Committee on the Administration of Justice
(N. Ireland affiliate of the
International Federation of Human Rights)

The Casement Trials

A Case Study on the Right to a Fair Trial in Northern Ireland

CAJ Pamphlet No. 19

April 1992

£3.00/IR£3.00

Committee on the Administration of Justice

The **Committee on the Administration of Justice** (CAJ) is an independent civil liberties organisation formed in 1981 to work for the highest standards in the administration of justice in Northern Ireland. CAJ is affiliated to the **Fédération Internationale des Droits de l'Homme**, an international human rights organisation which has consultative status at the United Nations.

CAJ's membership is drawn from both sections of the community and includes lawyers, students, community workers, trade unionists, unemployed people and academics. The CAJ is opposed to the use of violence to achieve political goals in Northern Ireland.

By carrying out research, holding conferences, lobbying politicians, issuing press statements, publishing pamphlets, circulating a monthly bulletin and alerting the international human rights community, the CAJ hopes to stimulate awareness and concern about justice issues in Northern Ireland and encourage the adoption of urgently-needed safeguards. In the Committee's view, not only are abuses of civil liberties wrong in themselves but, in the Northern Ireland context, they hinder the peaceful resolution of the conflict.

Open meetings for CAJ members and the public are held every two months to discuss a variety of civil liberties issues. Sub-groups work on an on-going basis on areas such as policing, Bill of Rights, emergency laws, international standards, use of lethal force by the security forces, juvenile justice, prisons and racism.

Membership of the Committee

Membership entitles you to receive CAJ's monthly civil liberties bulletin **Just News**, to take part in the work of the sub-groups and to use the CAJ documentation library and clippings service.

If you would like to join CAJ or find out more about its activities, please contact:

CAJ
45/47 Donegall Street
Belfast BT1 2FG
Tel: (0232) 232394
Fax: (0232) 333522

Copyright © **Committee on the Administration of Justice**

Published by the **Committee on the Administration of Justice**
45 - 47 Donegall Street
Belfast BT1 2FG
Ph: (0232) 232394

British Library Cataloguing-in-Publication Data.
A catalogue record for this book is available from the British Library.

ISBN 1 873285 01 9

Printed and bound in Belfast by **Shanway Distributors**

PREFACE

This pamphlet represents the fruits of a 10-week study of the Casement Park trials - the trials involving persons accused of being implicated in the deaths of British Army Corporals David Howes and Derek Wood in March 1988.

The study was conducted by **Joe Morrissey**, a law student at Columbia University in New York City. During his stay in Belfast in the summer of 1991 he interviewed a wide variety of individuals and read a long list of documents connected with the trials. In assessing the fairness of the trials he used as a measuring stick the legal standards laid down in international treaties such as the European Convention on Human Rights.

The Executive Committee of the **Committee on the Administration of Justice** wishes to thank Joe for his hard work on this project and for the other assistance he gave to the organisation during his internship. Thanks are also due to Columbia University's Human Rights Internship Program - and to its Director, Professor Deborah Greenberg - for enabling Joe to conduct his research in Belfast.

While Joe Morrissey carried out the bulk of the research himself, and did the writing, the report has been added to by members of CAJ. In particular, Brice Dickson, Chris Maggs, Martin O'Brien and Michael Ritchie deserve thanks for the completion of the project. The Executive Committee endorses his findings and recommendations. The pamphlet is put forward as an objective analysis of a patricularly controversial incident. We hope it contributes to a high standard of future debate and, soon, to a remedying of the injustices identified.

CAJ Executive Committee,

April 1992

CONTENTS

Chapter 1: Introduction

The horrific event occurred on 19 March 1988, in West Belfast, a strongly nationalist area which had seen seven members of its community die in the previous two weeks. Two off-duty British soldiers, **Corporal David Howes** and **Corporal Derek Wood**, drove into the funeral cortège of **Caoimhín Mac Brádaigh** (the English version is **Kevin Brady**). Mac Brádaigh had been killed in a loyalist attack on a funeral three days earlier. When the soldiers drove into the cortège, they were surrounded by mourners, frightened that another attack was about to ensue. The soldiers wore plain clothes. Upon being attacked, one of them produced a gun. The angry and frightened crowd was convinced that another loyalist assault was underway. The crowd proceeded to attack the soldiers, drag them from their car, and disarm them. They were beaten beside their car, then dragged into **Casement Park**[1], stripped of most of their clothes as they were being searched, and beaten again. Then they were thrown over a low wall into a slip road where a taxi was waiting. The taxi drove the men to a deserted lot on Penny Lane, and shortly thereafter they were shot repeatedly by two armed men who appeared on the scene suddenly. The killings were claimed by the IRA. The centrality of Casement Park has given the resulting trials and this pamphlet the title of the Casement Trials.

The events of the preceeding two weeks had created great interest and the media attended the funeral in great numbers. This meant that at least the initial minutes of the incident were recorded on commercial TV cameras and broadcast the world over. Thus, within minutes of the incident, millions of people witnessed in their living rooms the horror of what happened. The intensity of the experience coloured the incredulity with which people reacted to what they had seen.

Since that event, scores of men have been arrested for their involvement. Thirty four have already been tried or otherwise processed through the courts. Twenty have been convicted of offences ranging from murder to perverting the course of justice. The sentences they have received range from life imprisonment to three months suspended. Fourteen have been acquitted entirely. As of April 1992 seven more await trial. There has been no indication that the authorities have closed the case. In any event, the two men who actually killed the corporals have not been apprehended.

