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THE DELICATE BALANCE BETWEEN CIVIL LIBERTIES AND NATIONAL SECURITY

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INTRODUCTION

In looking at civil liberties, and their reconciliation with the security of the State, a paradox is presented: it is that acts of terror thrive in the freedom of democracies.[1] The freedom of association, expression and movement enjoyed in a liberal democracy are conducive to the planning and execution of acts of gross violence, designed to destabilise or destroy State structures, and to advance particular ideological ends. Innumerable themes are illustrative of the difficult juxtaposition of civil liberties and national security, in which a delicate balance may be less in evidence than a fervour for erosion of civil liberties in response to perceived crises. Detention without charge for years for suspects and extensive privacy incursions for the ordinary citizen have been considered necessary by States involved in a war on an intangible enemy – terror. But as the enemy is intangible so too are the contours of the front-line. Accordingly states engaged in wars against terrorist groups risk becoming engaged in a permanent state of emergency on their own soil.[2] And so it is that the

threat of terrorism in turn can pose a threat to the fundamental rights and freedoms which characterise democracy, the civil liberties and human rights upon which democratic societies are based. The greatest success the terrorist can achieve is to persuade the democratic state to abandon its democratic values.

The intention of this paper is to look at aspects of the legal response of three jurisdictions to terrorism – the United States and Britain’s response to terrorism after the Twin Towers attack, and the Irish response during the sixty years of republican violence and terrorism.

DEROGABLE AND NON-DEROGABLE RIGHTS AND THE TORTURE DEBATE

Human rights are recognised as intrinsic and universal, as inhering in the human person,[3] but that is not to say that such rights cannot be limited under any circumstances, a pragmatic reality that is recognised by the demarcation of derogable and non-derogable rights. The International Covenant on Civil and Political Rights (ICCPR) outlines in Article 4[4] the rights which may not be derogated from in any circumstance, irrespective of the extant public emergency. The most important are the right to life, and to freedom from slavery and from torture or cruel, inhuman or degrading treatment or punishment. The rights which are more in the civil liberty realm, such as the rights to personal liberty and to trial in due course of law can be derogated from in time of nation-threatening emergency but only to the extent strictly required by the exigencies of the situation. The European Convention on Human Rights[5] has a similar opt-out clause in article 15,[6] with the same rights to freedom from torture[7] and from slavery being non-derogable and imprescriptible. In the International Criminal Tribunal for the Former Yugoslavia (ICTY) case of *Furund ija* the court stated:

‘the existence of this *corpus* of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and the level of individuals. No legal loopholes have been left.’[8]

The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (UNCAT)[9] states at Article 2:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

TORTURE AS AN INTERROGATION TOOL?

Given this position, the use of torture as a State-sanctioned tool of interrogation sounds outlandish and improbable; yet it has of late been mooted by a leading Harvard academic,[10] and the use of evidence obtained by torture has even been considered by the British government. In *A and Others v Secretary of State for the Home Department (No. 2)* [2005] 3 WLR 1249, the appellants challenged the finding by the Special Immigration Appeals Commission (SIAC), which in turn had been upheld by the Court of Criminal Appeal, that the fact that evidence had, or might have been, procured by torture inflicted by foreign officials without the complicity of the British authorities was relevant to the weight of the evidence but did not render it legally inadmissible. The House of Lords rejected this proposition, holding:

“It trivialises the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer.”[11]

Though the use of evidence obtained through torture was ultimately rejected, the mere fact that the issue advanced to House of Lords stage, and was not flatly rejected by all concerned as an evidentiary option from

the outset, must give pause for thought and reason for concern, as do many of the measures designed for what President Bush has described as 'a new kind of war.' He has said

"Today's enemies do not mass armies on borders, or navies on high seas. They blend in with the civilian population. They emerge to strike, and then they retreat back into the shadows. And that's why there are thousands of our fellow citizens running down every single piece of intelligence we can find, doing everything we can to disrupt folks that might be here in America trying to hurt you." [12]

Extraordinary enemies have made for extraordinary responses. To the torture debate first.

