and stalemate in the political process has exacerbated the situation and allowed violence to flourish.

When armed and clandestine groups announce a policy of attacking and destroying the existing state, the authorities can claim title to special measures of defense. One consequence is the abrogation of the rights normally enjoyed by citizens. It would be utopian to expect that all abuses of human rights can be avoided in an emergency. Nevertheless, for a democratic government under real conditions of emergency, the concern is to prevent disproportionate reactions and to minimize the risk that officials and security forces will react to increased powers by excessive and illegal actions with the expectation that they will not be brought to account. The experience of the last decade in Ulster, even with a democratic government such as Britain's, underlines how difficult it is to ensure such objectives.

Under very difficult conditions both the United Kingdom and the Republic of Ireland have demonstrated at least some commitment to legality. There has not been a policy of wholesale abuse of emergency powers. The powers granted do not allow the suppression of freedom of speech and the imprisonment of the opposition in either state. Indeed, in Northern Ireland in particular, the powers granted are noteworthy for their narrow scope; they require renewal by Parliament semiannually or yearly; and their exercise can be questioned in the legislature and by a free press. The British government has established a Standing Advisory Commission on Human Rights in Northern Ireland which, over the years, has pointed to many of the deficiencies mentioned here, and also attempts to monitor the functioning of the exceptional measures on a continuous basis. Above all, the governments have submitted to international review at a time when it might be expected that state sovereignty and domestic jurisdiction would be asserted.

The interplay of international scrutiny and the involvement of municipal courts has helped limit the abuses of human rights under the emergency. At the same time, the judicial scrutiny possible under international law and through international bodies illustrates the relatively marginal role of the common law courts under national security measures.

#### A. *International Scrutiny*

Since Britain became one of the founding signatories of the European Convention on Human Rights, the conflict in Northern Ireland

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has been almost continuously on the agendas of the organs of the Convention. Among the first derogations from the Convention was a notice from the United Kingdom in respect of Northern Ireland. The derogation first notified in 1957 has never been withdrawn. Northern Ireland thus has been formally treated as subject to a public emergency and excluded from one or other of the Convention's major protections due to a "public emergency affecting the life of the nation" over the effective life of the Convention.<sup>6</sup>

The jurisprudence of the Commission and Court of Human Rights has established the following characteristics of an emergency where article 15 of the Convention is invoked: (i) the emergency must be actual or imminent; (ii) its effects must involve the whole nation; (iii) the continuance of the organized life of the community must be threatened; and (iv) the crisis or danger must be exceptional in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health, and order, are plainly inadequate.<sup>7</sup>

It does not follow, however, that the proclamation of a public emergency either absolves governments from all their obligations under the Convention or removes the element of international supervision. It is clear from the jurisprudence of the Convention that the Commission and Court consider themselves empowered to review the entitlement of a state to derogate from protected rights in the first place and to determine, given that derogation is justifiable, whether the state has taken such measures only "to the extent strictly required by the exigencies of the situation." The emergency in Northern Ireland therefore has not prevented important proceedings under the Convention.<sup>8</sup>

Article 15 of the Convention also limits the state's powers in an emergency through the concept of non-derogable rights. Thus, article 3 (prohibition on torture), article 4 (forced labor), article 7 (retroactive penal law), article 14 (discrimination), and article 2 (the right to life except "in respect of deaths resulting from lawful acts of war") may not be derogated from in any circumstances. In comparison with other situations in the world in which national security laws are deployed, the

6. The texts of the notices of derogation are gathered in *STANDING ADVISORY COMMITTEE ON HUMAN RIGHTS, THE PROTECTION OF HUMAN RIGHTS BY LAW IN NORTHERN IRELAND*, CMD. 5, NO. 7009 (1977) [hereinafter *PROTECTION OF HUMAN RIGHTS*].

7. *Lawless Case*, 1960 Y.B. EUR. CONV. ON HUMAN RIGHTS 492 (Eur. Comm'n on Human Rights); *Regina v. Deery*, 1977 N. Ir. 164, 166 (1977); see also Buergenthal, *To Respect and To Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS* 72 (L. Henkin ed. 1981).

8. Boyle & Hannum, *Ireland in Strasbourg: An Analysis of Northern Irish Proceedings Before the European Commission of Human Rights*, 7 IR. JUR. 329 (1976).

degree of effective scrutiny of such exceptional measures possible under the Convention is remarkable. But one equally remarkable feature in the United Kingdom's case is the contrast between acceptance of international judicial review and the domestic reality of judicial subordination. However valuable international complaints, procedures, and adjudications may be, they cannot substitute for the protection offered by a national judicial system, particularly where the government resorts to far-reaching powers.

### B. *Common Law Impotence under Emergency Conditions*

Political division and emergency conditions have demonstrated the inadequacy of the common law courts as protectors of human rights during times of tumult and conflict. Particularly striking is the total inadequacy of the law in providing remedies for grievances of maladministration and injustice. One example illustrates the general pattern of common law inadequacy.

