



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Terrorism, Counter-terrorism and Human Rights:
the experience of emergency powers in Northern Ireland

Submission by the
Northern Ireland Human Rights Commission
to the International Commission of Jurists
Eminent Jurists Panel

April 2006

1. The Northern Ireland Human Rights Commission (the Commission) has provided the Eminent Jurists Panel with a selection of relevant policy statements, mainly in the form of responses to Government consultations on proposed legislation in matters related to terrorism. The covering note explained the Commission's status and functions as a statutory agency recognised by the United Nations and other international systems as a 'national human rights institution', albeit operating at sub-national level.
2. The Commission, mindful of the many other written submissions being considered by the Panel, wishes to present its own views as concisely as possible. It submits the following brief comments which are designed to illustrate what it sees as the main points arising from the experience of emergency legislation in Northern Ireland over a prolonged period of time. **The Commission would stress that lessons are still being learned as to the long-term effects, so that the position set out here should not be taken as definitive; new evidence, and thus more informed perspectives, will emerge over time.**

General comments

3. Northern Ireland has always had a quite extensive array of 'emergency' or counter-terrorist legislation, with special powers available to and deployed by the authorities. It has not had a correspondingly comprehensive set of protections for civil and human rights, and one overarching lesson to be drawn from experience here is that there must be a close correlation between the powers asserted by the state and the constitutional, legal and institutional protections available to the citizen. The defence of society against the threat of terrorism is a right, and duty, of every democratic state. In terms of effectiveness as much as of moral legitimacy, counter-terrorist measures must be exercised within a framework of rights and responsibilities, with clear limits to the state's capacity to intrude on individual liberties. Particularly in the absence of strong domestic protections such as a comprehensive, constitutional-level Bill of Rights, the international human rights instruments provide such a conceptual framework.
4. In all of its work this Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United

5. No single model of action against a terrorist threat or other emergency can be applied in all jurisdictions and in all cases of violence. In Northern Ireland, at least initially, the state's strategic and tactical response to political violence was informed by counter-insurgency methods developed by military experts confronting insurgencies in colonies and former colonies. It was already apparent that some aspects of that approach, such as a reliance on 'counter gangs' sponsored by the state but operating outside official lines of accountability, were particularly dangerous in creating scope for collusion in criminality and subversion of the rule of law, rather than fitting into the legitimate parameters of military aid to the civil power. While it will certainly be difficult to establish the extent of any collusion between unlawful groups and the military, police and intelligence agencies in Northern Ireland, there is no doubt that it occurred, in the context of applying military doctrines of counterinsurgency and low intensity warfare. More information on this issue is likely to come into the public domain in the near future, assisted by the work of the police Historical Enquiries Team and the parallel efforts of the Police Ombudsman. Replication in one time and place of methods that were used elsewhere, not always successfully and not always within a human rights framework, can be inappropriate and counterproductive, and in the extreme lead to an escalation of violence rather than a solution to it. **Whatever the exigencies facing the state, and whatever military rationale may be advanced for such tactics, there can be no acceptable level of state sponsorship of terrorism.**
6. If it is accepted that a response should be tailored to the particular circumstances of a specific situation, there is a strong argument against the experience in Northern Ireland of using counter-terrorism measures being simplistically regarded as a test bed for policy for the rest of the United Kingdom. The situation in Great Britain, including the nature of the perceived threat, is significantly different to the conflict that Northern Ireland experienced over more than 30 years. However some lessons, particularly on the numerous

7. There has recently been a significant effort to develop international human rights guidance addressing issues of the protection of human rights in the fight against terrorism. While the international standards should be at the centre of international and national counter-terrorism legislation and policy, the experience of Northern Ireland shows that in situations of actual or perceived emergency, the state is often too ready to derogate from those provisions of international law which it sees as standing in the way of emergency measures. These derogations tend to last for many years, and so does the diminished protection of fundamental rights in the conflicted society.
8. An internal conflict typically pits one or more armed groups operating entirely outside the law against a state security apparatus designed to operate within the law. To the extent that emergency legislation reduces any of the constraints normally imposed on state agents, it can be seen as undermining the rule of law and thus as a victory for the state's opponents. By the same token, the ability of the state to maintain the rule of (ordinary) law allows it to claim a particular moral advantage that is diminished every time it bends the law to meet the perceived threat.
9. In the experience of Northern Ireland, new emergency legislation was often introduced as a 'knee jerk' reaction to a specific event (such as the Birmingham bombing). Emergency powers, once introduced, tend to remain in statute for far too long, and can have a political impact by virtue of their availability even if unused. In the context of Northern Ireland an example is the internment power, not used since 1975 but rescinded only in 1998. One reason for the retention of such powers may be the reluctance of the state, or the government of the day, to avoiding sending any signals that it is weakening in its resolve on the issue of terrorism. Once available to the state, emergency powers (relating to arrest, detention etc.) have also tended to be used in many instances where there was no apparent terrorist motive – i.e. apparently for the convenience of the police. **The 'special' measures came to be used as 'regular' measures and the 'emergency' became 'normality' for a prolonged period of time.**

