Accountable Intelligence and Intelligent Accountability

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Rogue Elements in Northern Ireland or Classic Failures in more Global Systems of Governance?

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Abstract

Intelligence led policing is in the ascendancy on a global level. This poses serious and often delegitimated questions around law’s ability to prevent and sanction wrongdoing by state security agents. The ramifications of law’s failures are particularly felt in conflicted and post conflict societies. This paper, through the prism of the Northern Ireland experience, problematises the more global sanitation and reification of ‘covert intelligence’ approaches and their potential to contribute to insecurity rather than security.

Introduction

Following the terror attacks on the United States of America in September 2001, the basis in many jurisdictions for major decisions affecting global and national security has more obviously been seen to be ‘intelligence’ – and often flawed or overspun intelligence at that.¹ In policing circles, after a brief flirtation with community

oriented models as key to achieving policing effectiveness, the intelligence driven agenda is once again in the ascendancy.\(^2\)

Intelligence led security is nothing new. It is arguably the most important weapon in a State’s arsenal. How else to combat organised criminals embedded in and indistinguishable from other members of community? How else to defeat terrorism where paramilitaries and suicide bombers do not play by State rules of engagement, are likely to be able to evade law at many levels, and will undoubtedly be trained to

Select Committee on Intelligence Report (July 2004) identifying ‘group think’ as a problem and concluding: ‘The key U.S. assertions leading to the 2003 invasion of Iraq -- that Saddam Hussein had chemical and biological weapons and was working to make nuclear weapons -- were wrong and based on false or overstated CIA analyses…’ http://www.fas.org/irp/congress/2004_rpt/index.html

withstand police and military questioning? Good intelligence obviously has life saving capability in the right hands and intelligence gathered in accordance with rule of law principles undoubtedly has an important role to play in the prevention and detection of serious crime.

However, where there is insufficient cross checking, independent scrutiny and recognition of the capacity of security agencies to have and to hide quite paranoid forms of group think, the overblowing of intelligence gathered in insufficiently accountable ways can in fact lead to miscarriages of justice, wrongful killings and other reprehensible acts by state agents.

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4 Consider ECHR cases of eg McCann v UK (1995) 21 EHRR 97, Jordan and others v UK (2001) 37 EHRR 52; Also note the circumstances surrounding the killing of Charles de Menezes at Stockwell Tube Station in London, see ‘The Terrorist who Wasn’t’ Guardian 8th March 2006 http://www.guardian.co.uk/attackonlondon/story/0,,1725935,00.html ; See also eg Stevens 3 Overview and Summary 17 April 2003 available at:

5 see eg Police Ombudswoman of Northern Ireland Operation Ballast Report (idem)
Kevin McNamara, a British MP, has identified the problematics of this approach quite succinctly:

The upside of…secrecy is that terrorists might be led to believe that the intelligence agencies are all-seeing and all powerful. They do not know where the subterfuge begins and ends, how deeply agent penetration goes or what are the agencies’ objectives at any time. The downside of the policy is that we do not know either. We do not know to what extent, if at all, the agencies are overrunning ethical boundaries. There is a plethora of agencies in the field, each running agents, collecting information and conducting operations. The terrorist might be confused over who is who, but so are we, especially when something goes wrong and we want to find out who is responsible.”

McNamara’s concerns have currency in that many practices currently privileged in leading out the “war on terror” are justified in terms of ‘intelligence received.’ Often these practices are ultimately ‘more effective in eroding international human rights principles than in countering international “terrorism,”’ particularly given the current self-defined role of powerful States like the US and, by extension of its ‘special relationship’, the UK. On one level prosecuting this never-ending war on terror plays out as an attack on law itself. Accepting that international human rights law is

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6 K McNamara MP, UK Parliamentary debate reported in Hansard 11 July 2002 col 1118

7 Amnesty International Annual report 2005; see web.amnesty.org/report2005/index-eng

8 See C Campbell ‘“Wars on Terror” and Vicarious Hegemons: The UK, International Law and the Northern Ireland Conflict’ ICLQ Vol 54 April 2005 321-356
still in its relative infancy and that enforcement has proved problematic on many levels, human rights are in danger of losing ground at a normative level as an underpinning concept for world order. How this has happened and what it means in terms of implications for nurturing peace on a local and regional as well as a global stage will be partially canvassed in this article.

Where the use and abuse of intelligence is concerned, a jurisdiction such as Northern Ireland which is currently being used to sell the right way of doing counter insurgency in key conflict areas around the world is worth mining for lessons insufficiently learnt in this respect.

The article thus aims to reflect on some relevant and more global aspects of the playing out of the Northern Ireland conflict and recent moves towards its purported resolution. The gains and losses for the Rule of Law sustained in this more localised ‘war on terror’ are examined from the standpoint of the current transitional context, among hundreds of former and serving colleagues providing advice in respect of intelligence gathering and counterinsurgency policing, a number of PSNI officers have been seconded to Iraq to train Iraqi police, and promoted from Inspector to Chief Inspector for the period of their secondment; Ronnie Flanagan, former RUC/PSNI Head of Special Branch and Chief Constable has been asked to conduct a review of the Iraqi police despite his own leadership having been found ‘seriously flawed’ by the Police Ombudswoman of Northern Ireland in her report into the inadequacies of police investigation surrounding the Omagh bombing; and in terms of his presiding over numerous acts of collusion by police officers with paramilitary agents who were permitted to commit various crimes, including murder, with impunity (See *Operation Ballast* Report 2007 at n.4).
where this particular society is trying to leave its own war behind and create conditions for effective and durable peace.

The issue of covert intelligence led policing looms large in this analysis. Wrongful activities of RUC\textsuperscript{10} ‘Special Branch’\textsuperscript{11} and failed attempts to curb its power have import beyond the shores of Northern Ireland. They are explored with a view to teasing out some relevant understandings to be brought to bear on the current peace process locally and more globally. What emerges calls for a more fulsome examination of some of the streams and processes flowing from the USA/UK ‘war on terror.’

Part I of this article, while accepting the undoubted value of good intelligence secured by people of insight and integrity in accordance with rule of law principles, nevertheless raises some general concerns as to how intelligent intelligence strategies are and can be, without a fundamental re-assessment of law’s role and reach in times of conflict. Part II of the paper uses events surrounding the murder, in 1989, of Belfast Solicitor, Pat Finucane, and other evidence of collusion\textsuperscript{12} by police Special

\textsuperscript{10} The RUC has been the state police force in Northern Ireland since 1922. Its name was changed to the Police Service of Northern Ireland (PSNI) in November 2001.

\textsuperscript{11} an elite, powerful and highly unaccountable section of the Royal Ulster Constabulary/Police Service of Northern Ireland with responsibility for counter-insurgency activities, often described as a ‘force within a force’.

\textsuperscript{12} Collusion is defined by Cory in relation to the army and police as ‘ignoring or turning a blind eye to the wrongful acts of their servants or agents or supplying information to assist them in their wrongful acts or encouraging them to commit wrongful acts.’ Cory Collusion Inquiry Report HC470, 1 April 2004 at 21-22. Fuller definitions exist. See eg http://sinnfein.ie/peace/document/109/1
Branch\textsuperscript{13} in paramilitary activities to frame the debate more concretely around the debasement of the rule of law by state agents in conflict situations. Historical accusations and more recently, findings,\textsuperscript{14} that Special Branch operatives have being

\textsuperscript{13} Although Special Branch provides the focus of this article, it is noted that elements of the British Army and MI5 were equally, if not more, involved in illegal activity of this nature, and that the army at times ‘took over’ from the police in terms of eg shoot to kill operations and the firing of plastic baton rounds in the face of increased ‘heat’ from relatively speaking more fulsome police accountability mechanisms. It must also be acknowledged that state actors were by no means alone in perpetrating abuse, and there are huge questions still to be answered in relation to the activities of paramilitary organisations on both sides of the conflict. One of the benefits of the many grassroots initiatives aimed at ‘story-telling’ and ‘truth recovery’ is their ability to provide a pathway to some of these difficult conversations at a community level. For a good example of such a process, see Arduyne Commemoration Project Report \textit{Arduyne: The Untold Truth (2002)} http://cain.ulst.ac.uk/issues/victims/ardoyne/

\textsuperscript{14} See eg summary Report of Stevens 3 Inquiry, April 2003 supra n.4 at 16: ‘My enquiries have highlighted collusion, the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, and the extreme of agents being involved in murder. These serious acts and omissions have meant that people have been killed and seriously injured.’ \textit{Operation Ballast} Report supra n. 4 further confirms such practices in the period up to 2003 in relation to at least 10 murders, 72 instances of further crimes, including 10 attempted murders, 10 punishment shootings and many other serious crimes.
involved in gross violations of human rights, including murder,\textsuperscript{15} paves the way for a closer examination of how criminal justice systems and the very notion of law and order become contaminated and subverted through the organs supposedly established for their protection.

Part III unpacks something of how this situation was allowed to unfold within a supposed democratic state and explores the processes at work in terms of their broader implications for the rehabilitation of the Rule of Law as a normative concept.

Part IV then turns its attention to the struggle to uncover the truth about Special Branch and other security policies and activities, and the extent to which law has assisted the British Government in telling what is still only a very partial truth about the activities of State agents during the conflict and into the post-conflict reality. This section further analyses the reasons behind this reticence and the ongoing obstruction occurring, even in the midst of the huge programme of reform based on the 1999 recommendations of the Patten Commission on Policing\textsuperscript{16}.

\textsuperscript{15} See eg Bill Rolston ‘An Effective Mask for Terror: Democracy, Death Squads and Northern Ireland’, Crime, Law and Social Change,(2006) advance access: DOI: 10.1007/s10611-006-9007-7, 16\textsuperscript{th} March

\textsuperscript{16} The Commission was established in 1998 as part of the Good Friday Agreement, the result of lengthy multiparty negotiations aimed at achieving a comprehensive end to decades of violent political conflict in Northern Ireland. The Commission’s mandate included “to make recommendations for future policing arrangements in Northern Ireland.” Its recommendations focused on the centrality of human rights to these arrangements. Report available at http://cain.ulst.ac.uk/issues/police/patten/patten99.htm
Part V ultimately challenges the validity in terms of good governance of state recourse to anti-democratic approaches during conflict, and continued variations on the denial theme both during and thereafter. In so doing the article analyses the role of law as an instrument in effecting the changes necessary to leave war behind, where law itself has been corrupted in the waging of that war. The potential of legal mechanisms and processes to bring about the paradigm shifts necessary in the construction of meanings and understandings of justice in a transitional setting is called into question at the same time as it is validated as an important determinant of a society’s ability to move forward.

The paper concludes with some comment on the necessity of extricating law from its position as simply another weapon in a conflict situation to allow it ultimately to function as a credible tool for (re)establishing its own legitimacy.

**Intelligent Intelligence  - Guaranteed by Law?**

Although there are clearly a whole range of instances where intelligence has been used to prevent criminality and save lives, in too many incidents where scrutiny has in some measure occurred, covert ‘intelligence’ both in substance and process, and despite supposed safeguards, has been found to be not only unaccountable and secret, but often highly suspect. Covert practice can too easily serve as camouflage for ineptitude and/or malfeasance. To allow this to happen is not only completely counterintuitive in terms of preventing bombings and other crime, but equally adds significantly to levels of insecurity.

17 Consider eg the ‘no risk’ assessment of Mohammad Sidique Khan; See ‘Spies ‘hid’ bomber tape from MPs’ *Sunday Times* 14 May 2006 at http://www.timesonline.co.uk/tol/news/uk/article717798.ece
The substance, the means by which intelligence is gathered and the use to which it is put have all been staunchly defended by the UK, US and other governments as vital and credible in the successful prosecution of the ‘War on Terror.’ Even where proved incontrovertibly wrong and, at best, clearly open to a range of political influences, interpretations and possible doctoring before being presented in any form to the public,\(^\text{18}\) – intelligence gathered through insufficiently accountable processes has been clung to by governments as a valid basis for taking life and death decisions – and sometimes for taking life.