In 1965, following the introduction of legal aid in Northern Ireland, an application for legal aid to challenge discrimination in housing by a local council was made to the Legal Aid Committee on behalf of the Campaign for Social Justice. That Committee, in a decision confirmed by the Appeal Aid Committee, refused legal aid because the application did not disclose a cause of action with the reasonable chance of success necessary to justify expenditure of public funds.<sup>9</sup> This approach characterized the legal advice given over the next few years to groups wishing to use the law for remedying grievances. It has been argued that the position as to legal remedies was not as bad as advised, and that a successful challenge to the discriminatory practices might have been pursued under the Government of Ireland Act of 1920.<sup>10</sup> Perhaps due to a combination of legal conservatism on the part of the bar and reluctance by minority groups to persist in their attempts, challenges through legal processes brought few limitations to abuses of power in Northern Ireland.

Hindsight shows that Northern Ireland was the wrong place to rely on the traditional English assumption that abuses of power could be left to common law and common sense. The theory of parliamentary sovereignty conflicts with the concept of fundamental or inalienable rights that are subject to judicial protection. This conflict becomes acute under emergency conditions. As Lord Scarman commented:

9. LAW AND STATE, *supra* note 3, at 11-12.

10. Palley, *supra* note 3, at 383-96.

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When times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual and respects human personality. But when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it cannot resist the will however frightened and prejudiced it may be, of Parliament. . . . It is the helplessness of the law in the face of the legislative sovereignty of Parliament which makes it difficult for the legal system to accommodate the concept of fundamental and inviolable human rights.<sup>11</sup>

The final court of appeal for Northern Ireland, the House of Lords, has proved Lord Scarman's contention by its actions during the emergency. *McEldowney v. Forde*<sup>12</sup> was one of the few legal challenges to Northern Ireland's code of emergency powers to come before the House of Lords. The case challenged the Civil Authorities (Special Powers) Act (Northern Ireland), 1922,<sup>13</sup> a permanent code of exceptionally wide executive powers that had been passed by the Northern Ireland Parliament. The Act gave the executive unfettered discretion over detention without trial, house arrest, expulsion, and the banning of organizations, publications, and public meetings. In *McEldowney v. Forde* the appellant had been prosecuted for breach of a regulation proscribing membership in a political organization, a republican club.<sup>14</sup> The appellant challenged the order as void under the Act, claiming that it was impermissibly broad and arbitrary in its scope, and that it exceeded the power granted by the Act.<sup>15</sup> The majority upheld the regulation, reasoning that, in the absence of bad faith, which had not been alleged, the Minister of Home Affairs alone could decide on the subversive nature of any organization and the necessity of its proscription. Lord Pearson commented:

The Northern Ireland Parliament must have intended that somebody should decide whether or not the making of some proposed regulation would be conducive to "preservation of the peace and maintenance of order." Obviously it must have been intended that the Minister of Home Affairs could decide the question. Who else could? . . . The Courts cannot have been intended to decide such a question because they do not have the necessary information and the decision is in the sphere of politics, which is not their sphere.<sup>16</sup>

11. ENGLISH LAW—THE NEW DIMENSION 15 (1974). For an important critique of human rights protections under English constitutional law, see Lester, *Fundamental Rights in the United Kingdom*, 125 PENN. L. REV. 337 (1976).

12. [1969] 2 All E.R. 1039.

13. N. Ir. Pub. Gen. Acts, 12 & 13 Geo. 5, ch. 5, *repealed by* the Northern Ireland (Emergency Provisions) Act, 1973, ch. 53, § 31(2).

14. [1969] 2 All E.R. at 1041.

15. *Id.* at 1044.

16. *Id.* at 1066.

This approach of the common law courts contrasts sharply with the approach of the European Commission and the Human Rights Court. The question raised in *McEldowney v. Forde* would have been within the competence of the European Commission and Court, as it directly raised the rights to freedom of speech and association under articles 10 and 11 of the Convention. The articles permit limitations on these rights; nevertheless, the organs of the Convention are empowered to decide if a limitation, including as in this case the removal from opponents of a government of all right to organize politically, would be justified in a democratic society.

It would be inaccurate to conclude that the judiciary, particularly in the local courts, has not attempted to protect and defend individual citizens. In a number of important decisions the courts have criticized the security authorities or declared their actions illegal.<sup>17</sup> All these decisions, however, were subsequently reversed legislatively by Parliament. A typical example was *Regina (Hume and Others) v. Londonderry Justices*.<sup>18</sup> The Northern Ireland Court of Appeal held that the powers to disperse assemblies given to soldiers under the Special Powers Act of 1922 were invalid because they had been conferred under a Northern Ireland statute and constituted legislation "in respect of" the military which was outside the competence of the Parliament of Northern Ireland, under its constitution, the Government of Ireland Act of 1920. Within twenty-four hours the Westminster Parliament reversed this decision. The Northern Ireland Act of 1972 confirmed the entitlement of the army to act under the local statutory powers and retroactively validated all earlier arrests by soldiers.<sup>19</sup> This is not to suggest that some legislation was not necessary in the wake of the decision. Legislation directly empowering the soldiers to exercise law enforcement powers might have been passed, however, without reversing the judicial decision.<sup>20</sup> Instant reversal of decisions hardly encourages the courts to play a meaningful role in supervising the operation of emergency powers.

In a series of important decisions prior to 1973 the Northern Ireland courts had made clear that the ordinary rules governing admissibility of evidence at common law in a criminal trial applied to politically motivated offenses. Under these common law rules the prosecution

17. PROTECTION OF HUMAN RIGHTS, *supra* note 6, at paras. 2.11 & 2.19; LAW AND STATE, *supra* note 2, at 119-37.

18. 1972 N. Ir. 91.