10. The experience of Northern Ireland has shown that elements of the state can, on occasion, take advantage of emergency powers to facilitate the abuse of human rights, as for instance in the application of interrogation techniques that were found to amount to breaches of Article 3 of the ECHR: these were applied exclusively to persons detained under emergency law.
11. While infiltration of terrorist groups may be a legitimate counter-terrorism technique, collusion and the use of informers can lead to distortions in the criminal justice system. It is almost inevitable that some permission will be given to agents or informers within illegal groups to engage in criminal acts, to protect sources of information and to assist the collection of intelligence by police, military and intelligence agencies. **In Northern Ireland, there is evidence that the protection of agents at times took precedence over the protection of the public, to the extent that very grave crimes, including violations of the right to life, were allowed to proceed.**
12. The recruitment of informers also led in Northern Ireland to so-called 'super-grass' trials that negatively influenced the quality of criminal justice and proved almost completely ineffective as the majority of the trials collapsed at later stages. There have also been allegations that super-grass trials and excessive use of remand in custody were used to facilitate a form of internment, with persons being arrested and held in custody with insufficient evidence against them to sustain a criminal conviction.
13. A key lesson from the Northern Ireland conflict is that the effects of the use of emergency powers stretch well beyond the 'armed phase' of the conflict. **In relation to the use of lethal force in this jurisdiction, Northern Ireland will for years to come be facing issues around the right to effective investigation of deaths, dealing with the past, the rights of victims of the conflict and the issues of the equality of victims of state and non-state violence.** This has been, and is likely to remain, a major focus of the work of the Human Rights Commission, particularly in relation to the need for investigative processes that meet the standards implicit in Article 2 of the European Convention.
14. While at the height of the Northern Ireland conflict a case could be made for the existence of a state of emergency

15. The Commission is not at this point saying that UK-wide measures should not extend to Northern Ireland; any measures that are excessive and incompatible with human rights should be disapplied across the state, and reasonable and compatible measures could, in principle, be available in all UK jurisdictions. **They must, however, be applied carefully and proportionately, and it is vital to ensure that measures drafted to respond to forms of terrorism almost unknown in Northern Ireland are not deployed in Northern Ireland in ways that would undermine the normalisation and stabilisation of our society.** That said, the Commission acknowledges that there has been evidence of new forms of terrorism in Northern Ireland, and it is alert to the need to prevent this region being denied necessary protections or being perceived, by the disapplication of law that applies in other regions, as a 'safe haven'.

Terminology of 'terrorist offences'

16. The Commission has in the past objected to the terminology of 'terrorism', which can be used loosely and emotively, means different things to different people and has very often been defined in much broader terms than those favoured in the international conventions. The Commission's documents have normally preferred alternatives such as 'politically

17. At the time of the Eminent Jurists Panel's visit the Commission is preparing a submission to Lord Carlile of Berriew QC, the Independent Reviewer, on the matter of the definition of terrorism in UK law. We will forward that paper to the Panel at a later date.
18. The ordinary law already contains a very wide range of offences capable of addressing most manifestations of political violence. Defining a particular offence, extant in ordinary law, as a 'terrorist' offence may mean that while the elements of the offence stay the same, the aggravation through purpose leads to substantial differences in sentencing and potentially creates a 'hierarchy of victims', although the effects on victims may be substantially the same as with other crimes.
19. As already noted there is particular scope for certain offences newly defined in anti-terrorist legislation impacting negatively in Northern Ireland, notably that of 'glorification'. Though designed principally for use in Great Britain in the context of 'international' terrorism, speech offences are particularly sensitive here in the context of a society still emerging from bitter conflict, still polarised, and searching for ways of dealing with the past and recognising the rights of victims of the conflict. The experience of Northern Ireland also shows very clearly that the existence of legislation criminalising incitement to hatred and including other speech offences had virtually no impact on the existence of the inter-communal conflict. This experience appears not to have been taken into consideration by the UK government when introducing similar offences to anti-terrorism legislation.