However, a mindset which defines security too narrowly and values unaccountable intelligence too highly implicates democratic states with others in a range of unacceptable practices from ethnic profiling\(^\text{19}\) to incarcration of individuals without trial\(^\text{20}\) to rendition and torture to all out war\(^\text{21}\) – all of which have implications for weakening rule of law baselines both domestically and internationally.\(^\text{22}\)

\(^{18}\) such as the British and US intelligence on Saddam Hussein’s capabilities in terms of weapons of mass destruction prior to the mass destruction of Iraqi people in 2003 (see n.1)

\(^{19}\) See eg Open Society Justice Initiative *Ethnic Profiling by Police in Europe* (2005)

\(^{20}\) with Guantanamo Bay a stellar, but far from the only, example

\(^{21}\) eg those visited on Afghanistan and Iraq

\(^{22}\) see eg Report by International Helsinki Federation for Human Rights *Anti Terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11* (April 2003) which concludes ‘many of the measures [in OSCE States] that have been adopted appear to be disproportionate to the threats posed or the goal of enhancing national security’ at 11. Available at: http://www.ihf-hr.org/viewbinary/viewdocument.php?doc_id=6426:
The prescience and over-valorising of intelligence is starkly evidenced by a growing acceptance in certain circles that even intelligence extorted by torture has some merit – on the fictional assumption that such information is somehow rendered sanitised and safe for democratic consumption where a particular state’s own agents did not carry out the torture themselves\textsuperscript{23} or where pain is inflicted within certain boundaries or by approved clinical means.\textsuperscript{24} That such formulae are able to gain ground within


\textsuperscript{23} See judgment of UK Court of Appeal I in \textit{A v. Secretary of State for the Home Department [2005] 2 AC 68, [2005] 2 WLR, [2005] 3 All ER 169, (2005) 17 BHRC 496} where the court legitimated in proceedings connected with administrative detention under the 2001 Anti Terrorism Crime and Security Act the use of information acquired as a result of torture - so long as it was committed by non-UK officials abroad. Although this ruling was subsequently overturned by the House of Lords, Lord Justice Laws proclaimed himself “quite unable to see that any… [Rule of Law] principle prohibits the secretary of state from relying … on evidence coming into his hands which has _ been obtained through torture by agencies of other states … If he has neither procured the torture nor connived at it, he has not offended the constitutional principle”. See ‘The Blind Eye of the Law’ by Malcolm Evans in The \textit{Guardian} newspaper August 13, 2004 available at \url{www.w3ar.com/a.php?k=1386}

\textsuperscript{24} See eg Amnesty International Annual Report 2005. Launching the report in London on May 25, 2005 AI Secretary General stated that the US government's use of doublespeak such as environmental manipulations, stress positions and sensory manipulation when describing treatment of prisoners amounted to "cynical attempts to redefine and sanitise torture". While claiming to be champions of human rights, the
supposedly democratic states throws into further question the effectiveness of protection guaranteed to fundamental human rights, not only at a national, but an international level, where the prohibition against torture might only a few short years ago have been thought to be at least an unassailable customary norm, with some degree of bite.

Human rights abuses associated with widening the powers of state police and other security agents are nowadays deemed guarded against by a range of rule of law safeguards, necessarily including effective oversight and scrutiny. In the UK these take the form of specific legislation such as the Regulation of Investigatory Powers Act (RIPA 2000), the Human Rights Act 1998 and particular oversight mechanisms such as the Surveillance Commissioner and Intelligence and Security Committee. On top of these there is the integrity of the individuals involved, the integrity of political process, and, of recent times, to the huge chagrin of Executive government, the integrity of the House of Lords. Legal rules and oversight mechanisms can only have full utility, however, when they are aware of and able to holistically address all the issues requiring addressing, many of which, by their very nature, are able to remain well under the radar of such processes.

Claims to be guaranteeing security through covert activity, reined in by effective safeguards, are the order of the day – despite warnings from a range of jurisdictions and experiences – including, recently, the Morris Tribunal in Ireland\textsuperscript{25} that the use and abuse of informers and the all too frequent failure of established accountability

\textsuperscript{25} Tribunal of enquiry into allegations of corruption by certain members of An Garda Síochána (the Irish Police Service) in Donegal. See www.morris.ie
systems distorts security realities, corrupts individuals and organisations, destroys lives and ultimately thwarts the Rule of Law, even in relatively consensual societies.\textsuperscript{26}

The reach of ‘intelligence’ in situations of political conflict and on into the post-conflict reality is particularly invidious and problematic as experience in Northern Ireland and elsewhere shows. In 2007, the Police Ombudswoman for Northern Ireland (PONI)\textsuperscript{27} on foot of a complaint by a member of the public in relation to a highly ineffective police investigation following the murder of his son, published the results of a damning and wide ranging investigation which had taken her office several years to complete.\textsuperscript{28} This had uncovered how one police informant had been permitted to engage in a spree of killings and other forms of serious criminality with impunity and state payment to boot. What was particularly significant about this investigation was that it provided irrefutable evidence of the continuing supremacy of police Special Branch and some of its particularly disturbing methodology, several years into a

\textsuperscript{26} The \textit{Operation Ballast} Report charted instances of collusion between security forces and loyalist paramilitaries in a particular area of North Belfast up until 2003, several years after paramilitary ceasefires and reform attempts to curb the power of Special Branch within the ‘new’ Police Service of N. Ireland (PSNI) (see n.4)

\textsuperscript{27} Established under the Police (NI) Act 1998 on foot of ‘\textit{A Police Ombudsman for Northern Ireland?’} a report by Maurice Hayes into the system for investigating complaints against the police (1997) HMSO Belfast; The \textit{Operation Ballast} investigation concluded that misleading information was prepared for the Director of Public Prosecutions (DPP) by Special Branch and that vital intelligence likely to have assisted in the investigation of serious crimes, including murder, was withheld from police investigation teams.

\textsuperscript{28} ‘\textit{Operation Ballast}’ Report January 2007 (see n.4)
major reform programme\textsuperscript{29} designed to decimate its power and ground the Police Service of Northern Ireland firmly in a ‘policing with the community’ model\textsuperscript{30} underpinned at every level by respect for human rights.

The \emph{Operation Ballast} report, having pointed out an extensive and murderous catalogue of wrongdoing by members of Special Branch in the handling of their intelligence sources chillingly points out as a side issue: “\textit{Before the Police Ombudsman drew these matters to his attention, the Surveillance Commissioner had not been able to identify the misleading documentation which was created by some Special Branch officers…}”\textsuperscript{31} Indeed he had been signing off on the organisation as having a clean bill of health in this regard, adding an extra level of impunity rather than drilling down to provide the effective assurances necessary that all was as it should be.

This is not just of concern within Northern Ireland. Despite the failure of accountability mechanisms and other evident shortcomings, a revamped, but still inherently problematic, Northern Ireland counter-insurgency model is currently being sold on the world stage as something to be catapulted into other highly sensitive, politically charged settings such as the Balkans and Iraq. Unfortunately, at the same

\begin{itemize}
  \item[29] see Report of Independent Commission on Policing (The Patten Commission) (1999) \emph{A New Beginning to Policing in Northern Ireland} The Stationery Office (see n.15)
  \item[30] The Patten Report described policing \textit{with} the community as the ‘core business of policing’ and made 175 detailed recommendations as to how this could be more effectively achieved. A Policing Board and a Police Oversight Commissioner were established to provide independent oversight of the process of reform.
  \item[31] See n. 3 at para 33.21
\end{itemize}
time as this is happening, a 98 page internal Ministry of Defence (MOD) review of the British Army operation\textsuperscript{32} in Northern Ireland drawn up for the purpose of informing future military operations, is indicative that some very important lessons from Northern Ireland have not been learnt. Based on the assessment of 3 senior British army officers, the report points to a mere handful of examples of ‘poor military decision making’ in 37 years of deployment, only 2 of which ‘stand out as having serious operational and even strategic consequences which were unforeseen at the time.’\textsuperscript{33}

One of these involved the de facto imposition of martial law during the Falls Curfew of 1970,\textsuperscript{34} when four civilians died and sixty civilians and fifteen soldiers were

\begin{quotation}
\textit{Operation Banner: An Analysis of Military Operations in Northern Ireland} (2006) prepared under the direction of the General Chief of staff and available, not on the MOD website, but at: \url{http://www.serve.com/pfc/misc/opbanner.pdf} At its height 30000 British troops supported the police in Northern Ireland during this operation. 763 military personnel were killed, many more were injured and the army was directly responsible for around 300 deaths. During the same period almost 1800 deaths have been attributed to the IRA and around 1000 to loyalist paramilitary groups such as the UDA and UVF. Police personnel were directly responsible for around 60 killings, themselves losing 302 police officers and having over 7000 personnel injured. Given that the truth around collusion with paramilitary groups has not yet been established, the figures for state killings are subject to variation upwards.
\end{quotation}

\textsuperscript{32} Para 829, Page 8-8 supra n.41

wounded. In relation to Bloody Sunday 1972 during which fourteen unarmed civilians were killed by British paratroopers, the gaffe was not apparently the reliance on faulty intelligence, the decision to use the Parachute Regiment to police a civilian protest or the decision to open fire on unarmed demonstrators. Rather ‘using vehicles to approach the crowd,’ seemed in the view of the report’s authors, ‘heavy handed.’ The report barely makes reference to the existence of loyalist paramilitary groups stating that “extreme loyalist violence was relatively rare.” This is a hard conclusion to sustain in light of the fact that loyalist paramilitary violence was responsible for around one thousand of the over three thousand conflict related deaths during ‘the Troubles’ in Northern Ireland.

The omission is perhaps less surprising when the extent of links between state soldiers and paramilitary groups is considered. This perhaps also explains why the report makes no mention of an earlier Ministry of Defence assessment that “the best single source of weapons, and only significant source of modern weapons, for Protestant extremist groups has been the UDR [Ulster Defence Regiment].”

Among other inaccuracies and glaring omissions, the Operation Banner report does not mention at all murders such as that of Pat Finucane and Adam Lambert or the fact that the British Army Intelligence Force Research Unit (FRU) has been implicated in these and other crimes. Not only does it omit reference to the conclusions of official investigations by Sir John Stevens, the report does not even refer to the fact that such investigations took place. Why these omissions are so worrying in such a supposedly

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35 On 3rd May 2006, the Irish News published evidence from official files from 1973 in which military intelligence officers estimated that up to 15 per cent of members of the Ulster Defence Regiment were linked to loyalist paramilitaries.

36 idem
self reflective analysis will become abundantly clear as this article continues. In the meantime, the report indicates contentedly that ‘immediate tactical lessons of Operation BANNER have already been exported elsewhere, with considerable success’\textsuperscript{37} and that ‘[t]he generally positive experience of Northern Ireland stood the army well in theatres such as Kuwait, the Balkans, Sierra Leone, Afghanistan and Iraq.’\textsuperscript{38} The remainder of this article considers whether police intelligence strategies are worthy of the same accolades.

\section{The Reign of Special Branch within the Royal Ulster Constabulary (RUC)}
Special Branch has always been considered a force within a force. Historically the unit within the Royal Ulster Constabulary responsible for counter-insurgency policing and national security, it has been charged with operating as a law unto itself, and its agents have been shown to have colluded with loyalist and republican\textsuperscript{39} paramilitary

\textsuperscript{37} foreword by Sir Mike Jackson GCB CBE DSO ADC Gen

\textsuperscript{38} para 847 at page 8-13. The remainder of this article will focus on police special branch by way of example. As such, it will not deal in depth with any of the other state security actors or paramilitaries involved in this conflict.