19. See THE SUNDAY TIMES INSIGHT TEAM, *supra* note 3, at 280-310.

20. This was done the following year in the Northern Ireland (Emergency Provisions) Act, 1973.

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carried the burden of proving that any statements or admissions by defendants were voluntary. In particular, the courts had held that the subjection of persons to interrogation for long periods, even if no allegations of physical ill-treatment were made, would render a statement inadmissible because it tended to sap the will of the person questioned.<sup>21</sup> In 1973 the United Kingdom Parliament passed the Northern Ireland Emergency Provisions Act, which replaced the common law rules with evidentiary rules more favorable to the prosecution.

These examples illustrate an undoubted policy of marginalizing the judiciary throughout the conflict. When this policy is considered in light of the subordinate role that judicial power plays under the British constitution, the possibility of ensuring effective safeguards against abuse of emergency powers must be deemed remote.<sup>22</sup>

### II. National Security Measures and Human Rights

The major features of government response to the violence in Northern Ireland have been: (a) the large-scale deployment of military force; (b) the granting of additional law enforcement powers to both army and police; (c) the use of internment or detention without trial; (d) the modification of ordinary criminal procedure for the trial of those suspected of involvement in the violence; and (e) the taking of special executive powers applicable in Britain and in Northern Ireland, including powers to detain and deport individuals and power to proscribe organizations.

These national security measures have been implemented through the enactment of statutes specifically designed to deal with the crisis, among the most recent of which have been the Northern Ireland (Emergency Provisions) Act of 1978 and the Prevention of Terrorism (Temporary Provisions) Act of 1976.<sup>23</sup> The former ultimately derived from the recommendations of a commission chaired by Lord Diplock in 1972<sup>24</sup> and reviewed in 1974 by a committee chaired by Lord Gardiner and charged "to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland."<sup>25</sup>

21. See *Regina v. Corr*, 1968 N. Ir. L.R. 193, 221 (C.C.A.).

22. Rose, *On the Priorities of Citizenship in the Deep South and Northern Ireland*, 38 J. OF POL. 247 (1976); see also LAW AND STATE, *supra* note 3, at 9-28.

23. Northern Ireland (Emergency Provisions) Act, 1978, ch. 5; Prevention of Terrorism (Temporary Provisions) Act, 1976, ch. 8.

24. REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURE TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, CMD. 5, NO. 5185 (1972) (Lord Diplock, Chairman) [hereinafter DIPLOCK REPORT].

25. REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND

The conclusion of the Diplock Commission, endorsed with reluctance two years later by the Gardiner Committee, was that the character and scale of terrorism in Northern Ireland made detention without trial a legitimate response by the State.<sup>26</sup> Nevertheless, the basic policy advocated by both groups was that in so far as possible the ordinary criminal law ought to be used in combatting terrorism.<sup>27</sup> To that end, the Diplock Commission recommended modifications of criminal procedure and enhanced powers for the army and the police in Northern Ireland.<sup>28</sup> Its principal recommendation was the suspension of jury trial for terrorist-type offenses.<sup>29</sup> The Diplock Commission also recommended relaxation of the common law rules on the admissibility of confessions, restrictions on bail, and certain other procedural and evidentiary changes.<sup>30</sup> In the Diplock Commission's view, these modifications, while not departing from the minimum requirements of a judicial process as laid down in article 6 of the European Convention on Human Rights, would enable more suspected terrorists to be tried by the courts rather than by executive detention.<sup>31</sup>

After one year's experience with the emergency provisions, the Gardiner Committee reported that the "non-jury" courts for the trial of terrorist offenses had worked well.<sup>32</sup> Though the Committee endorsed detention without trial as a last resort, it proposed radical alterations in the system of detention.<sup>33</sup> These proposals were, in the main, accepted by the Government and enacted in 1975, although the detention provisions of this legislation have never been used. Since the introduction of the non-jury (Diplock) courts, over 8000 persons have been prosecuted for a range of crimes involving murders, causing explosions, shootings, and membership in unlawful associations. Currently over 300 persons are serving life sentences in Northern Ireland for murder arising out of the political violence.<sup>34</sup>

There have been two distinct but overlapping phases in security policy: (1) from 1971 through 1975, detention without trial with a preeminent role for military action; and (2) since 1975, reliance on a criminal

HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISTS IN NORTHERN IRELAND, CMD. 5, No. 5847 (1975) (Lord Gardiner, Chairman) [hereinafter GARDINER REPORT].

26. DIPLOCK REPORT, *supra* note 24, at 34; GARDINER REPORT, *supra* note 25, at 22.

27. DIPLOCK REPORT, *supra* note 24, at 31; GARDINER REPORT, *supra* note 25, at 20.

28. DIPLOCK REPORT, *supra* note 24, at 30.

29. *Id.* at 17-19.

30. *Id.* at 32.

31. *Id.*

32. GARDINER REPORT, *supra* note 25, at 16-17.

33. *Id.* at 43.

34. K. BOYLE, SENTENCING LAW AND PRACTICE IN NORTHERN IRELAND 85-86 (1983).

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prosecution policy with a reduced role for the military and a correspondingly greater role for police forces. By the end of 1975 all persons who had been interned without trial had been released and no one has subsequently been interned. In both phases, a stark contrast appears between the judicial scrutiny available in international tribunals and the impotence of the common law courts, as the following three case studies of particular security measures make clear.