1 Casement Park is the local sportsground of the Gaelic Athletic Association. It is named after Roger Casement, a Protestant landowner from Ulster who was hanged in London for his participation in gun-running between Germany and Irish revolutionaries in 1916.

In the prolonged anguish that the events of those days in March 1988 caused, there was little willingness to look critically at the authorities' response to the killings. However, in the last year or two, concern over the Casement trials has emerged for several reasons and from various quarters.

- Firstly, several of the convictions seem dramatically out of proportion with the specific wrongdoing for which the men involved were found guilty, and also seem to deviate from other rulings.
- Secondly, there is concern over the special procedures which have been used during these trials and which depart from ordinary procedures in the United Kingdom; many people claim that these procedures negatively affect the substantive rights of the individuals accused.
- Thirdly, as the arrests and charges continue to be brought nearly four years later, when no new evidence has surfaced, allegations are being made that the trials have become a tool of intimidation and harassment.

This paper attempts to evaluate the trials of the Casement Accused according to the fair trial principles embodied in Article 6 of the **European Convention on Human Rights** and Article 14 of the United Nation's **International Covenant on Civil and Political Rights** (see Appendix 1).

Within this context, three major aspects of the trials will be examined for their prejudicial effects:

- the application of the prevailing law;
- the existence and use of special criminal procedures; and
- the quality of the authorities' response to the incident.

Chapter 2: The Background to the Corporáls' Killings

In the several weeks preceding the corporals' killings, there was a lot of anger, resentment and fear within the nationalist community in Northern Ireland. On 6 March 1988, three unarmed IRA members, **Máiréad Farrell, Seán Savage** and **Daniel McCann,** were shot dead in Gibraltar by members of an undercover unit of the British Army. While the official account initially claimed they were planting a bomb in Gibraltar at the time they were shot, it later emerged that this was untrue. They were acknowledged by the IRA to have been on active service, but seem to have been carrying out a reconnaisance trip at the time they were shot. When the bodies were brought back to Belfast, the hearses were allegedly rammed from behind by Royal Ulster Constabulary[2] (RUC) vehicles to prevent their exiting the motorway to meet a crowd of mourners.

At the funeral of "the Gibraltar three", while huge numbers of people stood at the graveside in Milltown Cemetery, a loyalist paramilitary named **Michael Stone** appeared and shot wildly into the crowd. He also threw a large number of hand grenades towards the mourners. One person present that day recalls the event: "They [the mourners] were literally dropping like flies." Stone was chased by a group of the mourners, despite the fact that he was still throwing hand grenades and shooting wildly. The mourners finally captured and disarmed him, but not before three more people had been killed and dozens wounded.

The RUC had made a recent policy decision to stand back from republican funerals. Thus, for the first time in years, there was no police presence at this funeral. The police arrived on the scene just after the mourners had subdued Stone.

Caoimhín Mac Brádaigh's funeral

Caoimhín Mac Brádaigh was one of the men who was killed by Stone. His funeral was held three days after his death. The funeral cortège proceeded from St. Agnes' Church on the Andersonstown Road towards Milltown Cemetery, where Stone had launched his attack. The atmosphere that day, according to several of those present, was tense, angry and despairing. From the perception of the local community, six needless deaths had occurred. There was a fear that more deaths might ensue.

2 The police force in Northern Ireland.

When the soldiers' car first appeared, it drove at speed toward the front of the funeral cortège. The procession had moved on preventing access to the main Andersonstown Road. The soldiers, however, could either have reversed and gone back the way they had come, or turned right, up Sleamish Way. Instead, they swerved and drove along the right side of the cortège and up a cul-de-sac in front of a row of shops. They then backed up, still driving at speed, but found their way blocked by the black taxis which were leading the funeral procession. Caoimhín Mac Brádaigh had been a driver of a black taxi himself.

The soldiers were in plain clothes and were driving a silver Passat. Most people's instinctive reaction was that another loyalist attack was underway[3]. The funeral stewards at first attempted to hold people back and discover the identity of the men in the car. But the crowd surrounded the car and started to beat on it. Soon, the driver emerged through his window with a gun. The crowd drew back momentarily but quickly returned to the car and proceeded to attack the men, pulling them out of their car to disarm them. A shot went off, apparently fired into the air, and some of the crowd drew back again, but only briefly. The crowd returned and began brutally to beat the men. Some of those present had found weapons. Someone was using a wheel brace to beat them. Another person had obtained a step ladder from a camera man. Someone else had found a stick.

Within two to three minutes Corporal David Howes and Corporal Derek Wood were dragged into nearby Casement Park. Their car was pushed out of the way of the funeral and burned. Inside the walls of Casement Park, with the gates shut, the soldiers were beaten further and stripped of most of their clothes as they were being searched. At this stage, the crowd was smaller than the one which had initially surrounded the car, but still involved approximately twenty people.

Again within minutes the pair were thrown over a low side wall and into a slip road below. The drop is about nine feet. A black taxi had been ordered to pull into the slip road and the men were forced into the taxi and driven around to a deserted lot on Penny Lane. It seems that five men were in the back seat with the soldiers and one man was in the front beside the driver.

Once the taxi reached Penny Lane the men all got out of the taxi. The soldiers tried to run away but were quickly grabbed and beaten again by the men who had accompanied them. Two of the men from the car left the scene but appeared again within moments with two more men. One of the newcomers had a gun. The soldiers were pointed out to him and he shot them repeatedly. He then gave the gun to the other newcomer who went over to the prostrate figures and shot them again. The two gunmen were wearing jackets with hoods.