\textsuperscript{39} This aspect of collusion in Northern Ireland has been much underplayed to date though it is clear that a number of republican paramilitaries were equally in the pay of the State as they carried out some very serious criminal activity. PONI is currently investigating 10 complaints relating to the role of ‘Stakeknife’. One of the British agents most important agents within the IRA, he headed up the IRA’s Internal Security Unit which was responsible for the ‘interrogation’ and killing of around 60 other supposed informers. PONI is investigating possible collusion in at least one
organisations in criminal activity up to and including the instigation and carrying out of murder.  

At around eight hundred strong Special Branch accounted for one tenth of full time police personnel and maintained a shadowy control over every aspect of RUC activity, as well as having a huge degree of influence over the loyalist paramilitary organisations that it infiltrated. The Walker Guidelines, a codified set of instructions drawn up by MI5 to outline the relationship between the Branch and the RUC’s Criminal Investigations Department (CID) were eventually leaked into the public domain in 2001. Belatedly acknowledged as official policy the Walker murder, that of Mary Travers in 1984. See ‘O’Loan’s Fears As She Steps Down’ by Henry McDonald, The Observer, July 1, 2007 at 16/17

see eg Stevens 3 Summary Report, April 2003 supra n.4; Cory Collusion Inquiry Report HC470, 1 April 2004 HMSO London

Patten confirmed this as the official figure in 1999. See Patten Report supra n.15

Loyalists favour maintaining union with Britain The extent of infiltration of republican paramilitary organisations (favouring British withdrawal and the establishment of a United Ireland) is still being investigated though it is already clear that high level agents were involved in brutality and murder while in the pay of Special Branch

The instructions were in a memorandum issued from RUC headquarters on February 23, 1981. They, in turn, were based on a report commissioned by the Chief Constable in January 1980.

One of two British secret security agencies

See ACC Sam Kincaid presentation to the Policing Board 2 September 2003; available at:www.policingboard.org
Report demonstrates how at every level of enforcement the organisation’s stated aims\(^46\) of protecting life and detecting crime were subservient to Special Branch diktat. Arrests, searches, charging and prosecution were all deemed to be subject to Special Branch veto and, even with this extraordinary degree of control over ‘normal’ law enforcement practices, there is incontrovertible evidence of obstruction of several important investigations through tampering with, falsifying or failing to disclose critical evidence to CID colleagues and external police and civilian investigators, including, most recently the office of Police Ombudswoman (PONI).

For example, the *Operation Ballast* Report highlighted as a ‘*significant obstacle to [its] investigation*’ the poor standard of record keeping by Special Branch, resulting in *a number of important documents [being] either missing, lost or destroyed*.\(^47\) The Police Ombudsman, having encountered such practices in respect of earlier investigations, is clear that ‘*this was not an oversight but was a deliberate strategy and had the effect of avoiding proper accountability*’.\(^48\) She has stated that out of 100 cases that she has investigated, relevant Special Branch information was not handed

\(^46\) The functions of the police were enshrined in legislation as: a. to protect life and property b. to preserve order, c. to prevent the commission of offences and d. to take measures to bring the offender to justice.

\(^47\) See eg supra n.4 paras 8.14, 8.18 and 8.19; The investigation also highlighted instances of the police not disclosing information to the Director of Public Prosecutions, with “*the then Deputy Assistant Chief Constable for Special Branch (replying) that no such disclosure was required, despite the fact that there was a clear obligation to do so*” (para 10.14 and 10.15).

\(^48\) *supra n.4 at paras 8.1-8, 19 and 33.6*
over to CID colleagues in a ‘significant number’. She concludes that ‘part of the failure to prosecute many of the murders of the Troubles must be attributable to the failure to disseminate information.’\textsuperscript{49} Furthermore, as Nuala O’Loan and others have painstakingly established: ‘[t]he whole procedure of Special Branch was predicated on the protection of the informant. So people had a vested interest in sustaining their own informants. There wasn’t a process by which informants were screened or their activities were looked at.’\textsuperscript{51}

A further symptom of a culture of impunity was evidenced when police officers “including some serving officers, gave evasive, contradictory, and on occasion farcical answers to questions. On occasion, those answers indicated either a significant failure to understand the law, or contempt for the law.”\textsuperscript{52}

The stock government and police response when such deceit is eventually uncovered is to blame the bad apples. However, by 2002, a report by the Lawyers’ Committee for Human Rights concluded categorically that ‘the evidence that has

\textsuperscript{49} Out of over 3000 deaths, less than a third have been successfully prosecuted. The Historical Enquiries Team established by the PSNI is currently revisiting over 2000 cases. When the government initially announced its establishment it spoke of 1800 unsolved murders – this factored out any killings by the security forces which were notoriously underprosecuted. Following a backlash by victims, and given the willingness of the Chief Constable to set up a special team for this purpose, the government was forced to backtrack and include direct state killings within the HET remit.

\textsuperscript{50} Nuala O’Loan cited in \textit{The Observer} 1\textsuperscript{st} July 2007:17 supra n. 30

\textsuperscript{51} idem

\textsuperscript{52} supra n.4:para 5 executive summary
emerged...extends far beyond isolated acts of collusion by individual members of the security forces and implicates the very foundations of the government’s security policy in Northern Ireland.  

The true extent to which Special Branch and other secret security units, such as MI5 and the British army’s infamous Force Research Unit (FRU) which similarly was involved in the running of ‘informants’, brutality and collusion in murder is still impossible to ascertain with certainty. This in itself is part of the problem, and part of the reason why the jury must still be out in terms of claims made currently by the Police Service of Northern Ireland that reforms in this area are now effective. However, what is clear is that the law was used cynically, at a very high level within the government of Northern Ireland, as a vital tool and cover in the policing of conflict, The problematics of a narrow framing of security based on ‘protection from  


54 This approach was actually publicly advocated by one army officer responsible for dealing with the ‘low intensity conflict’ in Northern Ireland during this time. ‘Broadly speaking there are two possible alternatives, [ concerning the way in which the law should work] the first one being that the law should be used as just another weapon in the government’s arsenal, and in this case it becomes little more than a propaganda cover for the disposal of unwanted members of the public. For this to happen efficiently, the activities of the legal services have to be tied into the war effort in as discreet a way as possible.’ ---Brigadier Frank Kitson, Belfast, Northern Ireland. Quoted in The Sunday Press, 31 October, 1971.
the nightmare’ and a securocratic driven analysis relying on informal knowledge gathered by an anonymous and narrow group of people (often elites within an elite) working secretively in a self referential culture that thrives on stereotyping and ethnic profiling is a reality that needs to be acknowledged and engaged by law for policing, and society more broadly, to move forward. As Nuala O’Loan has stated, shortly before stepping down as the first Police Ombudswoman for Northern Ireland: ‘If we have to learn anything from Northern Ireland it is that we mustn’t allow a situation to develop in places like Bradford, Manchester or London where you allow communities to become so disconnected from the police and the security services…that they stop giving the authorities the information they need.’ This point is particularly well made in the current ‘high terror alert’ context, particularly given that responsibility for intelligence and security policing, including the running of agents in Northern Ireland, will be transferred to M15 later this year, an organisation de facto beyond the effective reach of PONI or arguably any other truly effective oversight mechanism.

The paper now moves to look beyond general assertions about failures in intelligence and the likelihood of the situational corruption of even noble minded individuals to drill down into concrete human realities related largely to one specific case. In so doing, the paper does not wish to imply that this murder is more important than the thousands of others in Northern Ireland or indeed the millions of other avoidable

55 See David Bell 2007 supra n.2

56 cited in The Observer, July 1, 2007 at 17 supra n. 30

57 MI5 is subject to review by the Intelligence Services and Interception Commissioners established under RIPA 2000 and by the Intelligence and Security Committee under the Intelligence Services Act 1994. It is also subject to scrutiny by the National Audit Office.
deaths around the world in which there is direct or indirect state complicity. Simply, it provides a powerful illustration of the extent to which criminal practice can go hand in hand with impunity in the name of a State’s fight against terrorism in a supposedly democratic state.

**The Murder of Pat Finucane – before and after the facts.**

The case of Pat Finucane is telling in many respects. A Belfast solicitor, Pat was shot dead in front of his wife and children in February 1989. 3 weeks before his death, the Parliamentary Under Secretary of State for the Home Department, the Rt. Hon Douglas Hogg QC, MP, remarked during a debate in parliament on the renewal of Prevention of Terrorism legislation that 'some solicitors in Northern Ireland [were]

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58 On June 25, 2007 it was announced that no former or serving police officer would face prosecution over the murder of Pat Finucane despite Sir John Steven’s conclusion 4 years earlier that there had undoubtedly been collusion between Special Branch officers and UDA members directly involved in the killing. As part of its reasoning the Public Prosecution Service stated: ‘The issue of sufficient and available evidence was critical for the PPS when considering possible charges arising out of Stevens III. Some of the difficulties included an absence of particular records, potential witnesses who had since died and the inability in certain instances to identify the role and responsibilities that individuals played in specific events. In addition, the prosecution had to take account of potential abuse of process arguments by the defence that any trial at this stage would be unfair.’ Full statement available at http://www.ppsni.gov.uk; See [http://www.serve.com/pfc/collusion/](http://www.serve.com/pfc/collusion/) for reactions from Finucane family, Amnesty International and others
unduly sympathetic to the cause of the IRA.\textsuperscript{59} Mr Hogg had formed this conclusion after being briefed by senior RUC officers who helpfully conflated the solicitor’s legitimate legal representation of a number of high profile republicans with membership of the IRA.\textsuperscript{60}

Over the years, it has ultimately been possible to establish that in 1989 a number of factors were at work that might have made such intelligence based assessments appear somewhat less than objective. According to Michael Finucane, writing in the Guardian newspaper in February 2001, the motivating factors behind his father’s murder lay rather in the fact that: "[h]e was among the first to bring the RUC and the army to court when they broke the law…He was among the first to successfully take the government to the European court of human rights over its practices in Northern

\textsuperscript{59}Hansard, 17 January 1989. Stevens 3 concluded "To the extent that [these remarks] were based on information passed by the RUC, they were not justifiable and…the Minister was compromised." (supra n.4)

\textsuperscript{60}This theme of intimidation of defence lawyers through a variety of guises, including alleged death threats by RUC officers transmitted via their clients – was taken up by the United Nations Special Rapporteur Datam Parum Cumuraswamy when he reported such intimidation as being an ongoing problem in 1998. The chill effect of such public and not so public pronouncements might be seen in the small number of lawyers prepared to be involved in such cases – with its own implications for the proper administration of justice. The Police Ombudswoman for Northern Ireland also conducted a survey into the extent to which such intimidation exists in 2003. She concluded that the phenomenon existed in respect of a small number of lawyers. http://www.policeombudsman.org//Publicationsuploads/solresearch.pdf
Ireland. He was among the first to use the law to show that law still applies even in conflict. 61

This view is supported by information that has been painstakingly dragged to the surface in a necessarily piecemeal fashion by Pat Finucane’s family and friends and by courageous investigative journalists and NGO activists 62 over several years. This points to extensive collusion by both Special Branch and the British Army ‘Force Research Unit’ in the lead up to this murder (with certain sources suggesting it was to all intents and purposes commissioned by ‘the peelers’ 63 (police)). It was certainly not prevented by them on the basis of information within their purview at the relevant time. Intervention to prevent this death could have taken many forms at any number of points prior to the trigger being pulled. At the time the head of the loyalist paramilitary group, the Ulster Defence Association (UDA) in West Belfast (Tommy Lyttle), was a Special Branch informer. So was William Stobie, who supplied and subsequently collected the gun used in the shooting of Pat Finucane, but not before warning his RUC handler that he was doing so. So was Ken Barrett, the man who actually carried out the shooting, who, following his initial confession to members of the RUC 2 years after the murder, was not prosecuted but run as an agent instead.