The utility of torture as a tool is discussed nonchalantly by Alan M. Dershowitz, who argues for it on the basis of a 'cost benefit analysis'. He says

"It is precisely because torture sometimes does work and can sometimes prevent major disasters that it still exists in many parts of the world and has been totally eliminated from none. It also explains why the US government sometimes "renders" terrorist suspects to nations like Egypt and Jordan... As former CIA counterintelligence chief Vincent Cannistraro observed: 'Egyptian jails are full of guys who are missing toenails and fingernails.' " [13]

The measures Dershowitz has in mind for use in the American context are of the 'sterilized needle under the fingernail' [14] sort. Having hypothetically proposed 'a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life, or the method used in the film *Marathon Man*, a dental drill through an unanesthetized tooth' he asserts:

"The simple cost-benefit analysis for employing such non-lethal torture seems overwhelming: it is surely better to inflict non-lethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die. Pain is a lesser and more remediable harm than death; and the lives of a

thousand innocent people should be valued more than the bodily integrity of one guilty person.”[15]

By way of checks-and-balances Dershowitz proposes a ‘torture warrant,’ saying

“... I also believe that the rights of the suspect would be better protected with a warrant requirement. He would be granted immunity, told that he was now compelled to testify, threatened with imprisonment if he refused to do so, and given the option of providing the requested information. Only if he refused to do what he was legally compelled to do – provide necessary information, which could not incriminate him because of the immunity – would he be threatened with torture. Knowing that such a threat was authorized by the law, he might well provide the information. If he still refused to, he would be subjected to judicially monitored physical measures designed to cause excruciating pain without leaving any lasting damage.”[16]

So not only is torture justifiable, no trial is necessary to decide whether an individual is a guilty terrorist, and by reason of the grant of immunity no presumption of innocence need apply. The privilege against self-incrimination has been deftly cast aside.

The international law stance on torture is worth bearing in mind as an intellectual reference point. The right not to be tortured, it must be remembered, is non-derogable, under any circumstances.

Given the prominence of the principal proponent of torture (Alan Dershowitz is the Felix Frankfurter Professor of law at Harvard), the following statement by Paul O’Mahony is prescient:

“The police state is not a remote fantasy; on the contrary it is only kept at bay by the effectiveness of our laws in upholding individual human rights. This critical fact, not the vote-catching potential of hardline rhetoric, should be foremost in the minds of politicians whenever they consider legislation that might impinge on our traditional civil rights.”[17]

CIVIL LIBERTIES LOST POST 9/11

The torture debate is arguably outside the civil liberties realm. The right not to be tortured is a fundamental human right rather than a mere civil liberty. However, against the backdrop of the debate on torture a more insidious process of civil liberty erosion is occurring, which seems a comparatively lesser evil. But civil liberties lost are soon forgotten, as a process of normalisation occurs to blend extraordinary measures into the legal system.

American Supreme Court Justice Sandra Day O'Connor, speaking shortly after September 11th 2001 stated: 'We are likely to experience more restrictions on our personal liberty than has ever been the case in our country.' She warned that the government might 'rely more on international rules of war than on our cherished constitutional standards for criminal prosecutions in responding to threats to our national security.' [18]

THE USA PATRIOT ACT – IMPLICATIONS FOR PRIVACY

It can convincingly be argued that sacrificing privacy rights makes citizens less free without making them more secure, and amounts to destroying freedom in order to defend it. [19] Among the extensive surveillance measures contained in legislation such as the USA Patriot Act, are provisions which allow for the tracking of internet usage and for access to educational, business and financial records. The Patriot Act is among a number of American legislative measures designed to remove the impediments that individual privacy rights pose to investigations. It permits the interception and monitoring of communications and communications records, and searches without notice. These powers are largely exercisable without warrant. As one commentator remarks:

“Formerly confidential records concerning any American citizen are now available for FBI inspection on a clandestine basis whenever an investigator thinks they may be relevant to a terrorism investigation, whether or not the person concerned is a foreign agent or a suspected criminal offender. Again, this is the antithesis of government restraint: Judicial oversight is allowed no role as a check on the executive branch,

and the powers granted extend far beyond the international terrorism suspects that are the legitimate targets of concern.”[20]

The Act displays the extent to which extraordinary measures can disrupt the existing balance between national security and civil liberties. ‘USA Patriot’ is an acronym for ‘Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.’ The tools include the ability to conduct secret searches (section 213) and increased powers to wiretap communications devices, intercept communications, to employ pen registers[21] and trap and trace devices (section 216) and to access previously confidential records.