### A. *Interrogation Powers and Abuses*

Information or intelligence is a key factor in a conflict with armed and secret groups. It is no accident that in insurgencies generally the central area of complaint surrounds the interrogation room and the methods used to obtain information from those arrested. Northern Ireland has proved to be no exception. What is perhaps a greater indictment of the system than the ill-treatment of detainees has been the failure of government and the law to establish effective safeguards to prevent repetition of serious abuses.

In Northern Ireland the history of ill-treatment involves both military and police personnel and extends to efforts to gather intelligence and police efforts to translate such intelligence into evidence in the form of confession statements which could be produced in court.<sup>35</sup> Following the introduction of internment in Northern Ireland on a large scale in 1971, the security forces faced numerous allegations of torture and brutality in the treatment of internees. A Committee of Enquiry was established by the British government and it verified many of the allegations.<sup>36</sup> In particular the Committee confirmed that "interrogation in depth" had been undertaken in a number of cases. This process consisted of covering suspects' heads with black hoods for long periods, exposing them to continuous and monotonous noise of a kind calculated to make any communication impossible, making them stand against the wall with their legs apart and hands raised against the wall for continuous periods of six or seven hours at a time, and finally depriving them of food and sleep. In the wake of these findings the government established another committee to advise on the future use of these interrogation procedures.<sup>37</sup> This committee advised that the

35. See P. TAYLOR, *BEATING THE TERRORISTS?* (1980).

36. REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY ARISING OUT OF EVENTS ON THE 9TH AUGUST 1971, CMD. 5, No. 4823 (1971).

37. REPORT OF THE COMMITTEE OF PRIVY COUNCILLORS APPOINTED TO CONSIDER AUTHORISED PROCEDURES FOR THE INTERROGATION OF PERSONS SUSPECTED OF TERRORISM, CMD. 5, No. 4901 (1971).

procedures were illegal, but the majority approved of their continued use "on moral grounds," considering that tough measures were justified to obtain information. The government, however, followed the minority report that condemned the techniques and announced that, while interrogation in depth would continue, the specific techniques condemned as illegal would not be used.<sup>38</sup>

Largely because of the use of the sensory deprivation technique and because of the scale of the complaints of ill-treatment, the Irish government in December, 1971 invoked the European Convention on Human Rights, alleging widespread violation of article 3, which prohibits torture, inhuman, and degrading treatment. The Irish government also complained of violations of articles 5 and 6 in respect of detention without trial and of article 14 in that detention had been applied with discrimination as between republican and loyalist suspects.<sup>39</sup> The European Commission found that the five techniques of sensory deprivation constituted torture,<sup>40</sup> a finding changed by the European Court to one of inhuman treatment.<sup>41</sup> The Court, however, confirmed the Commission's finding that at one interrogation center in the autumn of 1971, there had been an administrative practice of ill-treatment in violation of article 3, and that this practice had been tolerated at the level of the government itself.<sup>42</sup>

The painstaking and lengthy investigation into the facts undertaken by the Commission stands in striking contrast to the role of the domestic common law courts and the Committees of Enquiry. Indeed, the Commission rejected the reasoning of both internal inquiries mentioned above.<sup>43</sup> The sensory deprivation procedures had been justified by their results.<sup>44</sup> The Commission rejected this view, citing the common article 3 of both the Geneva Convention and the European Convention.<sup>45</sup> It ruled that the prohibition under article 3 of the European Convention is an absolute one and there can never be, under the Convention or under international law, a justification for acts in breach of

38. Prime Ministerial Statement of Mar. 2, 1972, *explained in Ireland v. United Kingdom*, [1978] 2 E.H.H.R. 25 (Eur. Court of Human Rights).

39. *See O'Boyle, Torture and Emergency Powers under the European Convention on Human Rights: Ireland v. United Kingdom*, 71 AM. J. INT'L L. 674 (1977).

40. Report of the European Commission on Human Rights (Ireland v. United Kingdom), 1976-78 E.C.H.R., ser. B, vol. 23-1, at 390.

41. *Ireland v. United Kingdom*, [1978] 2 E.H.R.R. 55-57 (Eur. Court of Human Rights).

42. *Id.*

43. Report of the European Commission on Human Rights, *supra* note 40, at 390.

44. *See id.* at 144-52.

45. *Id.* at 390.

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that provision.<sup>46</sup> These proceedings, and other petitions by individuals complaining of ill-treatment, clearly illustrate the impotence of recourse to a remedy outside the state, where the actions of the state's security forces are being complained of and where these actions are condoned or ignored by government

The Convention, however, is not a remedy of first instance. The real significance of the findings in *Ireland v. United Kingdom* concerning ill-treatment in police or military custody was the emphasis placed by the Commission and Court on the inadequacy of remedies during the period it was examining.<sup>47</sup> The Commission expressed particular concern about the failure to carry out internal police inquiries and to prosecute or discipline those found guilty of misconduct.<sup>48</sup> In subsequent cases the Commission accepted the evidence that complaints had been investigated at the domestic level as proof that ill-treatment was not condoned or authorized, even though few prosecutions or disciplinary actions resulted from such investigations.<sup>49</sup>