The entire event, which lasted about 16 minutes, was filmed from an army helicopter which was observing the funeral (the "heli-tele"). The media turned out at the funeral in great numbers because of the dramatic events which had preceded it. They took videos and photographs until the men were dragged away to Casement Park, at which point they were prevented from continuing by members of the crowd. Most of the arrests have been based on identifications from this visual evidence.

3 See quote from Tom King, then Northern Ireland Secretary of State on next page.

Reactions

There have been many unanswered questions surrounding the deaths of the corporals. Throughout the entire episode, the police and army were conspicuously absent apart from the helicopter hovering overhead. Ulster Unionist Party leader, **James Molyneaux** MP, told the House of Commons that the local army bases received transmits from the heli-tele, but were under direct orders not to move into the locality of the funeral. The **Irish Times** on 24 March 1988 stated that a military patrol nearby saw smoke (presumably from the burning car), heard gunshots, and radioed the base to see if they should give help. They were told to remain in their positions and protect the police officers there who were controlling traffic to prevent interference with the funeral.

Other questions arise as to what the soldiers were doing in the area of the funeral in the first place. They were officially reported as being off duty, but they had been briefed that the funeral was taking place and were told to avoid it. Different accounts for their presence have been given, but the one most widely accepted is simply that they were lost and stumbled upon the funeral by accident. People in west Belfast, however, find this hard to believe considering that one of the soldiers had been in Belfast for several years. Another theory builds on the fact that the second soldier had just arrived in Belfast. The more experienced soldier might have been showing off for the new man. That might account for the fact that they did not retreat when they first realized they were approaching the funeral. The harshest allegation claims that the men were on a covert mission, but this too has not been proven.

Political reaction in Britain was stunned. **Margaret Thatcher**, then Prime Minister, made a statement soon after the event. She referred to it as "an act of appalling savagery." She also stated, "There seems to be no depths to which these people will not sink"[4]. When the bodies of the two corporals were flown home to England, Mrs Thatcher attended to receive them. **Tom King**, then secretary of State for Northern Ireland, made a statement to the House of Commons that annoyed local people intensely. He said: "It is no secret that the first impression was of a further attempted bomb attack on a funeral. As soon as it was clear that the matter was indeed serious, the police acted with considerable determination." This was seen by local people as suggesting that an attack on soldiers is more serious than an attack on people in West Belfast.

Unionists on the other hand have taken different lessons out of the incident. A few days after the incident, James Molyneaux called for the rewriting of the 'yellow card' rules of engagement for soldiers. He claimed that if the soldiers had sought to defend themselves and shoot their way out of the situation, they would have been suspended from duty.

Other reactions claimed to see a willingness on the part of the authorities to sacrifice the men as part of an attempt to counter a long period of bad publicity for the British government. The Gibraltar shootings, the killing of Aidan McAnespie, shot dead by a British soldier at a border checkpoint, the unsuccessful appeal of the Birmingham Six, and the attack by Michael Stone had all gained sympathy for nationalists in Northern Ireland. This one event allowed revulsion for the crowd to

4 Reported in The Observer, 20 March 1988. Not everyone received Mrs. Thatcher's comments well. A letter to the Morning Star on 21 March 1988 expressed the opposing sentiment: "Mrs. Thatcher's condemnation is hollow and sickening. It is the politics of her government which have brought Northern Ireland to its latest bloody crisis; shoot to kill policy, rejection of appeals by the Birmingham six, SAS gunning down three in Gibraltar, backing of partisan RUC, and the role of the British Army in intimidating and interfering with the community....".

replace any sympathy which people of that community had gained over the previous number of months.

Be that as it may, the event has become an emblem entrenching many of the perceptions held by people both within and outside West Belfast. The response of the authorities has been wide-ranging in its effect. The next chapter will detail the trials and charges that have resulted. At the time of publishing, neither of the men who finally shot and killed Corporal Howes and Corporal Wood have been apprehended.

Chapter 3: The Casement Accused: Arrests and Prosecutions to Date

Thus far some 41 men have been charged with offences arising out of the incident at Caoimhín Mac Brádaigh's funeral. The men's cases are set out in this chapter, grouped according to the trials that have taken place. All the ages given are approximate as at the time of charging.

I. Charges dismissed at a preliminary inquiry in November 1988

- 1. **Patrick McGeown** (31), who was charged with murder, grievous bodily harm and possession of firearms, had all charges dismissed at the preliminary inquiry into his case in the magistrates' court.

II. Tried before Lord Chief Justice Hutton in January 1989

- 2. **Alex Murphy** (30) was charged on 26 March 1988, the week following the incident, with murder, false imprisonment, possession of firearms, grievous bodily harm and assault. He was convicted of all charges and sentenced to life imprisonment with a recommendation that he serve 25 years. He appealed unsuccessfully in May/June of 1990.
  Murphy testified that he was not in Casement Park nor in Penny Lane at the time of the killing. Lord Chief Justice Hutton used forensic, video and photographic evidence to contradict Murphy. For example, some of his own garments were stained with blood which the judge found was the soldiers'. He concluded that Murphy was in Casement Park, helped take the corporals in the taxi to Penny Lane, helped subdue the corporals in Penny Lane, and pointed out the corporals to the gunmen.
  On appeal the defence contested the use of the video evidence, claiming that its poor quality prevented identification beyond a reasonable doubt. Further, the defence argued that the forensic evidence was not inconsistent with Murphy's testimony.
  Murphy has lodged a petition with the European Commission of Human Rights challenging the trial procedures under which he was convicted.