Application of emergency measures in the criminal justice system

20. Where, as in Northern Ireland, 'emergency' measures include the creation of special courts or tribunals, this cannot but lead to the perception that such courts are operating to different standards of justice. Where a higher than normal

Policing

21. In Northern Ireland, the disproportionate application of now-discontinued measures, such as internment and exclusion orders, to one section of the community (the Catholic/nationalist/republican population) added to a sense of alienation and, many would argue, thus prolonged the conflict. This experience should be heeded by the police and government in Great Britain, where there is a clear perception, and some emerging evidence, that the current anti-terrorism measures disproportionately affect the Muslim community. **The creation of 'suspect communities' in the context of a terrorist threat can only lead to the escalation of negative relationships between these communities and the authorities and between them and others in the society.**
22. The experience of Northern Ireland shows that police forces (and security agencies operating in support of or in parallel to the police) can become so accustomed to operating with 'emergency' powers that they can be impaired in their ability or inclination to perform normal policing functions, particularly in communities most affected by the conflict. The perception that the police force, which throughout the conflict had a significant under-representation of the Catholic community, and the armed forces, operated their emergency powers more frequently and aggressively in Catholic areas led to a persistent feeling of resentment towards law enforcement agencies. Overcoming this resentment and ensuring broader acceptance of the police service will take many years, and the impaired effectiveness of policing due to inadequate community support leaves those very communities vulnerable to crime and anti-social behaviour.

23. A police force that operates for many years in the context of an array of special 'emergency' powers may, in a post-conflict environment, require quite radical transformation including changes in ethos and personnel. This has been the experience in Northern Ireland, where a major effort has had to be undertaken to reform the police and introduce effective oversight mechanisms. Accountability, oversight and respect for human rights need to be at the centre of any such reform, and central from the outset to any powers and policies that may be introduced for such a service to exercise in the context of terrorism or any other policing concern.
24. In Northern Ireland the special role of the British Army in supporting and co-operating with the police, while also running its own agents and intelligence operations, is a matter of continuing controversy. Its exercise of powers of stop and search and arrest, its use of lethal force, and lack of clarity around mechanisms of accountability led to human rights abuses many of which are still to be addressed. The utmost caution is required in attributing any policing functions to armed forces, and the primacy of the civil powers must be maintained. Where soldiers are called upon to assist the police, they ought to be subject to comparable mechanisms of oversight and control.

Conclusion

25. Having throughout its existence sought to ground its positions on terrorism and counter-terrorism in the international human rights standards, it would be appropriate for the Commission to conclude its remarks with one further lesson that can be drawn from the experience of Northern Ireland. **That is our conviction that *reinforcing human rights protections, through institutions, legislation, policy and practice can make a significant contribution to stabilising a society emerging from a period of internal conflict.*** It is in that context that the Commission is working to define the scope for providing more effective protection of human rights through a Bill of Rights that addresses the region's particular circumstances and adds to the protections contained in the ECHR.
26. It is too early, and perhaps overly ambitious, to claim that such measures can of themselves provide an effective protection against the persistence or re-emergence of terrorism. Nevertheless, we regard it as highly significant that the 1998 Agreement was followed not only by the

27. The Convention is by no means the only human rights treaty of relevance in the context of terrorism and counter-terrorism, and few human rights advocates would say that it proved entirely satisfactory on those occasions when Northern Ireland issues arrived before the Court. The doctrine of the 'margin of appreciation' afforded to states parties has, at times, accommodated standards of behaviour that fall well below what would now be regarded as acceptable. This Commission would wish to see in place effective protections for the *full* range of internationally accepted human rights standards.
28. The Commission is well placed to contribute to the enhancement of protections, in that the 1998 Agreement and subsequent legislation specifically tasked it with advising on the scope for defining a Bill of Rights for Northern Ireland, drawing on other standards to supplement the Convention rights. In addressing that duty, the Commission has conducted an extensive consultation exercise in the course of which it has received many representations about the need for specific content to meet the particular circumstances of Northern Ireland, one of which is its past experience of terrorism and counter-terrorist measures. These issues will also arise in the context of a proposed round table Forum, designed to secure political consensus on the content of a Bill of Rights. **The Commission hopes that any Bill of Rights for Northern Ireland will assist in establishing a context within which terrorism is much less likely to arise, and where the state's response to terrorism will be constrained within a legal framework of respect for human rights.**

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