Meanwhile, a British undercover agent and former soldier, Brian Nelson, as head of

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61 Michael Finucane ‘They Killed my Father’ The Guardian Newspaper, February 13, 2001


http://www.birw.org/justice.html

63 Ken Barrett in 2 part BBC Panorama Programme, ‘A Licence to Kill’ broadcast June 2002
intelligence for the UDA, had responsibility for selecting their targets, and provided a photograph of the solicitor to set up the attack. Each of these nodes provides an apparent point of entry for a preventative measure.

That such steps were not taken points to a high degree of State sanction for this murder, something which is backed up by subsequent events. Through dint of the investigations of others, extensive evidence has emerged of wilful perversion of the course of justice in terms of the blocking of any effective RUC investigation in the aftermath of this killing. On 18 April 2003 a report on alleged RUC collusion with loyalist paramilitaries in the late 1980s by senior English police officer, Sir John Stevens, concluded that ‘the RUC investigation of Pat Finucane's murder should have resulted in the early arrest and detection of his killers.’ Four years after papers from the Stevens Inquiry were lodged with the PSNI, the Public Prosecution Service for Northern Ireland announced, on June 25, 2007, that there was to be no prosecution instituted against any police officer in respect of this case.

Although Ken Barrett was eventually arrested by the Stevens team and ultimately convicted for this murder in 2004, the whole murky underbelly of the systems and practices which connived more broadly around this and several other killings has not been put sufficiently in the spotlight. The fact that Barrett ultimately pleaded guilty to the murder, 16 years on and despite the absence of any forensic evidence to link him to the crime, (in part due to his potential eligibility for early release under the terms of the Good Friday Agreement\textsuperscript{64}) ensured that many of the issues and questions around the true extent of state involvement in this and other killings was not opened for

\textsuperscript{64} Multi-Party Agreement endorsed by referenda and underpinning the current peace process since 1998
question. This echoed a similar plea bargain situation in the case of Brian Nelson in 1992, also arrested by the Stevens team, where a number of charges, including 2 counts of murder, were inexplicably dropped and a simple plea to others prevented any trying and testing of the evidence in court. At this trial, Nelson’s handler, Gordon Kerr, known only at the trial as ‘Colonel J’, gave evidence that Nelson was ‘a hero’ and, rather than a rogue agent, merely a victim of the system to which he was loyal. Nelson was not charged with involvement in the murder of Pat Finucane.

65 A plea bargain was struck with Brian Nelson that 15 of the 35 charges, including the most serious of two counts of murder would be dropped. Nelson pleaded guilty to 20 lesser charges including 5 counts of conspiracy to murder and vital cross-examination was thereby dispensed with. He received a 10 year sentence despite a great deal of evidence existing of his involvement in murders and conspiracy to commit a number of other murders. Lord Justice Kelly, giving judgment on 3 February 1992 described him as a man of the greatest courage who had crossed the dividing line between criminal participation and lawful intelligence gathering. It may be of note that Kelly and LCJ Brian Hutton (who went on to conduct the recent Iraqgate inquiry into the death of David Kelly) met with Prime Minister John Major the week before the commencement of this trial. Nelson was released in 1996 and died in 2003.

66 Intelligence Colonel in Northern Ireland in 1987, since promoted to Brigadier. His response to the first Stevens enquiry in 1990 might be considered high-handed. "I find it incredible that I should be required to account for our handling of the case." cited in John Ware’s article ‘Did the Army’s Secret Weapon get too close to Ulster’s Death Gangs?’ The Guardian Newspaper, June 19, 2002
This murder, and its implications for the rule of law, therefore, provides an effective lens though which to examine the myriad failures of an intelligence led national security system. – not just in terms of this one killing, but with more generalised import. The failures pre-date the murder itself and implicate not only individuals within Special Branch and the FRU, but the whole system of police investigation, MI5, the Northern Ireland inquest and judicial systems and investigations by officers external to the RUC/PSNI, including, most recently the Police Ombudswoman for Northern Ireland.

As the police investigation into the murder was not permitted to get off the ground, other legal avenues were left to provide some degree of truth and justice for both the Finucane family and society at large. However, domestic legal remedies were either unable or unwilling to fulfil this function. For instance, the coroner at the inquest into Pat Finucane’s killing refused to allow his wife to read out a statement referring to death threats made against her husband by police officers prior to his murder, or alleging collusion by the security forces in her husband’s death. The Northern Ireland inquest system was, on the contrary, deliberately geared not to get to the objective reality of how people came to die in disputed circumstances involving the state. Changes to the law ensured that inquests in Northern Ireland, unlike the system pertaining in England and Wales, were not permitted to reach a verdict and were instead limited to making a short factual finding as to how a named person physically came by his or her death. The fact that legal aid was not, throughout the conflict, available to families of the deceased further curtailed access to either justice or truth and made inquests an incomplete and inappropriate forum for establishing what had happened to deceased relatives. However, in the absence of any prosecution, or even
any onus on the then Director of Public Prosecutions\textsuperscript{67} to give reasons for a decision not to prosecute on occasions where cases were actually referred to him, and the State’s frequent recourse to Public Interest Immunity certificates to prevent disclosure of relevant information\textsuperscript{68} in a range of settings, an inquest was often the only legal forum to address issues of family and public concern.

The Stevens 3 inquiry eventually put an official name to collusion in respect of Pat Finucane’s murder and that of another young man, Adam Lambert. Stevens’ inquiries ‘highlighted collusion, the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence and the extreme of agents of agents being involved in murder. These serious acts and omissions have meant that people have been killed or seriously injured. Informants and agents were allowed to

\textsuperscript{67}office now renamed Public Prosecution Service (PPS)

\textsuperscript{68}The government often issues public interest immunity certificates at the request of the security forces in order to suppress evidence from admission into the record of inquest proceedings. Inquests for ten people killed by state forces or by loyalist paramilitaries with suspected collusion with state forces in County Tyrone are cases in point. Despite being ordered by the courts to hand over vital information to the state coroner, the PSNI, like the RUC, has refused to cooperate. See

http://www.serve.com/pfc/euro/caj03oct.html. This interference has led to inquests being aborted on more than 12 occasions over the past 15 years. On issues relating to disclosure and the protection of informants more generally see: R v Chief Constable of West Midlands ex parte Wiley [1995] 1 AC 274 and Rowe and Davis v UK (2000) 30 EHRR 1, Wright, Re Application for Judicial Review [2003] NIQB 17 (7 March 2003)
operate without effective control and to participate in terrorist crimes.’ Stevens also
collapsed that where ‘[n]ationalists were known to be targeted…they were not
properly warned or protected. Important evidence was neither exploited nor
preserved.’ However, this summary report cannot represent the triumph of legal
process or justice finally done as, once again, only a glimpse into the full story is
provided. This was not the first time Stevens reported on the state of collusion in the
RUC. His first investigations began in 1989, although inexplicably they did not focus
on the Finucane killing till some years later. As with Steven’s first and second reports,
the full document, and the evidence on which conclusions were reached were passed
directly to the Chief Constable of the PSNI and have not been published in any further
shape or form. So 16 years on from Stevens first being charged to investigate security
force collusion, following the leaking of security montages and files on named
individuals to loyalist paramilitaries, his report has established only what could no
longer be denied, and the justice system, 4 years on, has finally deemed itself
incapable of pursuing this wrongdoing by means of prosecution of any police officer
involved.

The history of the Stevens investigations itself merits some attention. First appointed
following loyalist claims that they only targeted republicans known to the security
forces, and to back up their claims, having published around Belfast a series of photo
montages generated within the security forces, the parameters of the first Stevens’
inquiry apparently were restricted to the circumstances surrounding this security

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69 Public summary of Stevens 3 Report April 2003, supra n.4
70 PPS statement, 25th June 2007 available at http://www.ppsni.gov.uk
breach. From the beginning, this investigation met with obstruction at many levels.\textsuperscript{71} During the night of 10 January 1990, the office containing the enquiries' information, despite being housed within a heavily fortified and highly secure RUC station, was mysteriously burnt down hours before a dawn raid was due to arrest key suspect Brian Nelson\textsuperscript{72} and a number of other people. It subsequently transpired that fire alarms, telephones and heat sensitive intruder alarms were not working at the time. Stevens, who initially claimed not to suspect foul play has since gone on record describing this as deliberate arson.\textsuperscript{73}

A number of prosecutions followed the first Stevens inquiry – none of them of police officers, and a second inquiry began in April 1993, which rather than contributing to the truth, added to the sense of growing frustration that the British government was stalling and would do all in its power to prevent the full facts from emerging. By the

\textsuperscript{71} eg Army handlers delayed for several months before handing over 1000 photo montages held by Brian Nelson as Director of Intelligence for the UDA

\textsuperscript{72} who fled to England and was only arrested later that year when he decided to return to Belfast.

\textsuperscript{73} See Richard Norton Taylor, Evidence of the clandestine activities of military intelligence in Northern Ireland is being suppressed \textit{The Guardian April 10, 2000} http://www.guardian.co.uk/comment/story/0,3604,178144,00.html. Interestingly an unpublished report by John Chilcott was able to establish no involvement of any member of any government agency into a break in at Special Branch headquarters at Castlereagh on March 17, 1992, though the incident itself bore many of the hallmarks of this earlier attack. See ‘No Security’ Role at Castlereagh http://news.bbc.co.uk/1/hi/northern_ireland/3071059.stm
late 1990s, following on from fragile paramilitary ceasefires and insufficient changes to police structures, pressure was growing from a number of sources for an independent public inquiry into the murder of Pat Finucane. In 1998 United Nations special investigator Param Cumaraswamy accused the RUC of "systematic intimidation" of lawyers representing paramilitary suspects, one of whom, Rosemary Nelson, was later murdered herself in circumstances which have also given rise to allegations of collusion.\footnote{Report on the Mission of the Special Rapporteur on the Independence of Judges and Lawyers on Mission to UK (1998) http://www.hri.ca/forthereCord1998/documentation/commission/e-cn4-1998-39-add4.htm} An independent Commission on policing, the Patten Commission, was established on foot of a multi-party agreement in 1998 which had made clear that real movement on policing and security was necessary for the peace process to keep on track. In 1999 Stevens was invited back to Northern Ireland to specifically examine the killing of Pat Finucane and allegations raised by British-Irish Rights Watch\footnote{A London based human rights NGO} and the United Nations. By summer of that year, he had questioned Ken Barrett in relation to the murder. Events then took another sinister twist when Ed Maloney, a local journalist was pursued under the Prevention of Terrorism Act to produce notes from an interview published with William Stobie in which the former UDA quartermaster claimed to have warned the RUC about the planned attack using weapons that he would provide. Following a legal battle in which the journalist resisted this intrusion into press freedom, it emerged that his 122 pages of notes were not required to pursue the case as what Stobie had told the journalist, he had also already told to the RUC.
The trial against Stobie for conspiracy to murder subsequently collapsed in November 2001 after the chief witness, another journalist, was stated to be unable to give evidence on health grounds. 2 weeks later Stobie was shot dead himself by his former paramilitary colleagues.

By 2002, the government’s policy of avoidance was questioned in terms of advancing the political process and certain commitments were made in secret negotiations at Weston Park, including an agreement to set up public inquiries into the case of Pat Finucane and 5 other murder cases if a judge from outside the jurisdiction ruled that these were warranted. To provide grist to the mill, in June 2002 a special two-part investigation was aired on the BBC Panorama programme.\(^7^6\) This revealed publicly for the first time the workings of the Force Research Unit and carried the allegation that a special branch officer had persuaded loyalists to carry out the shooting of Pat Finucane.\(^7^7\) Shortly thereafter Stevens announced that the publication of his third report would be postponed, and 3 months later, in September 2002, Hugh Orde, the detective in charge of the day-to-day running of the Stevens inquiry, stepped down to become Chief Constable of the Police Service of Northern Ireland. Following a further postponement, a summary of this report was published in April 2003 setting out the skeletal findings detailed above.