The adequacy of these internal police investigations accepted by the Commission must be doubted. The experience in Northern Ireland throughout the 1970's has been that such investigation achieved very little and did not prevent the continuation of complaints of violence to prisoners in custody. While some of these complaints may be assumed to have been false and alleged for propaganda effect, many were true. The vulnerability of prisoners to abuse and of the police force to false allegations were inevitable consequences of emergency arrest powers which permitted detention for questioning for three or seven days depending on the power used with little or no concern for safeguards. During such periods there was no requirement to bring the arrestee before a court, and the interrogators had an exclusive right of access.<sup>50</sup> The context of these allegations also included the changes in the rules of evidence governing admissibility of confessions. The defense became obliged to establish prima facie evidence of "torture inhuman or degrading treatment" before the prosecution was required to rebut such evidence. The prosecution was not required to establish that any inculpatory admissions were voluntarily made. The new test on the admissibility of confessions was taken from the language of article 3 of the European Convention and illustrates the minimum nature of the Con-

46. *See id.*

47. *Ireland v. United Kingdom*, [1978] 2 E.H.R.R. 93-97 (Eur. Court of Human Rights).

48. Report of the European Commission on Human Rights, *supra* note 40, at 377-90.

49. *Donnelley v. United Kingdom*, 4 Decisions & Reports (1976).

50. AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO NORTHERN IRELAND 55, 67 (1978) (AI Index EUR 45/01/78).

vention's guarantees. In practice, the test encouraged ill-treatment, as was acknowledged by the Bennett Committee.<sup>51</sup> It is to be remembered that the main security strategy at this period was to prosecute through the courts and that eight out of ten prosecutions relied on confessions taken during interrogation.<sup>52</sup>

Following an Amnesty International mission in 1977, which concluded that ill-treatment of suspects by the police force had taken place with sufficient frequency to warrant an inquiry, the government was forced to react.<sup>53</sup> It established the Bennett Committee, without authority to investigate the complaints directly, to examine interrogation procedures and the procedures for making complaints against the police.<sup>54</sup> The Bennett Committee endorsed self-policing by the security forces.<sup>55</sup> While recommending that a suspect ought to have access to a solicitor after forty-eight hours in police custody, it refrained from recommending earlier access to a solicitor and specifically rejected a proposal that a solicitor should be present during questioning by the police.<sup>56</sup> The value of access to a lawyer after forty-eight hours is severely limited, for research has shown that most of those arrested will have already made statements or confessions during the first two days. In addition, it appears that access was permitted only in the presence of a police officer.

The numerous other recommendations made by the Bennett Committee, including a virtual ban on interrogations at night, the monitoring of interrogation cells by closed-circuit television, and proper training for interrogators, will improve the safeguards for those arrested under the emergency powers. Most of these recommendations have been implemented, and there have been few complaints of ill-treatment during interrogation by the police since the implementation of the Bennett Report. But, whatever the efficacy of these measures in supervising interrogation and complaint processes, they do not interfere with the autonomy of police in interviewing suspects.<sup>57</sup> Genuine controls on interrogation cannot be self-policed as is attempted in the Bennett reform. Physical abuse of prisoners will only be eliminated

51. REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION IN NORTHERN IRELAND, CMD. 5, No. 7497 at para. 84 (1979) (His Honor H.G. Bennett, Chairman) [hereinafter BENNETT REPORT].

52. TEN YEARS ON, *supra* note 5, at 44-46.

53. AMNESTY INTERNATIONAL, *supra* note 50, at 26.

54. BENNETT REPORT, *supra* note 51.

55. *Id.* at 14.

56. *Id.* at 125-26.

57. For a study of the implementation of the Bennett Report safeguards, see Walsh, *Arrest and Interrogation: Northern Ireland 1981*, 9 J. LAW & Soc. 37 (1982).

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when there is a judicially enforceable code of conduct whose breach is sanctioned by the exclusion of a confession statement tendered as evidence in a trial.<sup>58</sup>

Finally, it must be recalled that in 1975 when the rules governing the admissibility of statements were changed through legislation based on recommendations of the Diplock Commission, little or no thought was given to the creation of safeguards to match the greater ease with which confessions would be admitted. It took a further six years to address the question of safeguards and to attempt to provide them. In all probability, the loss of confidence, particularly by the minority community, in the administration of criminal justice as a result of numerous cases of ill-treatment over this six-year period damaged security goals more than the easing of the constraints on interrogation and the prosecution of persons through the courts aided those goals.

### B. *The Hunger Strikes and the Impotence of a Legal System*

If the major controversy over security and human rights in the 1970's concerned the interrogation centers, the prisons became the location of local and ultimately worldwide concern in 1980 and 1981. The gruesome contest between I.R.A. H-Block prisoners and the British government over whether the prisoners were to be labelled convicts or political offenders had traumatic effects on both the prison and the outside community.<sup>59</sup> Ten prisoners died on hunger strike and at least fifty people were killed in associated protest and violence during the strikes. The ultimate collapse of the hunger strike proved a pyrrhic victory for the British Conservative government. The large vote cast for I.R.A. candidates in the 1982 Northern Ireland Assembly elections demonstrated the minority community's sympathy for the hunger strikers and its anger at what it considered government intransigence. Having been denied political status in the prisons, the I.R.A. secured a measure of legitimacy through the ballot box. While the implications of the political significance of the I.R.A.'s having five elected representatives in Northern Ireland remain unclear, such electoral success represents an ominous development for those who seek a peaceful resolution of the conflict.

The origins of the prison dispute can be traced to an earlier phase of security policy when internment without trial was used on a large scale.