- 3. **Henry Maguire** (28) was charged along with Alex Murphy, on 26 March 1988, with murder, false imprisonment, possession of firearms, grievous bodily harm and assault. Convicted of all

charges, he was sentenced to life imprisonment with 25 years recommended. Like Murphy, he appealed unsuccessfully in May/June of 1990.
The Lord Chief Justice rejected Maguire's testimony as a "tissue of lies". He used forensic and visual evidence to conclude that Maguire was in Casement Park, was in the front seat of the taxi which took the corporals to Penny Lane, beat the corporals there and was instrumental in arranging for the gunmen to kill the corporals.
Maguire's appeal, like Murphy's, contested the use of poor quality video evidence, and contended that the forensic evidence was not inconsistent with Maguire's own explanation of where he was and what he had done.

III. Tried before Mr. Justice McCollum in June 1989

☐ 4. **David McConnell** (23) was charged in April 1988 with aiding and abetting murder, false imprisonment, causing grievous bodily harm and causing an affray. Mr. Justice McCollum ruled that there was no case against McConnell for murder, and dropped the charge.
McConnell was acquitted of grievous bodily harm but convicted of false imprisonment and causing an affray. Sentenced to 9 years' imprisonment, McConnell withdrew his appeal fearing that his sentence might be increased.
The murder charge was dropped despite McConnell having given confession evidence that he had thought the men would be killed. The judge dismissed the evidence, claiming McConnell did not know what he was saying and could not have been thinking clearly during the event in the first place. This is in stark contrast to Mr. Justice Carswell's rulings on Kane, Timmons and Kelly[5].
McConnell had confessed to having kicked one of the corporals while around their car, and having helped to push one towards Casement Park. Mr. Justice McCollum rejected some of his confession evidence as unreliable. He concluded that McConnell was probably not involved at the time serious injury was inflicted on the corporals and therefore acquitted him of grievous bodily harm. He accepted McConnell's confession regarding helping push a corporal towards Casement Park and therefore found him guilty of false imprisonment and causing an affray.

☐ 5. **Anthony Gallagher** (17) was charged on 1 April 1988 with grievous bodily harm, false imprisonment and causing an affray. Mr. Justice McCollum acquitted him of false imprisonment but, convicting him of grievous bodily harm and of causing an affray, sentenced him to 18 months' suspended imprisonment.
The convictions were based on confessions and video evidence, none of which implicated Gallagher in the false imprisonment. The judge accepted that Gallagher was a young man caught up in the hysteria and confusion of the event and reacted accordingly.

☐ 6. **Sean Gabriel Lennon** (39) was charged with grievous bodily harm, false imprisonment and causing an affray. Acquitted of grievous bodily harm, he was nonetheless convicted of false imprisonment and causing an affray. He was sentenced to 15 years' imprisonment.
A successful appeal was heard before the Court of Appeal with Lord Chief Justice Hutton presiding in January 1991. The original conviction was based on films and photographs which showed Lennon helping open the door of the car to get one of the soldiers out. Mr. Justice McCollum had ruled that, at that point, Lennon must have known he was involved in a malicious

5 Cases no. 23-25 below.

attack. On appeal, Lord Chief Justice Hutton disagreed, saying that it was possible Lennon may still have thought he was acting in defence of himself or others and so he quashed the conviction. This was a significant decision as it pushed further the cut-off point at which self-defence could no longer be argued in mitigation.

☐ 7. **Joseph Patrick Leatham** (28) was charged with grievous bodily harm, false imprisonment and causing an affray. He was acquitted of all charges.
The charges in this case were based on video evidence. Mr. Justice McCollum ruled that it was not possible to identify Leatham from the videos beyond a reasonable doubt.

☐ 8. **John Lennon** (63), the father of Sean above, was charged with causing an affray but acquitted. Mr. Justice McCollum ruled that the video evidence did not show Lennon doing anything illegal.

IV. Tried before Mr. Justice Murray in November 1989

☐ 9. **Terence Clarke** (40) was charged on 20 March 1988 with grievous bodily harm, assault (as an alternative to GBH), false imprisonment and causing an affray. Convicted of grievous bodily harm, false imprisonment and causing an affray, Clarke was sentenced to 7 years' imprisonment. Clarke argued that his involvement around the car took the form of disarming the soldier, a defensive act. Mr. Justice Murray rejected that testimony, arguing that the videos showed Clarke holding down the soldier while another man beat him on the head with a wheel brace. The judge concluded that Clarke was involved in "a frenzied retaliation".
Clarke withdrew his appeal at the last minute when he was informed that the appeal panel would include Lord Chief Justice Hutton and Mr. Justice Carswell. Relatives of the Casement Accused released a statement claiming that the panel had been changed in order to ensure a longer sentence on appeal.

☐ 10. **Gerard Reid** (36) was charged on 26 May 1988 with grievous bodily harm, assault (as an alternative to GBH), false imprisonment, causing an affray, possession of an offensive weapon and causing criminal damage. He was convicted of grievous bodily harm, false imprisonment, causing an affray, and possession of an offensive weapon and sentenced to 3 years' imprisonment.
The judge found that Reid was seen clearly on video holding one soldier down on the bonnet of his car. At the same time he was thrusting a stick downward towards the soldier. Reid claimed that he did not hit the soldier, but was threatening him. Furthermore, his involvement lasted for a very short period. Mr. Justice Murray rejected this testimony and concluded that Reid must have known the soldier was helpless at that point.