2003 also saw the European Court of Human Rights judgment that Pat Finucane’s right to life had been violated by the UK government in that there had been no

\(^7^6\)See also UTV *Insight* programme ‘Justice on Trial’ first aired 4 December 2001; transcript available at: http://www.serve.com/pfc/pf/pf07122001a.html

\(^7^7\) 18 June 2002
effective investigation into his murder. As well as police and other criminal justice failures the inquest system came in for swingeing criticism in that it failed to permit the issue of collusion even to be raised, much less examined. The Court concluded that, given the time that had elapsed and the obstruction to that point, an effective criminal investigation would not now be possible. The fact of Ken Barrett’s arrest and charging as a result of the third Stevens Enquiry in 2003, and his 11th hour plea in 2004 does not change that fact, because, in punishing one individual, the system through which the abuse came to be perpetrated is still protected. In short, the law has to date failed to find a remedy for this human rights abuse, because the law has been

Although the Chief Constable is on record as saying: ‘In relation to the Finucane finding, it is so easy to criticise the quality of investigation in 1989 when there were far more investigations than there are now. If you go back further than that to 1972 when over 440 people died, to expect an investigation of a quality you would get if you were murdered today is simply not the case. The courts in Strasbourg historically have been very good at ignoring the context, in fact they have excluded the context from their deliberations when forming a view. This is always regarded as difficult for people from my side because it is simply ignoring reality.’ Policing Board Minutes 2nd July 2003 links to all minutes can be found at

http://www.nipolicingboard.org.uk/minutes_agendas/nipb.htm

As indicated, Stevens, a senior British police officer was appointed on three separate occasions to investigate a number of issues around collusion and report to the Chief Constable of the RUC (now PSNI). Pat Finucane’s murder apparently did not feature in the first two of these investigations. The third enquiry concluded that collusion was a feature of this and at least one other murder, (Stevens April 2003, supra n.4)
implicated in it and tainted by it. The paradox is, however, that it is precisely a legal mechanism which is required\textsuperscript{80} to ensure that any fact finding mechanism which is established has sufficient reach to get to the bottom of just how much damage has been done to the rule of law throughout the period of conflict and beyond.

Even at this point, it still appears an imperative of the British government that the full truth does not emerge. Although public inquiries have now been set up in three other cases\textsuperscript{81} reported on by Judge Cory, (though controversy has also surrounded these and ________________

\textsuperscript{80} see eg P O’Connor ‘So the State Ran Death Squads?’ ‘If [a truth and reconciliation commission] were merely to be an exercise in story telling (by survivors who have been denied the basis on which they could even tell a story because they are denied the facts) then the British strategy at the Saville tribunal [into the events of Bloody Sunday when Paratroopers opened fire on a peaceful protest, killing 14 people in 1972] will have been a resounding success. Wear them down and tire them out. Faced with the implications of recent European Court judgements the British government would welcome a story telling style truth commission with open arms. We should remind ourselves again. The state organised and directed death squads. An inquiry with power to subpoena witnesses and documents, would form one part of the complex mechanism needed to uncover the workings of the secret state. It will be effective only if lessons are learnt from the Saville Inquiry… It will not uncover all of the facts. It will be legally ambushed every step of the road. But it would be foolish indeed to believe that information will be forthcoming without resort to a legal mechanism however flawed.’ 27\textsuperscript{th} June 2002, available at: www.serve.com/pfc/fru/licence/paulOConnor.html

\textsuperscript{81} those of Rosemary Nelson, Robert Hamill and Billy Wright
formal hearings were ultimately delayed in all of them) huge question marks hang over how the government has treated Cory’s recommendations in respect of the holding of a public inquiry into the murder of Pat Finucane. This will be examined later in the article.

**Security Force Collusion in the Murder of Pat Finucane – an isolated incident?**

Allegations of collusion between the security forces and loyalist paramilitaries have been made since the early 1970s. Space precludes a full examination here but the following serve by way of example.

One former British soldier, Ginger Baker, sentenced to 25 years imprisonment for killing 4 Catholics in the early 1970s, has consistently claimed that RUC members drove weapons through checkpoints, regularly provided police files to the UDA and tipped off loyalist paramilitaries to prevent the seizure of their weapons. He also claimed that an RUC officer was second in command of a UDA battalion during this time. Although the Stevens Inquiry confirmed that this man had contacted them in relation to their inquiries, nothing that Stevens has brought into the public domain relates to any information received as a result of this contact.

An independent panel of experts established by the Pat Finucane Centre examined 25 cases of suspected loyalist paramilitary violence in Northern Ireland during 1972-77. The 25 cases involved a total of 76 murders as well as attempted murders. In 24 of the 25 cases, involving 74 of the 76 murders, the panel found evidence to suggest collusion by members of the Royal Ulster Constabulary (RUC) or the Ulster Defense
Regiment (UDR). 82 One of the findings of this report was that: 'Credible evidence indicates that superiors of violent extremist officers and agents, at least within the RUC, were aware of their sectarian crimes, yet failed to act to prevent, investigate or punish them. On the contrary, they allegedly made statements that appeared to condone participation in these crimes.'83

Human rights abuse by Special Branch Officers extended beyond colluding with others in wrongful acts. In 1978 Amnesty International published a serious indictment of Castlereagh and other RUC interrogation centres where "ill-treatment, by plain clothes detectives, of suspects had occurred with sufficient frequency to warrant a public inquiry." Soon after publication of this report the British Government set up the Bennett Committee of Inquiry into Police Interrogation Procedures in Northern Ireland. The limits imposed on the Inquiry were severely criticised by Amnesty on the grounds that individual cases could not be investigated. Again, the cycle of using legal processes to obfuscate or ensure only a partial account is given, is evident. Even with this barrier in place, the report still found that there was clear evidence of injuries sustained during interrogation which could not have been 'self-inflicted' and went on to recommend the introduction of strict internal controls. Just before publication of the Bennett Report in the spring of 1979 Dr. Robert Irwin, an RUC surgeon with responsibility for interrogation centres, gave an interview to London Weekend Television. In it he revealed that he had seen roughly 150/160 prisoners with various injuries which could not have been self-inflicted. These revelations were supported by


83 idem at 4
another RUC surgeon, Dr Dennis Elliot, and the Association of Police Surgeons. A smear campaign was initiated against the main whistleblower. Following a public uproar a number of prosecutions of RUC officers were instigated but no RUC officer was ever found guilty. From partial truth to public outcry to no prosecutions, the circle was squared at the expense of faith in the Rule of Law.

In the early 1980s, controversy continued with Headquarters Mobile Support Units (HMSUs) involved in a number of controversial shoot-to-kill incidents. The units operated under the control of Special Branch, received their training from the SAS and were equipped with rapid fire weapons which were not standard police issue. When their existence finally came to light in the trial of one RUC officer in relation to the murder of Seamus Grew, Deputy Chief Constable Michael McAtamney informed the court that the units' members were trained to put people 'permanently out of action' rather than to injure them.’ The fact that six unarmed people were killed in three incidents in 1982 sparked off widespread public concern that the security forces had a policy of deliberately killing alleged members of Republican groups. Unsurprisingly, the British Government and the RUC denied any such policy and set up an investigation.

John Stalker, a senior officer in the Greater Manchester Police, was appointed to investigate the 'shoot-to-kill' incidents. However, as soon as it became clear that his report would expose serious and criminal wrong-doing by members of the security forces, Stalker himself became the victim of a smear campaign which led to his being taken off the case. By this time he had concluded that Special Branch had played a central role in directing operations both before and after two of the three incidents he was investigating.
"A clear message emerged: that Special Branch officers planned, directed and effectively controlled the official accounts given. The Special Branch targeted the suspected terrorist, they briefed the officers, and after the shootings they removed the men, cars and guns for a private debriefing before CID officers were allowed any access to these crucial matters. They provided the cover stories, and they decided at what point the CID were allowed to commence the official investigation of what had occurred. Most CID officers we saw seemed resigned to the supremacy of the Special Branch." 84

Stalker’s report was never made public. Nor was that of Colin Sampson who replaced him. Although the prosecution of a number of RUC members was recommended, the then British Attorney General, Patrick Mayhew, advised the House of Commons that such prosecutions ‘would not be in the public interest.’ Here again, any attempt to portray what has happened in respect of the Finucane case as an aberration is exposed as untenable. The sense remains that impunity has generally been the reward for loyally fighting a dirty war.

Stevens 1, 2 and 3 have merely followed a pattern previously established, which can be seen at work in various fora, ranging from the incidents described above through the Widgery Tribunal set up in the wake of Bloody Sunday 85 through various reports

84 J Stalker (1986) Stalker, Harrap at 28

into allegations of police wrongdoing or the workings of decades of ‘emergency’ legislation. The parameters of these investigations and inquiries have traditionally not been drawn in such a way as to allow truth to emerge.\textsuperscript{86} The Rule of Law is thus harnessed to political ends which ultimately are undermined by their lack of credibility and legitimacy.

The Reports by Judge Cory into the small number of cases he considered make clear that collusion is a more widespread phenomenon than the government would care to admit.

This is reinforced by the fact that the PONI \textit{Operation Ballast} investigation began with a complaint by one man feeling that, in relation to the murder of his son, police had acted to protect informants from being fully accountable to the law. This resulted in an investigation covering a time period of 12 years, which, although focussing only on one police informant and his associates in North Belfast, went on to establish collusion between certain officers within Special Branch and a UVF unit in relation to at least 10 murders and 72 other incidents of criminality, including 10 attempted murders.\textsuperscript{87} This is aside from the criminality uncovered, but unlikely to be charged, against Special Branch Officers who perverted the course of justice, stultified proper criminal investigations and babysat informants during interviews by colleagues. It is not insignificant that when Nuala O’Loan realising that her investigation was going to be particularly serious and wide ranging applied for more money from the Secretary of State in January 2003, this request for funding was not met.\textsuperscript{88} This lack of resources

\textsuperscript{86} see Phil Scraton and Bill Rolston 'In the Full Glare of English Politics: Ireland, Inquiries and the British State ' \textit{The British Journal of Criminology} vol 45, no 4, 2005

\textsuperscript{87} supra n.4 para 32.1-32.5

\textsuperscript{88} an insufficient sum was provided a year later.
significantly delayed her work. Special Branch had apparently not the same difficulties in accessing funds. They paid the informant in question almost £80,000 and rewarded him with a 60% payrise following his sectarian murder of Sharon McKenna in 1993, all on the basis that they ‘could not afford to lose him.’  

Susan McKay describes the Operation Ballast report as ‘shin[ing] a spotlight onto the activities of one UVF unit in one estate in north Belfast during one period of the Troubles. There is every reason to believe’ she concludes ‘that if a similar effort was made to illuminate the activities of other loyalist units across the north then other similarly sordid pictures would emerge.’  

Other complainants have since come forward to PONI alleging collusion – with the question of collusion with republican paramilitaries finally surfacing onto the PONI agenda as a significant issue. A number of investigations are ongoing at the time of writing. The difficulty is that PONI has neither the resources nor the capacity to get to the truth about collusion. Its investigations are necessarily piecemeal and ad hoc, generally triggered by individual complaints by individual members of the public against individual officers. Similarly careful consideration needs to be given to whether the resources which this office does command should be directed at the past, albeit a relatively recent past in some cases, or the present. High profile investigations like Operation Ballast means resources are directed away from a whole range of other complaints and matters of public interest equally requiring to be addressed by PONI.