The only Senator to oppose the Patriot Act, Senator Russ Feingold, made a statement at the Act’s Bill stage in which he refers to the past suspensions of civil liberties in the US, and how the experiences have stained their history. He said:

“There have been periods in our nation’s history when civil liberties have taken a back seat to what appeared at the time to be the legitimate exigencies of war. Our national consciousness still bears the scars of those events: The Alien and Sedition Acts, the suspension of habeas corpus during the civil war, the internment of Japanese Americans, German-Americans and Italian-Americans during World War II, the blacklisting of supposed communist sympathizers during the McCarthy era, and the surveillance and harassment of antiwar protestors, including Dr Martin Luther King Jr., during the Vietnam war. We must not allow these pieces of our past to become prologue.”[22]

Senator Feingold refers to the judgment of Justice Arthur Goldberg in the case of *Kennedy v Mendoza-Martinez*:

"It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared,

will inhibit governmental action. "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances ... In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution."

Senator Feingold goes on to discuss the incarceration of people based on ethnicity during World War II, and says:

"Of course, there is no doubt that if we lived in a police state, it would be easier to catch terrorists. If we lived in a country that allowed the police to search your home at any time for any reason; if we lived in a country that allowed the government to open your mail, eavesdrop on your phone conversations, or intercept your email communications; if we lived in a country that allowed the government to hold people in jail indefinitely based on what they write or think, or based on mere suspicion that they are up to no good, then the government would no doubt discover and arrest more terrorists.... Preserving our freedom is one of the main reasons that we are now engaged in this new war on terrorism. We will lose that war without firing a shot if we sacrifice the liberties of the American people."

DETENTION WITHOUT CHARGE ON BOTH SIDES OF THE ATLANTIC

Given that one poll showed that 55% of American citizens were worried that their government would not go far enough in fighting terrorism in order to protect civil liberties,[23] it is perhaps unsurprising that the prolonged detention of suspects in detention centres such as Guantanamo Bay has been supported by the American public. 65% of those surveyed in a TNS / Washington Post / ABC News poll supported the holding of suspected terrorists in Guantanamo Bay in 2003. The figure has since dropped to 57% supporting the detention as of June 2006, but it still represents a majority favouring its continued use.[24] 51% of those polled expressed the view that holding prisoners had made the United States safer from terrorism, while 45% felt that it has not.

Some of the issues surrounding the continued detention of suspects in custody without charge were considered by courts on both sides of the Atlantic. In the US *Rasul v Bush* concerned whether American courts had

jurisdiction to hear the *habeas corpus* applications of foreign nationals who were detained at Guantanamo Bay; while the English case of *A and Others v Secretary of State for the Home Department* centred on the proposed derogation by the UK government from the right to liberty guaranteed by the European Convention on Human Rights, to provide for the detention of non-nationals whose presence in the UK was believed to pose a risk to national security. The cases illustrate the interplay between the judicial and political spheres; and demonstrate that deference will not be the unquestioning response of the courts to draconian emergency legislation.

Rasul v Bush[25] arose from the holding in Executive detention of two Australian citizens and 12 Kuwaiti citizens, without charge and without access to counsel, in the US Naval Base at Guantanamo Bay in Cuba. Following the September 11th attacks on the World Trade Centre and the Pentagon, Congress had sanctioned the use by the President of “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks... or harboured such organizations or persons.”[26]

The majority of a divided Supreme Court[27] held that the legality of the detention of aliens can be examined where such detention occurs in territory over which the US exercises plenary and exclusive jurisdiction but not ultimate sovereignty. The Court found that the habeas statute would create federal court jurisdiction over the claims of an American citizen held at the base, and that the statute draws no distinction between Americans and aliens held in federal custody. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority.

The decision displays the willingness of the American Supreme Court to examine critically the position adopted by the government on issues of national security, and to assert judicial control over executive and legislative action in this area.