☐ 11. **Kevin Ferguson** (19) was charged with causing an affray and causing criminal damage. He was convicted and sentenced to 3 months' imprisonment, suspended for 2 years.
Ferguson admitted to having climbed on to the bonnet of the car just after it had stopped and then having kicked at the windscreen. He did not testify and Mr. Justice Murray concluded that at that time of the incident Ferguson's actions were unjustified. It is hard to see why the judge came to this conclusion when compared to his judgement in Gerard Hale's case[6].

6 See Case No. 15.

- 12. **Paul Magee** (24) was charged on 11 November 1988 with grievous bodily harm, assault, false imprisonment and causing an affray. He allegedly hit and kicked the soldiers. He pleaded guilty to assault, false imprisonment and causing an affray and was sentenced to 6 months' imprisonment, suspended for 2 years.

- 13. **Robert Dornan** (49) was charged on 22 March 1988 with grievous bodily harm, assault (as an alternative to GBH), false imprisonment and causing an affray. He was acquitted of all charges.
  Mr. Justice Murray concluded that it was possible Dornan's involvement was defensive. Dornan's involvement, like Reid's (see above) was momentary in as much as he helped to subdue the soldier who had the gun.

- 14. **Edward Higgins** (31) was charged on 22 March 1988 with causing an affray and causing criminal damage. He was acquitted of all charges.
  Higgins kicked the car when it first stopped. Mr. Justice Murray reasoned that his action was instinctive and without criminal intent.

- 15. **Gerard Hale** (33) was charged on 26 May 1988 with causing an affray and causing criminal damage. Mr. Justice Murray acquitted him of both charges.
  Hale kicked the car when it first arrived and soon thereafter ran over the top of it. Mr. Justice Murray, in contrast to his finding in relation to Kevin Ferguson (see above), was not convinced that Hale acted with a criminal intent.

- 16. **Michael McCorry** (23) was charged on 13 May 1988 with grievous bodily harm, assault (as an alternative to GBH), false imprisonment and causing an affray. He was acquitted of all charges.
  McCorry was involved in the overpowering of the soldier who had the gun and was part of the crowd around the bonnet of the soldiers' car when one of them was being beaten on it. Mr. Justice Murray concluded that McCorry's actions could have been defensive.

V. Tried before Mr. Justice McCollum in January 1990

- 17. **James Neeson** (47) was charged on 22 March 1988 with grievous bodily harm and false imprisonment. He was acquitted of all charges.

- 18. **Thomas McCann** (34) was charged on 22 March 1988 with grievous bodily harm and false imprisonment. He was acquitted of all charges.

- 19. **Patrick McKee** (28) was charged on 22 March 1988 with grievous bodily harm and false imprisonment. He was acquitted of all charges.

- 20. **Desmond Hill** (23) was charged with grievous bodily harm and false imprisonment. He was acquitted of all charges.

- 21. **Patrick Fegan** (31) was charged with hijacking the soldiers' car and false imprisonment. He was convicted of both charges and sentenced to 3 years' imprisonment.
  Fegan pulled the keys out of the ignition in the soldiers' car.
  No appeal was lodged because there were rumours circulating at the time that appeal judges

were prepared to find appellants to have time-wasted, despite the fact that there is an automatic right of appeal under emergency law. Nonetheless there was great surprise that Fegan was convicted because of his marginal involvement, and because nearly all his co-defendants had been acquitted.

- 22. **Isaac McIlhone** (25) was charged with grievous bodily harm, false imprisonment, causing an affray and possession of a weapon. Convicted of causing an affray, he was sentenced to 6 months' suspended imprisonment.

VI. Tried before Mr. Justice Carswell in March 1990

- 23. **Patrick Kane** (32) was charged in December of 1988 with murder (counselling and procuring), grievous bodily harm, assault (as an alternative to GBH) and false imprisonment. The murder charge was only added at the preliminary enquiry stage. Despite Kane's bail having been set at a mere £750, an indication that his case was not viewed very seriously, he was convicted of all charges and sentenced to life imprisonment. He appealed unsuccessfully in March 1991.
  The convictions rested on the contention that Kane was in Casement Park, encouraged the beatings, inflicted one kick, and must have known that murder was one possible outcome for the soldiers. According to Mr. Justice Carswell, if a defendant was engaged in illegal conduct and knew murder was one possible outcome of the conduct, then that defendant can be prosecuted for murder.
  Kane denied having been in Casement Park. He testified that his confessions which stated otherwise were made out of fear of the police. The defence stated that Kane was of abnormally low intelligence, but Mr. Justice Carswell concluded that Kane was attempting to appear less intelligent than he actually was, and that Kane was trying to mislead the court. Mr. Justice Carswell used this conclusion to support heli-tele film identification evidence which he admitted was weak.
  In August 1991, the Court of Appeal judges accepted Mr. Justice Carswell's findings. They further refused Kane leave to appeal to the House of Lords. Kane's case has now been lodged in Europe arguing breach of fair-trial procedures under the European Convention.