90 Susan McKay idem
The PSNI Chief Constable continually makes this case in respect of the impossibility of his own officers effectively policing the present while having to constantly direct substantial resources to investigate the past.\textsuperscript{91}

III Implications for Government and Governance - Stratagems of Secrecy and Denial

Before moving on to look at the current state of play in terms of revealing the truth of intelligence gone wrong in Northern Ireland, it is worth pausing to consider how and why this happened. Why should a democratic entity seek recourse to such practices? Why is it, thereafter, so difficult for an avowedly democratic and open government to acknowledge the full truth about the impunity\textsuperscript{92} of the security forces during the conflict and up to the present time? And how has this state of affairs been able to continue for so long, even in the face of concrete evidence that the contrary position is in fact the reality? It is to these questions that this section now turns.

Law as Formalising and as Formality

\textsuperscript{91} see most recently, 2007 Annual Report of Chief Constable of PSNI

\textsuperscript{92} Dermot Walsh “The Royal Ulster Constabulary – A Law Unto Themselves?” in M. Tomlinson, T. Varley, T. and C. McCullagh, Whose Law and Order?, Belfast Sociological Association of Ireland (1988), 95 (concluding: “It would appear…that the RUC have exceeded their powers regularly in their dealings with republican individuals and groups…This prompts the question why has there not been a much greater volume of prosecutions, convictions and successful civil actions against police officers in Northern Ireland? A large part of the answer lies in the functioning or malfunctioning of the criminal justice process…”).
Gross and Ní Aolán, authors of the definitive legal text on law in times of crisis,93 assert:

‘Emergencies exert great pressure against continued adherence to protection of human rights…Moved by perceptions of physical threat both to the state and to themselves as individuals, motivated by growing fear and by hatred toward the “enemy,” the citizenry may support and even goad the government to employ more radical measures against the perceived threats. Aroused emotions frequently overshadow rational discourse both among ordinary citizens and among their leaders. In these circumstances, notions of the rule of law, rights, and freedoms take a back seat, considered as legalistic niceties that bar effective action by the government’94

Given its privileged position in the world order following the second world war, the UK was ideally placed internationally to ensure that its own take on what was happening in Northern Ireland was privileged and thereby validated at UN and regional level.95 A ‘terrorist threat’ brooked no compromise and required a strong and decisive response to defeat the ‘evil-doers’. An assessment of ECtHR jurisprudence during the 1970s and 1980s in particular reveals the granting of a wide margin of appreciation to a High Contracting Party such as the UK in terms of both the assessment of whether a state of public emergency existed and the legislation required


95 See Campbell ICLQ 2005 supra n.8
to contain it. The emergency legal regime in Northern Ireland, supposedly a ‘temporary’ measure predicated on a speedy return to normal state practice, became entrenched and normalised through the operation of a dual criminal justice system. Those suspected of scheduled offences under successive Emergency Provisions and Prevention of Terrorism (Temporary Provisions) Acts [emphasis added] were treated to a less rights oriented legal regime than that accorded to ‘Ordinary Decent’ suspects – though in keeping with the tendency of exceptional measures to seep more fully into day to day legal process, anti-terrorist legislation giving police greater powers of arrest and detention and allowing for questioning to take place without the suspect’s lawyer present also operated in practical terms against many who were not necessarily suspected of any involvement in terrorist violence. This latter point was nowhere prescribed on the face of the legislation but is indicative of a range of administrative practices which grew up on the basis of law being construed in a particular way. Challenges to these particular administrative practices, where they happened, were unlikely to succeed, with undefined National Security97 considerations de facto closing many avenues of redress. In these circumstances, the international community found itself unable or unwilling to intervene in any decisive way to address the repressiveness inherent in government policy.98 International law, rather than

96 see eg Lawless v Ireland (1960) 1EHRR 1; Ireland v UK 1978 EHRR series A, no. 25

97 ‘the nebulous and all pervasive concept of ‘National Security’ though littering legislation and policy, is still not defined to this day in legislation.

98 see Ní Aoláin and Gross (2007)
preventing excesses during this period, itself acted as an effective ‘shielding device’ from too close scrutiny. 99

Following the atrocities in September 2001, the International Helsinki Federation for Human Rights has reported that in many parts of the world:

‘[s]earch and surveillance powers have been enhanced and judicial oversight over them has been weakened. Time limits for the retention of telecommunications traffic data have been extended, and safeguards on the collection of and access to personal data have been weakened at both national and regional levels. Government agencies have demanded increasing amounts of personal data from airline passengers, foreign nationals, students and asylum seekers, but there has been no corresponding increase in protections against its misuse. In addition, information gathered through the use of extraordinary powers granted for the conduct of terrorist investigations has not been restricted to use in those investigations.’ 100

At a local level, law tends to fare no better as an effective restraint on State power in the name of protection from the nightmare. Special powers characterised the Northern Ireland legal landscape from its inception as a State in 1922 running through legal and administrative practice in an unbroken chain to the present day. 101

Loudly re-echoed

99 See Campbell ICLQ 2005 supra n.8; O Gross and F Ní Aoláin ‘To understand where we are going to…’ in A Hegarty and S Leonard (eds) ‘Human Rights: An Agenda for the 21st Century’ Cavendish Publishing

100 IHF report supra n.21(at 18) emphasis added

101 though there are currently more safeguards or nods in the direction of human rights than there would have been prior to the Good Friday Peace Agreement of 1998 and
in the aftermath of any major paramilitary atrocity, there were many prepared to accord to government whatever tools it needed in the ‘fight against terrorism’. The fact that an effective approach to a terrorist threat must necessarily include comprehensive human rights protection is not one with great currency at such periods. The ideation privileged in such scenarios is that ‘protecting human rights and civil liberties to their fullest extent [is] a luxury that must be dispensed with if the nation is to overcome the crisis it faces.  

In the Northern Ireland context, as in others, those who cautioned the need to seek to understand the motivation behind acts of terrorism were dismissed as witting or unwitting apologists for evil to be ignored or vilified. Those who sought to reveal state wrongdoing, were at best seen as mealy-mouthed and only likely to give succour to terrorists who were riding roughshod over the human rights of the rest of us. Where criticism of repressive government strategies did happen, then as now, – the response was denial and vilification of the critics. John Reid and others, in echoing many of the same sentiments in Britain over recent years, is merely directing the same ill 

the incorporation of the European Convention of Human Rights in the Human Rights Act 1998


informed polemic that characterised legislation and policy for decades in Northern Ireland in the direction of a slightly different bogeyman.

Perhaps an important qualitative difference now is that ‘draconian’ is seen as a badge of honour in terms of ushering in repressive legislation, whereas, in respect of Northern Ireland, members of parliament would generally have shied away from embracing such an appellation.

The legal system, thus fortified against the terrorists, also fortified itself against too close media scrutiny. It is telling, for example, that despite evidence of collusion existing and being built upon from the 1970s, only when Stevens 3 reported did the mainstream media move, for the first time, to drop the word ‘alleged’ from their discussions of collusion. This, despite the fact that there was no further ‘evidence’ brought into the public domain as a result of this enquiry.

The emergency regime, in many informal as well as more formalised ways, played a part in muting dissent and was influential in a chill factor resulting in a great degree of self censorship in terms of local and British media. The legalised attempt to ‘starve the terrorists of the oxygen of publicity’, which reached its high point in the media ban against Sinn Fein and others in the 1980s further contributed to an emaciated democracy. Bans and restrictions on nationalist marches while thousands of Orange Order and other parades were permitted untrammelled access to the public highway and the particular ways in which police and army powers were directed against the nationalist community all contributed to law being seen as the preserve of one section

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of society only. Its failure to prosecute state agents in the face of perceived wrongdoing further cemented alienation and thus acted on one level as a formality which could be evaded in the pursuit of terrorists and a formalising structure in terms of entrenching unhelpful mindsets in both the police and the policed.

The continued phenomenon of law as formality has been evidenced nicely in the UK in David Blunkett’s announcement of the declaration of a State of Emergency in the UK in 2002. As Human Rights Watch has noted, “Blunkett assured the public that the declaration was a legal technicality—necessary to ensure that certain anti-terrorism measures that contravene the ECHR could be implemented—and not a response to any possible imminent terrorist threat. In a statement to parliament on October 15 announcing the broad outlines of the emergency anti-terrorism measures, Blunkett stated that ‘[t]here is no immediate intelligence pointing to a specific threat to the United Kingdom’”. The comments by the home secretary raise serious concern that the derogation does not comply with the requirements of article 4, including in particular that the emergency be strictly required by the exigencies of the situation”.  

**Law as an ineffective reader of psychodynamic process**

The rationale which leads inexorably to the doing of illegal acts in the name of legality is imprinted deep within the psyche of security minded states (and others) at a group and individual level. A psychoanalytical approach is, therefore, key to understanding the processes involved, whereby human rights come to be seen as

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impediments to security. Law, as designed and operated by and against people not fully aware of their own unconscious desires and drives, has not sufficiently understood or acknowledged how unconscious processes operate or are fuelled. Psychoanalytical approaches have, however, much of merit to offer in terms of how law manifests or is understood to operate as a normative framework for the behaviour of others. Law, without much more insight and holistic reenvisioning is actually very poorly placed to provide effective solutions to address its own shortcomings or those of others in an effective, healthy and ultimately restorative way. The writings of Klein\textsuperscript{106} Bion\textsuperscript{107} and others shed great light on how paranoid, pathological and unethical states of being can come about through the application of projective identification processes used unconsciously or otherwise by individuals and groups to validate and sustain themselves. These primitive defence mechanisms are best understood, not as isolated incidents, but as forming part of a series of projections, counter projections, identifications and counter-identifications which evolve and come to shape relationships quite significantly. The literature is not quite settled on the extent to which there is awareness in these processes and the degrees to which the person or entity projected onto comes to behave in ways characterised by the thoughts and beliefs that have been projected onto them. However, some basic tenets run through the writings on this subject. A need to eschew vulnerability can result in grandiose understandings of self as good and other as bad. Where a number of people sustain and validate each other in these projective processes, behaviour that would be


\textsuperscript{107} W. Bion (1961) \textit{Experiences in Groups} Routledge
deemed psychotic in an individual can come to be seen as perfectly rational in a self-referential working and functioning group. The dysfunctional and pathological is not viewed as such – but rather comes to assume credibility as the only rational way to do things. Organisations and groups can become imprinted with a form of institutional mindset which is hard to shake off. This approach becomes difficult to resile from, however shaky the original foundations and sometimes precisely because the original foundations for such behaviour are so shaky.