In England a more defined dichotomy is in evidence between the competing approach of the government and the judiciary to the reconciliation of the rights of citizens with the preservation of national security. The so-called Belmarsh case, *A and Others v Secretary of State*

for the Home Department[28] was based on the assertion by the government of the existence of ‘a time of war or other public emergency’ in which derogation from the European Convention was both permissible and necessary. The House of Lords was of the view that the measures introduced by the government were disproportionate.

The government proposed a derogation (on the basis of a public emergency threatening the life of the nation within the meaning of article 15 of the ECHR) from the right to personal liberty guaranteed by Article 5 (1) of the European Convention on Human Rights, and with section 23 of the Anti-Terrorism Crime and Security Act 2001 (ATCSA) the government provided for the detention of non-nationals if their presence in the UK was believed to be a risk to national security and they were suspected of being terrorists. Section 23 of the ATCSA was held by the Special Immigration Appeals Commission to be discriminatory on nationality grounds, as suspected terrorists of British nationality could not be detained under the provisions. An appeal by the Secretary of State was allowed, and the appellants then brought their case to the House of Lords.

The House of Lords accepted (not without misgiving, in the words of Lord Bingham of Cornhill, delivering a speech in which the majority concurred)[29] that, having regard to the jurisprudence of the European Court of Human Rights and to the nature of the terrorist attacks on 11 September 2001, the absence of a specific threat of an immediate attack did not invalidate the assessment that there was a risk, and that great weight should be given to the judgment of the Government and Parliament on the question of where they were called on to exercise a pre-eminently political judgment, and that the declaration of a public emergency threatening the life of the nation was valid.

However, when it came to judge the actual measures adopted the House of Lords adopted a less deferential approach. Lord Bingham stated that the Attorney General had submitted that

“as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not judicial

judgment. Just as the European court allowed a generous margin of appreciation to member states, recognising that they were better placed to understand and address local problems, so should national courts recognise, for the same reason, that matters of the kind in issue here fall within the discretionary area of judgment properly belonging to the democratic organs of the state. It was not for the courts to usurp authority properly belonging elsewhere. The Attorney General drew attention to the dangers identified by Richard Ekins in "Judicial Supremacy and the Rule of Law" (2003) 119 LQR 127. This is an important submission, properly made, and it calls for careful consideration."**[30]**

Lord Bingham's response to this was as follows:-

"... I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues."**[31]**

The House of Lords held that the right to liberty was among the most fundamental, and that section 23 did not rationally address the threat to security, was a disproportionate response, and was not strictly required by the exigencies of the situation. The court further held that there had been no derogation from the prohibition on discrimination, and the appellants

were treated differently on nationality grounds from UK nationals suspected of terrorism. The measure, it was found, unjustifiably discriminated against non-national suspects, and such treatment was inconsistent with the UK's international treaty obligations to afford equality before the law and to protect the human rights of all individuals within its territory. The House of Lords relied heavily on the Human Rights Act 1998 and the European Convention on Human Rights to which it gives effect.

ABOLISH THE HUMAN RIGHTS ACT AND ABANDON THE ECHR...

The political divergence from the rights-imbued approach to national security was evident in the recent proposal by the leader of the opposition that the UK should 'abolish the Human Rights Act and pull out of the ECHR.'^[32] David Cameron said:

"The Human Rights Act has made it harder to protect our security. And it's done little to protect some of our liberties. It is hampering the fight against crime and terrorism. And it has helped create a culture of rights without responsibilities... the act of leaving the ECHR would send a message to all those countries that we have encouraged to sign up to it that you cannot have rights and security at the same time."^[33]

This approach can be contrasted with the dicta of Baroness Hale of Richmond, in which the fact that the courts hold the delicate balance between the rights of the individual and the powers of the State is emphatically reiterated. She said of the Belmarsh detainees:

"They are being detained on suspicion of being international terrorists ... neither the common law, from which so much of the European Convention is derived, nor international human rights law allows indefinite detention at the behest of the executive, however well-intentioned. It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely. Only the courts can do that and, except as a preliminary step before trial, only after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and security of person."^[34]

She continued:

“Protecting the life of the nation is one of the first tasks of a Government in a world of nation states. That does not mean that the courts could never intervene. Unwarranted declarations of emergency are a familiar tool of tyranny.”[35]