- 24. **Michael Timmons** (31) was charged in February 1989 with murder (counselling and procuring), grievous bodily harm, assault (as an alternative to GBH) and false imprisonment. Bail was fixed at £11,000. Convicted on all charges, he was sentenced to life imprisonment. He appealed unsuccessfully in March 1991.
  Timmons admitted to having been in Casement Park, but denied being there to help in any criminal activity. Mr. Justice Carswell concluded from the video evidence that Timmons kicked one of the soldiers and lent encouragement to the attackers to continue. Mr. Justice Carswell assumed that it must have been apparent to Timmons that the soldiers would eventually meet their death. On appeal, the judges accepted Mr. Justice Carswell's findings.
  The case has been lodged in Europe.

- 25. **Sean Kelly** (21) was charged in February 1989 with murder (counselling and procuring), grievous bodily harm, assault (as an alternative to GBH) and false imprisonment. The murder charge was only added at the preliminary enquiry stage. Bail was set at £2000. He was convicted on all charges and sentenced to life imprisonment. He appealed unsuccessfully in March 1991. Kelly made one statement during interrogation and refused to say anything more. He also

refused to give testimony during his trial. Mr. Justice Carswell found inconsistencies between Kelly's statement and the videos and film. Kelly had claimed not to have been in Casement Park. The heli-tele, while unclear, shows a figure which could have been Kelly in Casement Park. Mr. Justice Carswell also took an adverse inference from Kelly's refusal to testify. He combined this inference with the inconsistencies of Kelly's statement, and the visual evidence against him, to place him in Casement Park. According to Mr. Justice Carswell, the figure identified on the heli-tele as Kelly played at least a supporting role in beating the soldiers in Casement Park and sending them off in the taxi.
On appeal, the judges decided that they did not need to use the adverse inference from his silence to get a conviction against Kelly. They claimed to be able to identify him in Casement Park beyond a reasonable doubt from the heli-tele film.
Kelly's family claim that the appeal judges altered the grounds of the conviction and the case should therefore have been re-tried. The case has been lodged in Europe.

- ☐ 26. **Joseph Coogan** (23) was charged with conspiring to pervert the course of justice. Convicted of the charge, he was sentenced to two years' imprisonment.
Coogan admitted helping to dispose of the blood-stained trousers of one of the funeral organisers. However, he claimed he did it out of fear, not to pervert the course of justice.
At appeal, the sentence was reduced to 6 months, with Coogan being bound over for 8 years.

- ☐ 27. **Thomas Hawkins** (35) was charged with conspiring to pervert the course of justice. Convicted of the charge, he was sentenced to two years' suspended imprisonment.
Hawkins bought Coogan another pair of trousers after Coogan had exchanged his for the blood-stained pair.

VII. Tried before Mr. Justice MacDermott in March 1991

- ☐ 28. **Kevin McCaughley** (33) was charged on 4 June 1990 with murder (counselling and procuring), grievous bodily harm, assault (as an alternative to GBH), false imprisonment and possession of firearms. Acquitted of murder, the defendant was convicted of grievous bodily harm and false imprisonment and sentenced to 7 years' imprisonment.
McCaughley drove the taxi from Casement Park to Penny Lane. When at Penny Lane he also hit one of the soldiers. Nonetheless, Mr. Justice MacDermott decided that McCaughley may not have had the criminal mind necessary for murder. This is dramatically different from Mr. Justice Carswell's opinions with regard to Kane, Timmons and Kelly, where he assumed that they must have known that murder was a possible outcome of their activity, even though they were only found to have been involved at Casement Park.

VIII. Tried before Mr. Justice Higgins in April 1991

- ☐ 29. **Sean Simpson** (32) was charged on 9 August 1989 with murder (counselling and procuring), grievous bodily harm and false imprisonment. The initial judge, Mr. Justice MacDermott, granted a re-trial because he had already heard evidence against Simpson during the Kane, Kelly and Timmons appeal. Simpson was acquitted at trial. Mr. Justice Higgins ruled that the identification evidence against Simpson was insufficient to convict.

- 30. **Brendan Moyna** (24) was charged in July 1989 with assault and false imprisonment. He was acquitted of all charges. Moyna was only involved around the car and the judge reasoned that he may have thought he was acting in self-defence.

- 31. **Ciaran Scullion** (28) was charged with grievous bodily harm and possession of firearms. He was acquitted of all charges. Scullion had obtained a step ladder and was seen in the videos to have raised it, but never actually to have hit either of the soldiers. The judge reasoned that it was possible Scullion had decided not to join in the attack.

- 32. **Myles Murphy** (24) was charged with grievous bodily harm and possession of firearms. Found guilty of grievous bodily harm and causing an affray, he was given a two and a half years' suspended sentence.
  Murphy assaulted a cameraman to prevent the filming of the attack around the car. The judge reasoned that he must have known that the soldiers were defenceless.

- 33. **Bernard McMullan** (22) was charged with grievous bodily harm and false imprisonment. He was found guilty of grievous bodily harm, false imprisonment and causing an affray and sentenced to three years suspended.
  McMullan was involved with the crowd which pushed the soldiers towards Casement Park. The judge reasoned that he must have known the soldiers were disarmed. Additionally, McMullan would not testify at trial, and Mr. Justice Higgins used his silence to support his conviction.

- 34. **Paul Loughran** (38) was charged on 22 June 1990 with murder (attempted), grievous bodily harm, false imprisonment and possession of a dangerous weapon. He was found guilty of grievous bodily harm and sentenced to nine years' imprisonment.
  Loughran was found to be the man who had the wheel brace on the top of the car.