Projective identification processes work through the infusion of the ‘enemy’ with a range of unambiguous bad and evil characteristics, thus cleansing the ‘good guys’ from any similar ‘abnormalities’ or aberrational potential. When this happens, the threat, no matter how objective or subjective to begin with, is imbued with a greater degree of meaning and potency which in turn increases the group’s own sense of vulnerability and appears to justify particular kinds of responses to the threat posed. Doing something wrong for the greater good may not even be categorised as wrong where anxiety driven group thought processes give way to paranoid belief systems. Wrong simply computes as necessary when applied to the forces of good and a spiral of silence\textsuperscript{108} works to prevent individuals airing qualms seen as out of step with established organisational ways of doing things.\textsuperscript{109} Skolnick’s conceptualisation of the

\textsuperscript{108} see E. Noelle-Neumann \textit{The Spiral of Silence}. University of Chicago, Chicago (1984)

\textsuperscript{109} see eg US Senate Intelligence Committee Report (July 2004) identifying ‘group think’ as a problem and concluding: ‘The key U.S. assertions leading to the 2003 invasion of Iraq -- that Saddam Hussein had chemical and biological weapons and
‘working personality’ of police officers\textsuperscript{110}, and much of the literature\textsuperscript{111} on the tendency of police organisations to particularly unhealthy forms of organisational culture and occupational subculture implicitly support these deeper psychological assessments as significant. Law which lacks sufficient reach into cultural and presentational realities and which has its own shortcomings in these respects will fail to hold, particularly, covert practice, sufficiently to account. In fact, ‘whenever the rules of constraint are ambiguous, they strengthen the very conduct they are intended to restrain. Thus the police officer already committed to a conception of law as an instrument of order rather than as an end in itself is likely to utilize the ambiguity of the rules of restraint as a justification for testing them or even violating them. By such a process, the rule of law may serve to undermine its salience as a value.’\textsuperscript{112}

The greyness and murkiness is disguised in an apparently total lack of ambiguity in terms of the presentation of what police officers have done as unreservedly the correct thing to have done. This total lack of ambiguity on a surface level is equally evidenced on a macro-level in Bush’s ‘with us or against us’ exhortations\textsuperscript{113} in terms was working to make nuclear weapons -- were wrong and based on false or overstated CIA analyses…’ Also UK Butler Review of Weapons of Mass Destruction July 2004 http://www.butlerreview.org.uk/

\textsuperscript{110} see J Skolnick (1948) \textit{Justice without Trial: Law Enforcement in Democratic Society} (original edition 1966 John Wiley & Sons Inc) 3\textsuperscript{rd} edition 1994 Macmillan Publishing


\textsuperscript{112} Skolnick, J. supra n.110 at 12

\textsuperscript{113} see http://archives.cnn.com/2001/US/11/06/gen.attack.on.terror/ (November 2001)
of the prosecution of the ‘War on Terror.’ A further example of such rhetoric is evident during his 2002 State of the Union rallying address against the Axis of Evil. Both these formulations are indicative of projective identification processes at work and echo in many ways US policy during the Cold War articulated most memorably in Ronald Reagan’s Empire of Evil speech in 1983.\textsuperscript{114}

This mindset manifests in a particularly pernicious form in the area of security responses to perceived and actual threat. Not only does it operate when the threat is objectively at its height, but it can, itself, create, increase or perpetuate the same threat. Equally this securocracy mutates to match and capture reform processes and gild them with the same blindspots as allowed anti-democratic behaviour to arise in the first place. Purity of intent will extend in such situations to covering up what was wrong, again for the greater good.\textsuperscript{115} The problem with much of our legal response to criminality or threat (and the capacity of law to fully recognise and flush out wrongdoing perpetrated in its name or under its veil) is deeply embedded in a failure to comprehend and factor in unconscious and self feeding processes in ourselves and

\textsuperscript{114} delivered 8\textsuperscript{th} April 1983 in Orlando to 14st Annual Convention of National Association of Evangelicals available at: http://www.americanrhetoric.com/speeches/ronaldreaganevilempire.htm

others.\textsuperscript{116} If law is ever to develop sufficiency of approach in this area, much interdisciplinary work requires to be done.

\textbf{Denial does not make it go away}

Aside from the psychological processes involved and to avoid straying into the realms of crude reductionism around individual psychology, the pathology of our elites and leaders, projecting too much onto the police themselves, there are a number of reasons for the denial phenomenon operating at different and perhaps more conscious levels. Justin O’Brien posits a few of them in his book ‘Killing Finucane: Murder in Defence of the Realm’:

‘It is apparent that despite the partial closure of the Northern Ireland conflict, unearthing the intelligence secrets there remains too sensitive and potentially destabilising. There are domestic and external reasons for this reticence. Within the NI peace process, establishing the truth behind operational policy without a parallel investigation of IRA activity risks legitimising a republican worldview and destabilises attempts to resuscitate a stalled political process. Perhaps more importantly, exposing the modus operandi of Special Branch delegitimises the export of intelligence driven policing to Kosovo and other post-conflict countries. It undermines the British State precisely at the same time as it is playing a frontline position in the self proclaimed war on terror.’\textsuperscript{117}

Because of the political imperative seen in maintaining a strong position and holding on to control and moral authority in a domestic and international arena, and because

\textsuperscript{116} D Bell (2007) supra n. 2

of the complexity in trying to co-create holistic and multi layered truths, the challenge
of dealing with the past for the future is still effectively to be faced.

Whatever, the multiplicity of root causes, one thing is clear. Over a decade into a
peace process, the British government, like many other governments and a whole
range of non-state actors, is still committed to keeping as much of a lid on the murkier
aspects of its past as possible. In so doing – it creates pathways from the supposedly
rehabilitated present back to the replication of wrongdoing insufficiently dealt with
from the past. Clearly time, distance and political expediency do assist with this in
relation to the rehabilitation of historical monsters and scapegoats in the societal
psyche, but law should ideally learn to be able to address wrongdoing either at the
time or, on the basis that justice delayed is justice denied, as soon as possible
thereafter.

III Letting the Light In?: The Cory Reports and the Failure of State Sponsored
Truth: A Case of Back to the Future

Even at this point in the Northern Ireland peace process, 14 years on from the first
paramilitary ceasefires in 1994, it is still difficult for the British government to
acknowledge much less confess the involvement of state agents in a very dirty war, in
which law served a dual purpose as a weapon of expediency and a cover for
wrongdoing. Such information as has seeped into the public domain over the years
has not been as a result of government or judicial endeavour to expose truth, but
rather has come about in spite of continued state efforts to prevent others doing so.
Evidence has now reached a high watermark with the recent Cory reports. Yet at the
same time as these reports indicate the existence of further secret intelligence

118 eg Nelson Mandela, Japanese Americans interned during War, Victims of the
McCarthy era in US or Stasi regime in East Germany
documentation demonstrative of extensive collusive activity with loyalist death squads, the government has seen fit to redact around 10 pages of the reports themselves on shifting and, one might therefore, say spurious grounds.

The Ministry of Defence’s legal battle to prevent the printing of further information concerning the operational role of yet another undercover agent, "Stakeknife", a leading figure inside the IRA alleged to have participated in up to 40 murders in order to maintain his cover and credibility is just another in a long line of attempts to muddy the waters that are claimed to be transparent and unsullied.

Judge Cory was appointed in May 2002 by UK and Irish Governments to look at a number of high profile cases where collusion had been alleged and assess whether a public inquiry was necessitated in any of them. In four cases, the evidence was such that public inquiries were recommended by Judge Cory in April 2004. In the case of Patrick Finucane, Judge Cory concluded emphatically that "only a public inquiry will suffice." What happened from this point is interesting. It was agreed that public enquiries would be instituted in three of the four cases under exiting legislation. However, instead of announcing a public judicial inquiry under the Tribunals of Inquiry (Evidence) Act 1921 in the Finucane case, however, the government eventually announced that it would introduce new legislation under which an inquiry into the Finucane case would be established. There was no consultation prior to the

\footnote{alluded to by Kevin McNamara MP in Hansard 11 July 2002, column 1120 available at \url{www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020711/debtext/20711-28.htm} Hansard debates 11.7.02}
publication of the Bill. The new Inquiries Act 2005\textsuperscript{120} repeals the Tribunals of Inquiry (Evidence) Act 1921.

A number of human rights NGOs\textsuperscript{121} expressed concerns ‘over some of the provisions of the Inquiries Bill introduced into Parliament on 24th November 2004.’ They were of the opinion that it ‘would, if enacted, alter fundamentally the system for establishing and running inquiries into issues of great public importance in the UK, including allegations of serious human rights violations...In particular, in those cases where one or more person has died or been killed, the right of their surviving family members to know the truth about what happened and to an effective investigation could be violated by the operation of the Bill.’

According to Judge Cory himself, ‘the proposed new Act would make a meaningful inquiry impossible. The commissions would be working in an impossible situation. For example, the Minister, the actions of whose ministry was to be reviewed by the public inquiry would have the authority to thwart the efforts of the inquiry at every step. It really creates an intolerable Alice in Wonderland situation. There have been references in the press to an international judicial membership in the Inquiry. If the new Act were to become law, I would advise all Canadian judges to decline an appointment in light of the impossible situation they would be facing. In fact, I cannot

\begin{quote}
  for a detailed discussion on the Inquiries Act 2005, see Marny Requa
\end{quote}

\textsuperscript{121} in an open letter of March 22, 2005
contemplate any self respecting Canadian judge accepting an appointment to an
inquiry constituted under the new proposed act."122

In a letter of January 26, 2005 to DCA Baroness Ashton, Lord Saville, Chair of the
Bloody Sunday Tribunal established under the 1921 legislation stated, “I take the
view that this provision makes a very serious inroad into the independence of any
inquiry and is likely to damage or destroy public confidence in the inquiry and its
findings, especially in cases where the conduct of the authorities may be in question.”
He further stated that neither he nor his fellow judges on the Bloody Sunday Inquiry
would be prepared to be appointed as a member of an inquiry that was subject to a
provision of that kind.

The fundamental problem with the Inquiries Act is its shift in emphasis towards
inquiries established and largely controlled by government Ministers. The Act grants
broad powers to the Minister establishing an inquiry on issues such as the setting of
the terms of reference, restrictions on funding for an inquiry, suspension or
termination of an inquiry, restrictions on public access to inquiry proceedings and to
evidence submitted to an inquiry, and restrictions on public access to the final report
of an inquiry. Neither does the Act grant the requisite independence to inquiry chairs
and panels that makes their role so crucial in examining issues where public
confidence has been undermined.

Under the new Act, the inquiry and its terms of reference fall to be decided by the
executive, no independent parliamentary scrutiny of these decisions being allowed.
Each member of an inquiry panel, including the chair of the inquiry, is to be appointed

122 Extract from letter from Honourable Judge Cory to Congressman Chris Smith
March 15, 2005
by the executive which retains the discretion to dismiss any member of the inquiry. The executive can now impose restrictions on public access to the inquiry, including on whether the inquiry, or any individual hearings, should be in public or private. The executive can also impose restrictions on disclosure or publication of any evidence or documents given, produced or provided to an inquiry. On top of this the final report of the inquiry may only be published at the executive's discretion and crucial evidence could be omitted at the executive's discretion, "in the public interest".

According to Amnesty International, supporting the call by Geraldine Finucane to boycott such an inquiry in her husband’s case "By proposing to hold an inquiry into the Finucane case under the Inquiries Act 2005, the UK government is trying to eliminate independent scrutiny of the actions of its agents. Any judge sitting on such an inquiry would be presiding over a sham." 123

In the face of this strong criticism and opposition, the UK executive railroaded the Inquiries Bill through Parliament and managed to have it passed as legislation as the Inquiries Act 2005 on 7 April 2005, the last possible day before Parliament was dissolved.

Amnesty riposted that "the Inquiries Act 2005 deals a fatal blow to any possibility of public scrutiny of and accountability for state abuses. Any inquiry under this legislation would automatically fall far short of the requirements in international human rights law and standards for effective remedies for victims of human rights violations and their families. One of the first tasks of the new UK Parliament should be to immediately repeal the Act." Needless to say this did not happen.

123 available at www.serve.com/pfc/pf/inqubill/ai050420.html
The father of Billy Wright whose death was originally to be subject to inquiry under the old legislation initiated judicial review proceedings in 2006 following the decision by the Secretary of State to convert the inquiry into his son’s death into one under the new Act. Mr Wright and a number of NGOs made the case that an inquiry under the new legislation in this particular case would not satisfactorily comply with the requirements of relevant international and domestic human rights law in particular, the obligations to give effect to article 2 of the European Convention on Human Rights. The Judge ruled that the Secretary of State had given insufficient consideration to these issues and his ruling contained a number of substantive criticisms of the Inquiries Act itself via-a-vis the old legislation.