IRISH EXPERIENCES OF EMERGENCY POWERS

Ireland is familiar with the use of emergency powers to deal with terrorism. Following the ending of the Irish civil war the majority of the losing republican side embraced democratic politics in the form of the Fianna Fáil party which came to power in 1932 and has remained the dominant Irish political party ever since.[36] However, a minority of republicans continued to embrace the concept of armed struggle against Britain to regain the unity of Ireland and overthrow the status quo in Northern Ireland and this minority denied recognition to either of the “partitionist” states in Ireland. Armed campaigns were carried on from 1939 to 1945, from 1956 to 1962, and, most seriously, by the Provisional IRA after 1970. Following the ceasefires in the mid 1990’s small breakaway groups – notably the “Real” IRA and the “Continuity” IRA have continued to wage an armed struggle and in the Omagh bombing of 1998 perpetrated the single worst atrocity of the Northern Ireland troubles.

The reaction of successive Irish Governments has been uncompromising and severe. The Offences Against the State Act, 1939, created a number of offences related to the activities of unlawful organizations. It also permitted two extraordinary measures. The first, the internment of persons without trial, may be brought into effect “in time of war or national emergency”. The second was the establishment of a special criminal court which could be brought into being where the Parliament resolved that the ordinary courts of justice were inadequate to secure the effective administration of justice and the preservation of public peace and order. The response in 1939 has to be seen against the political threat posed by extreme republicans to Ireland’s decision to remain neutral in the Second World War; while their ability to carry out effective attacks against Britain was very limited they risked damaging the delicate international relations between a state at war – indeed, fighting for its life, and its small,

non-belligerent neighbour, and perhaps even risked creating a pretext for British re-intervention in the territory of the new independent state.

Internment was used during the Second World and again during the IRA's 1956-62 campaign. While it was occasionally talked about in the early 1970's it was not used, probably because of the disastrous experience of the British government with internment in Northern Ireland from 1972 on. It may be noted that while the introduction of internment in 1957 was the subject of a derogation under Article 15(1) of the European Convention of Human Rights on the grounds that there was a "public emergency threatening the life of the nation" which derogation was unsuccessfully challenged in *Lawless v Ireland*.^[37]

The second measure was the creation of a Special Criminal Court, consisting of three judges sitting without a jury. As originally constituted the "judges" of the court could consist not only of judges in the proper sense but of barristers, solicitors or senior army officers. During the 1939-45 period the Court was staffed by army officers and was used to deal, not only with terrorism, but with black-marketeering. Sentences of death were imposed and carried out. A Special Criminal Court was again established during the 1956-62 IRA campaign and again from 1972 to date.^[38]

Since its reestablishment in 1972 the Court has always consisted of judges or former judges. A powerful tool was created by the introduction of a rule of evidence making the opinion of a police officer that a person was a member of an unlawful organization evidence of that fact. ^[39]

The usual justification advanced for the use of non-jury courts is that it is a counter to possible jury intimidation. Perhaps more significant is the likelihood that unanimous jury convictions of republicans engaged in an armed struggle would have been difficult – while only a tiny minority were ever actively engaged in violent activity the number of sympathizers – "sneaking regards" as they were sometimes known would often have been much larger.

In this connection it is interesting to note the remarks of Henchy J. in the Supreme Court:-

“I am satisfied that the indissoluble attachment to trial by jury ... was one of the prime reasons why the Constitution of 1937 (like that of 1922) mandated trial with a jury as the normal mode of trying major offences. The bitter Irish race-memory of politically appointed and Executive-oriented judges, of the suspension of jury trial in times of popular revolt, of the substitution therefor of summary trial or detention without trial, of cat-and-mouse releases from such detention, of packed juries and sometimes corrupt judges and prosecutors, had long implanted in the consciousness of the people and, therefore, in the minds of their political representatives, the conviction that the best way of preventing an individual from suffering a wrong conviction for an offence was to allow him to "put himself upon his country", that is to say, to allow him to be tried for that offence by a fair, impartial and representative jury, sitting in a court presided over by an impartial and independent judge appointed under the Constitution, who would see that all the requirements for a fair and proper jury trial would be observed...” [40]

Three areas in particular have given rise to criticism of the court as an institution. The first is the role of the judges both as tryer of fact and decider of questions of law, so that inadmissible evidence which would never reach a jury is mentally segmented from the admissible evidence in evaluating the case against the accused. As against that, unlike in the case of juries, the court gives a reasoned judgment.