IX. Charged in late 1990 and still awaiting trial which is expected to take place in summer 1992

- 35. **William Silcock** (33) was charged on 12 October 1990 with grievous bodily harm and false imprisonment. At the preliminary enquiry the charge of aiding and abetting murder was added. Silcock is out on bail. He admits involvement in the initial stages and is not accused of having entered Casement Park.

- 36. **Hugh Cullen** (32) was charged on 15 November 1990 with grievous bodily harm and false imprisonment. He is currently out on bail.

- 37. **Patrick Doherty** (23) was charged on 21 November 1990 with grievous bodily harm and false imprisonment. He is on bail.

X. Charged in June 1991 and still awaiting trial which is expected to take place in summer 1992

- 38. **Padraic Wilson** was charged with grievous bodily harm and false imprisonment; he is currently on bail.

- 39. **Brendan Burns** was charged with grievous bodily harm and false imprisonment; he is currently on bail.

- 40. **Patrick Maguire** was charged with grievous bodily harm and false imprisonment; he is currently on bail.

- 41. **Charles McMenamy** has been similarly charged with grievous bodily harm and false imprisonment. McMenamy had suspected that the police were looking for him and fled south of the border. He finally decided to give himself up. He is currently on bail.

Conclusion

Out of the scores of men who have been arrested for their involvement in the beating and killing of Corporals Howes and Wood, one had all charges dismissed and thirty-three have faced trial. Twenty of these have been convicted of offences ranging from murder to perverting the course of justice. The sentences they have received range from life imprisonment to three months suspended. The other fourteen have been acquitted entirely. Eight major trials have taken place and, as of April 1992, seven more men await trial.

The first few trials took place with little major controversy. The main legal basis of the trials was being established with rulings on the questions of hidden witnesses and the use of the available identification evidence. Some, however, felt that mitigating factors were not adequately being taken into account.

Nonetheless, after the fifth trial there was a feeling among campaigners and lawyers that the DPP and police were being given a strong indication by the judiciary that there had been enough prosecutions arising out of the incident and that they were no longer willing to convict. Aside from one prison sentence, regarded by supporters as surprising, the other five defendants were acquitted or given suspended sentences.

However, Mr. Justice Carswell confounded this optimism with his findings at the end of the sixth of the Casement Trials. It was the convictions in three of these cases that galvanised opinion among relatives who felt that the trial represented a new level of vindictiveness. The sentences seemed out of step given those imposed in previous cases. After Mr. Justice Carswell's judgement some felt that convictions could follow in more and more cases. Comparisons were drawn with the lack of prosecutions, let alone convictions, of members of the security forces who killed people. The three defendants, Kane, Timmons and Kelly, on the other hand, were sent to prison for life amidst great controversy.

Padraic Wilson, Brendan Burns and Patrick Maguire, currently awaiting trial, had all been arrested, questioned and released without charge a year before they were finally charged. It is assumed by observers that they were re-arrested and charged because the RUC and the DPP felt that convictions

were, after all, likely. The key appeal decision confirming the common purpose finding of Mr. Justice Carswell may have been of significance in the decision, after all, to prosecute.

There has been no indication that the authorities have closed the case. In any event, the two men who actually killed the corporals have not been apprehended.

The next two chapters will explore the legal issues that have arisen in the eight trials which have so far taken place.

Chapter 4: Application of the Law

1. The doctrine of common purpose

Perhaps the most unsatisfactory aspect of the Casement trials has been the extension of the law on "common purpose", the doctrine according to which a person can be found guilty of murder even though his or her actions did not directly cause the death. This extension, which occurred in the sixth of the Casment Trials, has resulted in the most egregious examples of convictions and sentences, which seem out of proportion to the accuseds' involvement.

Mr. Justice Carswell convicted Patrick Kane, Michael Timmons and Sean Kelly of murder even though he found that they only played minor roles in Casement Park. All three received the mandatory life sentence. None of these accused was found to have been involved beyond Casement Park and Kane and Kelly deny having been inside the park at all. Their convictions rely on Mr. Justice Carswell's interpretation of the law of common purpose.

Defendants can be guilty of murder under the law of common purpose in two possible ways:

- First, the defendant might have given assistance to a joint enterprise, the purpose of which was to commit murder.
- Alternatively, if the purpose of the joint enterprise was not to commit murder, the defendant might have foreseen that one of his co-planners could commit murder while pursuing their common purpose.

Mr. Justice Carswell found Kane, Timmons and Kelly to have been in Casement Park and to have aided in the grievous bodily harm of the soldiers. He further reasoned that those accused must have contemplated the soldiers' murder as one possible outcome of their joint enterprise. Since murder did result, the judge found Kane, Timmons and Kelly guilty of that crime.

Mr. Justice Carswell's application of the law on this point can be said to represent an improper extension of the law because none of the accused was even alleged to have conspired, expressly or impliedly, with the actual killers. Nor were they part of the group who took the corporals to Penny Lane in the taxi. In all but one of the cases quoted by Mr. Justice Carswell in support of his view, the accused had formed a prior criminal plan with the person who finally killed someone. Further, each accused in the cases referred to had contemplated the killing before having embarked on the criminal common purpose.

Mr. Justice Carswell first points to **Chan Wing Sui v. The Queen [1985] AC 168.** In that case three men were committing robbery and one of the men fatally stabbed the victim. Mr. Justice Carswell quoted from the decision:

> *"A secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend."*

The law in this case specifically applies to situations in which conspirators get together and agree to enact a criminal plan. If another crime, foreseen as possible, is committed while that plan is being executed then all the conspirators are liable for that further crime. A necessary precondition is that the parties have made an initial agreement to commit a crime.