Following the decision by the PPS not to prosecute police officers in Finucane case, as in a host of others before it, an effective public inquiry appears to the only official forum in which there might be official acknowledgement of the extent of state involvement in wrongdoing up to the present day. Given the British government’s reluctance to institute such an inquiry and the prevarication and lack of legal remedy up to this point, and given also that the State was not the only wrongdoer in this conflict, it is clear that sights must be set on some other more holistic process of truth recovery, and creative thinking developed on how to bring all actors to a different place. Maurice Hayes and others dismiss this ‘picking at the sores of the past’ as inevitably frustrating the development of peace and reconciliation in Northern Ireland.


125 Maurice Hayes (2007) Moving Out of Conflict , Tip O’Neill Peace Lecture, University of Ulster, Magee Campus 5th June
However, if dirt gets into a wound and that dirt is not cleaned, the infection that can then set in may far outweigh the initial injury.

**Conclusion: Reassessing the implications of State Denial for the transitional Moment**

The broader community in Northern Ireland recognise at some level that there is still truth waiting and needing to be told.\textsuperscript{126} It is interesting to note that 92\% of all respondents in a recent survey did not trust the British Government to run a truth commission (95\% of Catholics and, tellingly, 89\% of Protestants).\textsuperscript{127} The reasons behind some of this are all too obvious in light of the foregoing discussion.

\textsuperscript{126} Dr Patricia Lundy (University of Ulster) and Dr Mark McGovern (Edge Hill College), as part of the Northern Ireland Life and Times Survey, published in June 2005 found 52\%, of all respondents felt that a truth commission is important for the future, with only 28\% declaring that they believed it would be unimportant. This is a significant and, for many, unexpected finding. There were some differences in community attitudes. Over 60\% of Catholics surveyed supported calls for a truth commission, with only 21\% expressing disapproval. Perhaps surprisingly however, 44\% of Protestants expressed broad approval, with 34\% against such a process. Again, this higher than expected approval from the Unionist community tends to indicate that there is a far less clear cut opposition to dealing with the past than has previously been suggested by commentators. See: www.ark.ac.uk/nilt/2004/Political_Attitudes/HRDTCOMM.html

\textsuperscript{127} Life and Times Survey, June 2005 idem
There are two important lessons to learn from this. Firstly eroding the very value base on which the state makes claims for its own legitimacy is problematic in the course of a conflict as it makes it harder for all involved to believe in the possibility of ‘peace breaking out,’ and thus narrows openings and opportunities for the peaceful resolution of that and other conflicts.\textsuperscript{128} It is axiomatic at this point, given experience throughout history and across the world, that a repressive criminal justice system beset with ‘emergency’ legislation will tend towards authoritarianism and abuse of power, which, rather than containing, can exacerbate and unnecessarily prolong the conflict it claims to manage.\textsuperscript{129} Those affected by unjust state policy and praxis become radicalised through increasing alienation from legal institutions which survive intact despite (or possibly through) blatant misuse of power\textsuperscript{130}; By dint of the acceptance of

\begin{quote}
\textsuperscript{128} ‘When governments allow an atmosphere in which human rights can be ignored for political goals, their outcry when opposition groups descend to using the same brutal tactics may just ring hollow. In these circumstances, the chances of peacefully resolving internal conflicts recede even further.’ Amnesty International (1993) Getting Away with Murder: Political Killings and ‘Disappearances’ in the 1990s’ at 80
\end{quote}

\begin{quote}
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\textsuperscript{130} As O’Connor and Ruhman (supra) conclude: “The more a community feels voiceless, unable to address the injustice in their lives, the more tolerant of violence they become particularly when it is aimed at the perceived source of injustice.”
\end{quote}
an anti-rights disposition, those state agents traumatised by their own experience of conflict dehumanise not only the perceived enemy, but themselves in the process. Removing the baselines on which law and order rely leaves society less able to prepare for the distance which needs to be travelled to meet ‘the other’. Therefore, even on a strictly utilitarian reading, the decision, subconscious or otherwise of a state to loosen the purported shackles of human rights in its own pursuit of the greater good ultimately does society a disservice for it leaves key protagonists less able to engage effectively with the eventual, already difficult, experience of peacemaking. The legacy of such conflict strategies does not end there. The carefully crafted and imbibed culture of control and secrecy have huge implications for a transitional context when the ‘war’ to all intents and purposes is over, but the peace is not yet won. The internalised role of state denial and obfuscation is so embedded and ‘normalised’ by the conflict that it continues to characterise state discourse in the post-conflict setting at many levels. That it carries through has significant implications for what the transitional period will look like, how long it will last and what it will have the capacity to deliver. When harm is accompanied, even at the cessation of hostilities with a refusal to acknowledge that harm, the effect is to perpetuate the conflict by other means. At a moment when a cathartic break with the past could be key to unlocking seemingly intractable differences and divisions, at a time when people need and crave space to manoeuvre out of entrenched positions, a refusal by the organs and individuals of government to change the normative content of state discourse ensures a lingering and fragmented societal memory in terms of wrongs done and perceived. The result is a reinforced mythology of the conflict and unshaken alienation\textsuperscript{131}. Not only is a continued refusal to tell truth unhelpful, it is all

\textsuperscript{131} It took 8 years into the reform process before Sinn Féin, the majority nationalist
the more so for being completely unnecessary and Machiavellian in the context of peacemaking itself. It also has implications for the truth that will be told by others in terms of their own wrongdoing and destructiveness. The antidote to this poison infecting and ultimately consuming a nascent peace process would seem to be the development of multi-layered and accountable truth recovery strategies and processes albeit with their own attendant problems and costs. The first hurdle for such strategies and processes is their ability to facilitate perpetrators of abuse (who are often at the same time victims of trauma in their own right) and particularly the State\textsuperscript{132} (if it is to makes the twin gains of establishing a position of acceptability and legitimacy sufficient to drive changes forward and be possessed of sufficient political will to see the job through appropriately) to ‘see’ their part in the cycle of destructiveness and the need to acknowledge and address it. Such mechanisms must further be invested with the potential to move a society from ‘intelligence’ to knowledge in a way capable of counteracting a State tendency, even in the face of stated openness to the experience of others, to seek to control the narrative of the conflict and, through this, the agenda for change.

In situations where there is no regime change, continued State denial and obfuscation about what has happened on its watch, the ultimate chain of command and the apportionment of responsibility is to be expected as a corollary of the same phenomenon which permitted anti-democratic values to be superimposed as a necessary adjunct to the struggle for democracy in the first place.

\textsuperscript{132} party in Northern agreed to take their seats on the Policing Board which oversees the PSNI, despite the fact that Sinn Féin members had been ministers in the previous Stormont government while it was operational.

\textsuperscript{132} whether in the form of ancien regime or liberator of the people
The PSNI Chief Constable in Northern Ireland knows that the past must be revisited in a more coherent way. ‘In simple terms, the past has the potential to destroy all the effort and real change policing has delivered in the post-Patten world. Firstly, in practical terms the sheer volume of unsolved crime would incrementally lead to the increased deployment of current resources to chase old cases, at the direct expense of day to day demands.

‘As I have said previously we are funded to police the present, not the past. In the broader context, revisiting old cases in an unstructured way over a prolonged time period would mean regularly surfacing old accusations and old suspicions and will detract from progress and reforms made in policing and investigation methods in recent years. I am opposed to a piecemeal approach to history; we need a comprehensive strategy.’133

His contribution to the comprehensive strategy has been the Historical Enquiries Team, which in turn has its problems and must form part of a much more complex jigsaw.

However public acknowledgement eventually happens, clinging to the last vestiges of the delusion of non-responsibility, particularly when challenged through the sustained intervention and verified experience of other actors, can only serve to allow the very problems the State ostensibly seeks to combat not to be consigned to history. This approach instead ensures that war will continue to be waged by means of

133 Address to Irish School of Ecumenics conference at Trinity College, Dublin, June 10, 2005
apparent peace process\textsuperscript{134}, in the course of which the State, while seeking to protect and promote intelligence, can only render itself unintelligent and increasingly unintelligible, thereby undermining and ultimately damaging the essence of democratic governance and the prospect of real peace. Campbell suggests that, in terms of international law, the leeway that was accorded to States like the UK during the period of extended conflict by international mechanisms such as the European Court of Human Rights has waned as the State moves further into the transitional context. He points to the recent jurisprudence of the European Court, particularly in respect of Article 2 (Right to Life) of which Finucane v UK is itself an example, as being more prepared to analyse, look behind and critique state narrative than ever before. In the same way that the conflict discourse was narrowed during the period of conflict in the rush to see things from the State’s point of view, it can thus be argued that the recent openness of the ECHR to interrogate State practice and policy as it occurred during the conflict, has been possible from the more comfortable standpoint of distance from its more intense phases. Such judgments are, in their turn, ‘contributions to the meta-conflict which in turn may influence the self-definition of the actors and thus the conduct and outcome of the conflict.’\textsuperscript{135} At the same time as this phenomenon may be interpreted positively, there is also a tendency of international actors to stand back during a period of transition and let the state get on

\textsuperscript{134} See J McGarry and B O’Leary ‘Explaining Northern Ireland: Broken Images’ (Blackwell Oxford 1995) and C Bell ‘Peace Agreements and Human Rights’ (OUP Oxford 2000) on ‘meta conflict’ – a conflict about what the conflict was about. ‘The story that the state tells itself is a contribution to this meta-conflict and thus to the conflict’.

\textsuperscript{135} Campbell supra n. 8 at 328
with what it thinks it needs to do to build the peace,\textsuperscript{136} Witness the relative inefficacy of the Council of Ministers to ensure delivery on 6 original Article 2 judgments currently being monitored vis-a-vis the UK.

In conclusion, although the context of Northern Ireland does not map exactly onto the global manifestations and outplayings of the global war on terror, there is sufficient that is similar in the group-think and self-serving justifications of key democratic states involved to give cause for concern as to the rehabilitation of secure space if current practices and tendencies are perpetuated.

\textsuperscript{136} eg Response of Police Oversight Commissioner to a request by the NGO CAJ that he make some comment on the fact that draft legislation brought in by the UK government to ‘implement Patten’ fell very far short of the mark. ‘I’m here to oversee that they do what they say they’re going to do’ – allowing the state to redefine the parameters of the debate rather than be held to account for the full implementation of the Patten report. See M O’Rawe ‘Transitional Policing Arrangements in Northern Ireland: The Cant and the Won’t of the Change Dialectic’ Fordham International Law Review April 2003; see also Jordan v UK [2001] ECHR 24746/94 ECtHR para 121, which although a quite far reaching judgment in some respects, stopped short of deeming access to police reports and investigative material an automatic requirement of an effective investigation under Article 2 ECHR. This was on the basis that such documentation ‘may involve sensitive issues with possible prejudicial effects to private individuals or other investigations.’ Although the principle underlying the Court’s judgment is undoubtedly correct, it may clearly be problematic for such decisions to rest entirely with state agencies in a context such as that in N. Ireland.
While States use legal process and discourse to refuse the succour of acknowledgement to others and insist on distancing themselves from responsibility for human rights abuse, the resultant unbrokenness in the culture of secrecy in respect of State acts and omissions will super-impose onto the other aspects and other realities of conflict which the State (and the demonised ‘other’) _would_ wish to see coming to an end. The cloak stitched together through lack of transparency and denial of wrongdoing is thus exposed as serving the Emperor as old clothes only, even as the desire to wrap it tighter around the State body continues.

Reimagining security in a much more expansive\(^{137}\) and gender aware ways\(^{138}\) and building community capacity to have a real say in the definition of security priorities and the allocation of budgets might help shift unhelpful and closed mindsets. This, coupled with psychoanalytic understandings firmly applied to law and legal process might facilitate the co-creation of space for different truths and realities to emerge. This approach could assist an important first step away from the fear and insecurity currently proffered as our lot in the security gone mad global context.