Secondly, the Court has been used not only to try terrorist offences but in some cases crimes committed by organized gangs. The court’s jurisdiction does not depend on the cases being terrorist; rather the test is whether the ordinary courts “are inadequate to secure the effective administration of justice and the preservation of public peace and order.”[41] This use of the court is seen by its critics as part of the normalisation of emergency provisions. The Supreme Court has upheld the lawfulness of using the Special Criminal Court in non-terrorist cases.[42]

The third area of criticism is the fact that the decision whether to use the court is in the hands of the Director of Public Prosecutions whose decision is effectively unchallengeable.

KAVANAGH V IRELAND

A myriad of constitutional challenges to the court have failed, and the Supreme Court has effectively closed the avenue of legal challenge in *Kavanagh v Ireland*.^[43] The applicant had *inter alia* challenged the government's decision to maintain the Court in operation, claiming that its establishment was a consequence of the conflict in Northern Ireland, and that given the paramilitary ceasefires there was an onus on the government to keep the situation under review. He had been charged with false imprisonment, firearms and robbery offences, and he contended that 'the offences of which he stood charged were ordinary crimes with no political or subversive connection.'^[44] The Supreme Court rejected this argument. Following the decision of the Supreme Court, the applicant in *Kavanagh* applied to the UN Human Rights Committee on the basis that the reference of his case to the Special Criminal Court constituted a violation of his entitlement to equality before the law as guaranteed by the International Covenant on Civil and Political Rights.^[45] His complaint was upheld by the UN Committee which observed that:

"No reasons are required to be given for the decisions that the Special Criminal Court would be "proper" or that the ordinary courts are "inadequate", and no reasons for the decision in this particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances.

The Committee considers that the State party has failed to demonstrate that the decision to try the author before the Special Criminal Court was based on reasonable and objective grounds. Accordingly, the Committee concludes that the author's right under Article 26 to equality before the law and to equal protection of the law has been violated."^[46]

A subsequent challenge to the legality of the applicant's detention based on the UN Committee's findings was rejected by the Supreme Court. The Court held that as the ICCPR did not have legal effect as part of the domestic law of Ireland that therefore: " the provision of an international

agreement which has not been adopted into Irish law cannot prevail over the legal effect of a conviction by a duly constituted Irish court.

JUDICIAL CONTROL

Despite the fact that the Irish courts have resisted attempts to attack the use of the Special Criminal Court, the Irish Supreme Court has not been prepared always to accept unquestioningly emergency legislation justified by reference to the threat from terrorism.

In 1976, following a series of atrocities carried out by the Provisional IRA south of the border and culminating in the assassination of the British ambassador in Dublin, the Irish parliament passed the Emergency Powers Act, 1976, which increased police powers of detention from two to seven days. The legislation was justified by reference to Article 28.3.3° of the Constitution of Ireland which provides as follows:-

“Nothing in this Constitution other than Article 15.5.2° shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law. In this sub-section "time of war" includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall have resolved that, arising out of such armed conflict, a national emergency exists affecting the vital interests of the State and "time of war or armed rebellion" includes such time after the termination of any war, or of any such armed conflict as aforesaid, or of an armed rebellion, as may elapse until each of the Houses of the Oireachtas shall have resolved that the national emergency occasioned by such war, armed conflict, or armed rebellion has ceased to exist.”

The President of Ireland, relying on the provisions of Article 26 of the Constitution, declined to sign the Bill and referred it to the Supreme Court to decide on its constitutionality. The Government sought to argue that the Court had no power to go behind the parliament's declaration of state of emergency, but the court, although upholding both the legislation and the

validity of the emergency declaration, asserted its jurisdiction to examine both the validity and proportionality of such a declaration and legislation passed under it in a suitable case.[47]

CONCLUSION

It is in times of emergency that civil liberties can be lost, and their absence becomes normalised and accepted as a full-time feature of the legal landscape. It is because of this process of normalisation that actions taken in the defence of the security of the State must be taken carefully, and must be restrained in their application, limited in a way that echoes the derogation provision of the ECHR, no more extensive than demanded by the exigencies of the situation, and which do not go beyond it. Cesare Beccaria's advocacy of restraint in punishment applies equally to the civil liberty debate today:

“Thus it was necessity that forced men to give up a part of their liberty. It is certain, then, that every individual would choose to put into the public stock the smallest portion possible, as much only as was sufficient to engage others to defend it. The aggregate of these, the smallest portions possible, forms the right of punishing; all that extends beyond this, is abuse not justice.”[48]

[1] See Conor Gearty, *Terror*, London, Faber & Faber, 1991, at p.1.