58. For a model of one possible interrogation code, see TEN YEARS ON, *supra* note 5, at 110-12.

59. The term H-Block derives from the layout of the Maze Prison. For an analysis of the prison crisis, see TEN YEARS ON, *supra* note 5, at 88-97.

From the introduction of internment in 1971, detainees were not treated as convicted prisoners but were given a status similar to that of prisoners awaiting trial. They were entitled to wear their own clothes, were released from prison labor, and had generous visiting and correspondence privileges. In addition, they were granted a considerable degree of autonomy in organizing their affairs. They had, in a word, something akin to prisoner of war treatment. From June, 1972, this treatment was extended to convicted prisoners who had been found guilty of terrorist-type offenses and it became known as "special category status." As detention without trial was phased out in 1975 and detainees were released, pressure mounted for the abolition of special category status. Because the emphasis of security policy was now to bring those involved in violence before the courts, it was considered a contradiction of that policy to confer a special status on those who claimed political motivation for their offenses.<sup>60</sup>

In 1976 the authorities moved to change the policy with a combination of carrot and stick. It was announced that all of those convicted through the Diplock courts would no longer be entitled to a special regime but would have to conform to the prison rules as they applied to other prisoners. The major and immediate implications were that all prisoners would be required to wear prison uniforms and to engage in prison work. The inducement to conform to the changes came in the form of a generous remission of sentences. A conforming prisoner could expect to be released after having served one-half of his sentence.

Nevertheless, many convicted of terrorist offenses did not conform. Refusing to wear a prison uniform and not being permitted their own clothes, they remained naked. Their refusal to work resulted in disciplinary measures, including confinement in their cells and withdrawal of privileges. As the prisoners continued to refuse to conform, the disciplinary sanctions were also continued, and stalemate resulted. The decision to go on hunger strike was the final action taken in this protracted struggle over symbols and labels. To I.R.A. prisoners, the decision to remove special privileges was rightly seen as part of a larger attempt to change the public perception of them from politically motivated to criminally motivated offenders, and hence to deny them the legitimacy they claimed for their violent campaign.

Perhaps the most extraordinary feature of the hunger strike crisis was the non-involvement of the municipal legal system in its resolution.

60. See GARDINER REPORT, *supra* note 25, at 22 (strong criticism of special category status and plea for abolition).

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Because punishments imposed on the prisoners were within prison rules, there was no possibility for intervention. Questions as to the proportionality of the authorities' official response to the recalcitrant prisoners could not be raised.

The European Commission of Human Rights, however, was again involved. In *McFeeley and Six Others v. United Kingdom*, the applicants complained of their conditions and claimed that their treatment by the authorities violated their rights under the European Convention.<sup>61</sup> After a detailed examination of the facts and the law, the Commission dismissed the bulk of the complaint. The proceedings, however, were important despite the rejection of the prisoners' case. The Commission did not hold that the case was inadmissible on grounds of non-exhaustion of domestic remedies, the basis for rejection of most complaints brought before it. It confirmed the applicants' plea that no adequate or effective remedies existed at the domestic level.

Lack of any possibility of ventilating complaints through the courts of Northern Ireland provides a further illustration of the limitations on remedies in the United Kingdom. Had local courts possessed jurisdiction to consider the prisoners' central claim that the authorities' response to their non-conformity was disproportionate and cruel there might well have been no crisis. Without denying the difficulties involved, it ought to have been possible to arrive at a *modus vivendi* which ensured minimum rights for the protesting prisoners without compromising the security of the prison or the declared policies of the government. Judicial intervention might at least have induced the government to adopt a more flexible approach.

The Commission of Human Rights did express concern "at the inflexible approach of the State authorities which has been concerned more to punish offenders against prison discipline than to explore ways of resolving such a serious deadlock."<sup>62</sup> When the hunger strike actually commenced in March, 1981, the Commission took an active part in attempting to resolve it. A Commission delegation made a publicized visit to the prison to determine if the first hunger striker, Bobby Sands, M.P., wished to proceed with an application that had been lodged on his behalf. This intervention failed, but the Commission continued its involvement. When the British government waived its objection to admissibility of the surviving complaints in the *McFeeley* case, the Commission exercised its jurisdiction to assist in friendly settlement under

61. Application No. 8317/78, Partial Decision of the Commission on Admissibility, [1980] 3 E.H.R.R. 161 (Eur. Comm'n of Human Rights).

62. *Id.* at 203.

article 28 of the Convention following admission of the case. Strenuous effort to negotiate a resolution through the good offices of the Commission ultimately came to naught, but the process contributed to clarification of the issues in contention between the hunger strikers and the prison authorities. After ten prisoners had died, the hunger strike collapsed in October, 1981.

A full account of the prison crisis remains to be written, but a sufficient account has been given here to illustrate the contrast between the active role of an international human rights agency and the inactive and, indeed, impotent role of the domestic courts.