[2] The UK parliamentary Joint Committee on Human Rights, in its eighteenth report of the session 2003-2004 (HL Papers 158, HC 713, 21 July 2004) stated: “Derogations from human rights obligations are permitted to deal with emergencies. They are intended to be temporary. According to the government and the Security Service, the UK now faces a near-permanent emergency.” Quoted in *A and Others v Secretary of State for the Home Department* [2005] 2 AC 68, at 99.

[3] The first line of the Preamble to the Universal Declaration of Human Rights states: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”

[4] Article 4 of the ICCPR states: “1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.” Article 6 refers to the right to life, Article 7 to freedom from torture, cruel, inhuman and degrading treatment or punishment, Article 8 to freedom from slavery, Article 11 prohibits imprisonment for contractual delict, Article 15 prohibits *ex post facto* criminal sanctions, Article 16 refers to recognition as a human person before the law and Article 18 confers freedom of thought, conscience and religion.

[5] Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

[6] Article 15 – “1 In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.” Article 2 refers to the right to life, Article 3 prohibits torture, Article 4 prohibits slavery and forced labour and Article 7 prohibits retrospective punishment.

[7] Torture is also prohibited by the Universal Declaration on Human Rights. Article 5 of the Universal Declaration states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

[8] *Furund ija* (IT-95-17/1-T), Trial Chamber II, Judgment of 10 December 1998, para. 146

[9] The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (UNCAT) came into force in June 1987.

[10] Alan M. Dershowitz has suggested in his book 'Why Terrorism Works' that 'torture warrants' could be used to obtain information on potential terrorist attacks.

[11] *Per Lord Bingham of Cornwall, A and Others v Secretary of State for the Home Department (No. 2)* [2005] 3 WLR 1249, at 1283

[12] President Bush's Address to Military Families, Idaho Center, Nampa Idaho, August 24th 2005. Available online at <http://www.whitehouse.gov/news/releases/2005/08/20050824.html>

[13] Alan M. Dershowitz, *Why Terrorism Works, Understanding the Threat, Responding to the Challenge*, Yale University Press, 2002, at p. 138.

[14] *Ibid.* see p. 144 and p. 148.

[15] *Ibid.* at p. 144

[16] *Ibid.* at pp. 158-159.

[17] Paul O'Mahony, *Criminal Chaos – Seven Crises in Irish Criminal Justice*, Dublin, Round Hall Sweet & Maxwell, 1996, at p. 38.

[18] Quoted in *The New York Times*, September 29th 2001. See also Richard C. Leone "The Quiet Republic: The Missing Debate About Civil Liberties After 9/11" in Leone and Anrig (Eds), *The War on Our Freedoms – Civil Liberties in An Age of Terrorism*, Public Affairs, New York, 2003.

[19] See Stephen J. Schulhofer, "No Checks, No Balances: Discarding Bedrock Constitutional Principles" in Leone and Anrig (Eds), *The War on Our Freedoms – Civil Liberties in An Age of Terrorism*, Public Affairs, New York, 2003.

[20] *Ibid.*, at p. 78.

[21] The US Code, at 18 U.S.C. § 3127(3), defines a pen register as "a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a

wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication, but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.”

[22] Statement of US Senator Russ Feingold, available online at <http://www.senate.gov/~feingold/speeches/01/10/102501at.html>

[23] See Richard C. Leone, “The Quiet Republic : The Missing Debate About Civil Liberties After 9/11,” in Leone and Anrig (Eds), *The War on Our Freedoms – Civil Liberties in An Age of Terrorism*, Public Affairs, New York, 2003, at p.6.

[24] The Poll Question asked: “Do you support or oppose the federal government holding suspected terrorists without trial at the US military prison in Guantanamo Bay, Cuba?” In September 2003 the responses were: Support – 65%; Oppose – 28%; No opinion – 7%. In June 2006 the figures were: Support – 57%; Oppose – 37%; No Opinion 5%. Methodology: Telephone interviews with 1,000 American adults, conducted from June 22 to June 25, 2006. Margin of error 3%. See <http://abcnews.go.com/images/Politics/1015a2Gitmo.pdf> See also <http://abcnews.go.com/US/story?id=2121953&page=1>

[25] 542 US 466 (2004).

[26] Authorization for Use of Military Force, Pub. L. 107-40, § 1- 2, 115 Stat . 224.

[27] The Court was divided 6 –3: Stevens , O’Connor, Souter, Ginsberg and Breyer JJ.; Scalia J., Rehnquist C.J. and Thomas J dissenting.

[28] [2005] 2 AC 68

[29] *Ibid.* at p 101.

[30] *Ibid.* at p. 107.

[31] *Ibid.* at p. 110

[32] Speech by David Cameron, Leader of the Conservative Party: “Balancing Freedom and Security – A Modern British Bill of Rights”

[33] *Ibid.*

[34] *A v Secretary of State for the Home Department, X v Secretary of State for the Home Department*, [2005] AC 68, at p. 171.

[35] *Ibid.*, at p. 172.

[36] It has been in power for 56 out of the 74 years since then.

[37] (No 3)(1961) I EHRR 15

[38] Article 28.3.3 of the Irish Constitution provides for the emergency power to suspend ordinary constitutional safeguards ‘for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion.’ The provision continues: ‘in this subsection “time of war” includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which... a national emergency exists.’ However, the operation of the Special Criminal Court is not dependent upon the existence of such a state of emergency, rather Article 38.3.3 of the Constitution expressly allows for the establishment of special courts in cases where the ordinary courts are inadequate ‘to secure the effective administration of justice and the preservation of public peace and order.’ Special Criminal Courts may be established under Part V of the Offences Against the State Act 1939. See further Hogan and Walker, *Political Violence and the Law in Ireland*, Manchester University Press, at p.227 *et seq.*

[39] Section 3(2) of the Offences Against the State (Amendment) Act 1972 provides that where a garda (police) officer, not below the rank of superintendent, in giving evidence in proceedings related to an offence of membership of an unlawful organisation, states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member. The Supreme Court in *People (DPP) v Gannon* (unreported, Court of Criminal Appeal, April 2003) held that although a court was not bound to accept and

act upon such evidence of belief, it could, if unchallenged, form the basis for a conviction. In a formal sense the rules of evidence in the Special Criminal Court do not differ from those in the ordinary courts, but the offence of membership of an unlawful organization is invariably prosecuted before the Special Criminal Court.

[40] *People (DPP) v O'Shea* [1982] I.R. 384, at 432.

[41] Article 38.3.1° of the Constitution provides that 'special courts may be established by law for the trial of offences in cases where it may be determined in accordance with law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.' Special courts are legislatively provided for by section 35(2) of the Offences Against the State Act 1939, which mirrors Article 38.3.1°, providing: "35.—(2) If and whenever and so often as the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and that it is therefore necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid and ordering that this Part of this Act shall come into force."

[42] *People (DPP) v Quilligan* [1986] IR 495.

[43] *Kavanagh v Ireland* [1996] 1 I.R. 321.

[44] *Ibid*, at p. 356, per Barrington J.

[45] *Kavanagh v Ireland* 4 April 2001 (CCPR/C/71/D/819/1998)

[46] *Ibid*.

[47] The case had an extraordinary sequel. In a speech at an army mess the Minister for Defence called the President of Ireland (who is titular commander-in-chief of the armed forces) "a thundering disgrace" for referring the legislation to the Supreme Court. When the Taoiseach and Government failed to defend the President, Cearbhaill Ó'Dáilagh, a former Chief Justice, against this attack, he resigned. A year later the Government

lost power in a general election. Many saw the “thundering disgrace” incident as a key factor in that loss of power.

[48] Cesare Beccaria, *Dei Delitti e Delle Pene* (On Crimes and Punishments), 1964.