### *C. Lethal Force and the Right to Life*

Perhaps it is in the nature of a protracted emergency, particularly one as violent as that in Northern Ireland, that one human rights concern replaces another. If ill-treatment of suspects under interrogation dominated the 1970's and if 1980-1981 were the years of the hunger strikes, the issue which is currently prominent is killings by the security forces. In December, 1982 and January, 1983 nine people were shot dead by the police in circumstances which appear *prima facie* unjustifiable. In only one of these recent incidents were the targets armed—two youths were handling a pair of antiquated unloaded rifles which they had found—when the police shot them. As a result of these and earlier incidents, there have been claims by opposition leaders that a policy of “shoot to kill” is now being adopted. The police and government authorities strenuously deny this claim.<sup>63</sup>

Although the recent killings have resulted from the use of conventional bullets, another controversy has raged over deaths due to plastic and rubber bullets (“baton rounds”). The rubber bullet was first introduced in 1970 as a substitute for conventional arms in riot control. Subsequently, it was replaced by a similar projectile made of plastic for greater accuracy in firing. The plastic bullet is about four inches long and an inch and a half in diameter. It is fired from a riot gun with a muzzle velocity of over 160 miles per hour. Regulations specify that it should not be used at a range of less than twenty meters. While the authorities' intention in arming the security forces with an alternative weapon was to avoid disproportionate injuries and killings, the weapon chosen has proved to have lethal potential. Fourteen people, seven adults and seven children, have been killed by both plastic and rubber bullets in the last twelve years, and another sixty have suffered serious

63. Irish Times, Dec. 29, 1982, at 1, col. 1; The Guardian, Dec. 29, 1983, at 1, col. 2.

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permanent injury.<sup>64</sup> While civil claims for damages have been pursued successfully in some cases and there have been some prosecutions arising from the use of lethal force by the security forces, no member has been convicted or imprisoned as a result.

It is important that the conditions within which the security forces are operating are made clear. Interpol has calculated that members of the Royal Ulster Constabulary, the Northern Ireland police force, face higher risks of being murdered than any other police force in the world. They have, for example, a fifty per cent greater chance of being murdered than do the police in El Salvador.<sup>65</sup> The killings of soldiers and police do not occur incidental to some other crime, as in situations elsewhere, but they are the purpose of the crime itself.

In these circumstances of pervasive danger, the law protects neither the security forces nor civilians. The sole provision governing the circumstances in which force, including deadly force, may lawfully be used by the security forces in Northern Ireland, is contained in section 3 of the Criminal Law Act (Northern Ireland), 1967, which provides that “[a] person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting the lawful arrest of offenders unlawfully at large.”

This codification of what was assumed to be the common law derived from the Criminal Law Revision Committee’s report of 1965.<sup>66</sup> The Committee had considered whether it should specifically prescribe conditions for the use of lethal force but decided against doing so because it imagined that such circumstances would rarely arise and that the criteria to be applied could safely be left for development by judicial decision.<sup>67</sup>

The Committee’s sanguine view has not been borne out. The police in both England and Northern Ireland have used firearms with increasing frequency and the common law courts have not developed rules governing the use of lethal force. The result is an almost entirely unregulated discretion subject only to a general standard which is, inevitably, imprecise. The failure to regulate the circumstances in which soldiers and police may legitimately shoot to kill has undoubtedly contributed to the controversies surrounding such killings in Northern Ireland. Indeed, it could be said that the imprecision in the law has

64. Shallice, *The Harmless Bullett That Kills*, NEW STATESMAN, Aug. 14, 1981, at 6.

65. See Foley, *Public Security and Individual Freedom: The Dilemma of Northern Ireland*, 8 YALE J. WORLD PUB. ORD. 284, 289-90 (1982).

66. CRIMINAL LAW REVISION COMMITTEE, REPORT ON CRIMINAL PROCEDURE (FELONIES AND MISDEMEANORS) (1965).

67. See *Id.*

resulted in deaths or serious injuries that might have been prevented if it had been possible to ensure accountability for the use of deadly force.

The lack of guidelines frequently has been criticized by the security forces themselves, particularly in connection with duties to disperse rioters.<sup>68</sup> It is true that soldiers and police are issued instructions (the "yellow card") on when and when not to shoot. However, these instructions have no status in law and juries have been told to ignore them when considering questions of civil or criminal liability.<sup>69</sup>

The courts have had opportunities to provide guidance which, although less satisfactory than statutory standards, could have filled an important need. Although few prosecutions have arisen from the use of deadly force, some of the circumstances of the killings have appeared so lacking in any apparent justification that failure to prosecute would have led to public outrage. One of the more notorious incidents concerned the killing by a soldier of a young farmhand in a rural district of Northern Ireland in 1975. The victim had just been questioned by the soldier and was permitted to go. He was not armed and was wearing heavy wading boots when he began to walk across a field. The soldier, who apparently had a fresh suspicion that the farmhand might be an I.R.A. man, called on him to halt. The youth allegedly began to run and the soldier shot him. The farmhand was not a member of the I.R.A. The soldier was subsequently acquitted of murder. The prosecution sought a ruling on the questions raised by the case by referring it under established procedures to the appeal courts. Such a reference does not permit reversal of the acquittal but enables the courts to prevent an error in law from becoming a precedent. The House of Lords, which ultimately heard the case, refused to give the necessary guidance on the use of lethal force.<sup>70</sup> The court held that all issues arising from this case and similar cases were issues of fact for the jury. It was for the jury in any case to say what was or was not reasonable force in the particular circumstances. The House of Lords persisted in this refusal to offer guidance on the use of deadly force in the *Farrell* case, which also had been appealed by the state authorities for the specific purpose of clarifying the law.<sup>71</sup>

These decisions leave the courts open to the charge that they have denied justice. Not the least consequence of this situation is to make it

68. See R. EVELEGH, PEACE-KEEPING IN A DEMOCRATIC SOCIETY—THE LESSONS OF NORTHERN IRELAND (1978).

69. Regina v. Naughton, 1975 N. Ir. 203, 206, 208.

70. Attorney General for Northern Ireland's Reference, 1976 N. Ir. 169.

71. Farrell v. Secretary of State, [1980] 1 All E.R. 166; 1980 N. Ir. 55.

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extremely difficult for a prosecutor to bring future cases. In Northern Ireland the office of prosecutor, the Director of Public Prosecutions, has compounded the problem by not giving reasons for a failure to prosecute. This produces the unacceptable result that the public is left to draw the inference that deaths of seemingly innocent people were considered justifiable homicides by the authorities. Such a perception can only exacerbate tensions and increase violence, since no one could reasonably regard the killing of seven children by baton rounds as justifiable.

The problem requires judicial scrutiny and legislation to protect lives. In light of the themes in this paper it will not be surprising that the judicial scrutiny denied within the United Kingdom is occurring instead under the European Convention on Human Rights. On December 10, 1982, the Commission of Human Rights admitted the *Farrell* case under article 2, which protects the right to life.<sup>72</sup> The central argument in *Farrell* is that the standards applied in the trial deriving from the Criminal Law Act (Northern Ireland), 1967, section 3, do not correspond to the requirements of article 2 of the European Convention.

### Conclusion

The concept of an emergency gives rise to the expectation that such a state of affairs is temporary and that normal conditions will be restored. In Northern Ireland, however, there can be no such expectation. The duration of the conflict, the impact of the violence, and the measures taken to respond to it have left little in the society unaffected or unchanged. Normal conditions will not be restored in Northern Ireland. Instead, normal conditions will have to be built from the ground up. The important questions are how much longer it will take the work of construction to begin and at what costs in terms of human life.

The debate continues in Northern Ireland as elsewhere in the United Kingdom as to how best to safeguard rights and whether the permanent securing of individual and minority rights is best promoted by the succession of ad hoc measures and agencies already created, or requires further protection in a Bill of Rights.<sup>73</sup> But what is now clearly accepted by all government authorities is that modern standards of democratic government require a greater significance to be given to the

72. *Farrell v. United Kingdom*, No. 9013/80 (Eur. Comm'n of Human Rights) (filed Dec. 15, 1982).

73. J. JACONELLI, ENACTING A BILL OF RIGHTS: THE LEGAL PROBLEMS (1980).

protection through law of individual and minority rights than has occurred in the past, especially in a community so deeply divided as Northern Ireland. In practical terms, the most effective mode of protection would result from the incorporation of the European Convention on Human Rights into the domestic law of Northern Ireland.<sup>74</sup> The Republic of Ireland has a written constitution with explicit provision for judicial review, and has experienced little difficulty in reconciling the common law traditions with a constitution which protects fundamental rights.<sup>75</sup> But the prospects for political resolution would be enhanced if in addition the Convention was also made directly enforceable in the courts of the Republic of Ireland.

Should a Bill of Rights for Northern Ireland be legislated now, it would be necessary to suspend at least some of its provisions. Limitations of human rights, after all, will persist as long as the underlying political and social issues remain unresolved.

There are indications that both the Republic of Ireland and the United Kingdom have come to recognize that the primary responsibility for settlement lies with them. The most positive reflection of this awareness has been the beginnings of an institutional relationship between the two states. These developments stem from meetings in 1980 between the British Prime Minister and the Irish Taoiseach. They agreed to initiate policies "(i) to achieve peace, reconciliation and stability and (ii) to improve relations between the peoples of the two countries."<sup>76</sup> A joint working group of officials was established to examine "the totality of relationships within these islands," and find means of expressing the "unique relationship" between the two countries.<sup>77</sup> The working groups have envisaged an intergovernmental council, a secretariat, and an inter-parliamentary body. The Republic of Ireland urged that the latter should include representatives from Northern Ireland. Cooperation across a broad spectrum of activities was also advocated.

Progress along these desirable lines has not yet been much in evidence. The Falklands war, in which Ireland failed to back the British on grounds of neutrality, and the British government's initiative in establishing a new elected assembly within Northern Ireland in 1982 without consulting the Republic, have left relations between the gov-

74. PROTECTION OF HUMAN RIGHTS, *supra* note 6, at 14.

75. Costello, *Rights of Accused Persons and the Irish Constitution of 1937*, in HUMAN RIGHTS IN CRIMINAL PROCEDURE: A COMPARATIVE SURVEY 165 (J. Andrews ed. 1982).

76. ANGLO-IRISH JOINT STUDIES REPORTS 11-12 (1981).

77. *Id.* at 13-18.

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ernments in a cool and, until recently, almost unfriendly state. One may nevertheless predict that the worsening situation in Northern Ireland, and the urgency of joint political, economic, and security policies to halt the deterioration will result in closer relations in the future. A beginning could be made by making the protections of the European Convention on Human Rights, which has proved so valuable over the last decade of strife, directly available to the populations on the island by its incorporation into the domestic laws on both sides of the border. This incorporation is especially important because it appears that for the foreseeable future in Ireland there is likely to be a minority population where it would prefer not to be—whether a Catholic nationalist minority in the North or a Protestant Unionist minority in a united Ireland. Under these conditions the theme that most needs development now is the theme of protection of human rights and minorities.