The next case Mr. Justice Carswell quotes from is **R. v. Slack [1989] 3 All ER 90.** This involved a joint enterprise to rob a widow. One of the robbers brought a knife with him to threaten the woman, but he ended up killing her. The accused was found to have given his consent to the widow's possible murder and was found guilty. The judge said:

> *"If, however, as part of their joint plan it was understood between them expressly or tacitly that if necessary one of them would kill or do serious harm as part of their common enterprise, then B is guilty of murder."*

This case is very similar to **Chan Wing Sui**. Both involve a prior agreement between the killer and his accessory to commit some criminal act.

Mr. Justice Carswell cites several other cases to support his interpretation of the law. In **R. v. Anderson and Morris [1966] 2 QB 110** the two accused went in search of a man to seek revenge for something that man had done. One of the accused had a knife and fatally stabbed the man. The other was said to be guilty of murder only if he knew about the knife and the possibility of such a result. In **R. v. Ward (1987) 85 Cr. App. R. 71** X and Y had been fighting a group of men. X had a knife and Y had a pair of scissors. X ended up fatally stabbing one of his opponents and Y was found to have known that the killing was a possible result of their joint enterprise. In both of these cases a necessary condition for conviction under a theory of common purpose was that the accused had agreed to a joint criminal enterprise with the killer.

Mr. Justice Carswell relies heavily on **R. v. Maxwell [1978] NI 42.** In that case a man was convicted for a bomb attack. He was found to be a member of a paramilitary organisation and to have played the role of a guide for the bombers. He drove in a car in front of theirs and pointed out the targeted pub. The accused claimed not to know what the men in the other car intended. The then Lord Chief Justice, Lord Lowry, explained that, since the man was doing this job for a paramilitary organisation, he must have realized that a bombing was one likely outcome. Having aided that activity, he was found guilty of it.

This case is also distinct from the Casement situation. In **Maxwell**, as in **Chan Wing Sui** and **Slack**, the accused agreed to take part in a criminal enterprise with the men who ultimately did the bombing. Also, in **Maxwell**, the accused was found to have been a member of a paramilitary organisation. In the Casement situation neither initial agreement with the ultimate killers nor membership of any paramilitary organisation has been shown to exist. Without proof of such an agreement, the convictions of Kane, Timmons and Kelly seem unsafe and unsatisfactory.

Lord Lowry LCJ went on in his **Maxwell** decision to present hypothetical situations where the law of common purpose would apply. One example he gives parallels **Chan Wing Sui** and **Slack**. If two people decide to rob a bank, and one of them ends up shooting someone, then they both are liable for murder. This example indicates that Lord Lowry did not intend to take the law on common purpose beyond the decisions in those earlier cases.

Mr. Justice Carswell cites only one case, **R. v. Grundy [1989] Crim. L.R. 502**, to prove the contention that under the law of common purpose a party to a crime need not have been a party to the enterprise from the beginning. He does not elaborate on **Grundy** at all, merely making the proposition and citing the case in support. In that case, however, the accused joined in with a group which was beating up a police officer. Because the accused joined in beside the others, he was found to have given his implied consent to their actions. This situation is completely different from that of the Casement accused. Kane, Timmons and Kelly may have joined in beating the soldiers, but they could then only be found guilty for what those people were doing at that scene - inflicting grievous bodily harm. The killing occurred at a different place, at a later time, and at the hands of different people.

In the **Grundy** decision another case was referred to, **R. v. Abbott (1955) 39 Cr. App. R. 141.** There two defendants were jointly accused of the same crime but the prosecution could not prove which one actually did it, or that there was a conspiracy. The judge in that case firmly stated that:

> *"if there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty...because the prosecution has not proved its case."*

This seems to be the situation with Kane, Timmons and Kelly. The prosecution did not prove that they had conspired with the actual killers. They did not even allege such a conspiracy. The judge in **Abbott** continued his judgement by saying that to assume a conspiracy existed would be to shift the onus to the defendants to prove themselves not guilty. This would be a clear violation of the presumption of innocence, which is crucial to a fair trial.

Mr. Justice Carswell may have assumed that the killers were part of the crowd in Casement Park which beat the soldiers, and therefore that Kane, Timmons and Kelly did conspire with them. But he never states this nor do the prosecution present any such evidence. Such an assumption would have to be proved before it could form the basis of a conviction. The prosecution would still have to prove that Kane, Timmons and Kelly had contemplated that their actions might end in the shooting of the two soldiers in Penny Lane.

In his decision, Mr. Justice Carswell stressed that the subjective mind of the accused is what must be considered when assessing guilt under a common purpose doctrine. He cites the House of Lords, referring to **Maxwell**. The Lords stressed that the law focuses on what the accused contemplated - not on what the accused might have contemplated, or should have contemplated, but on what the accused actually contemplated. When considering Kane, Timmons and Kelly it is crucial to remember that their entire alleged involvement lasted only for a few minutes. It is also crucial to recall the panic and chaos of the situation. One might well ask whether, given that they were acting as a part of a frenzied mob (quite apart from the claims of two of the men that they were not involved at all and never went into Casement Park), the three accused had considered anything at all.

Shortly after quoting from **Maxwell**, however, Mr. Justice Carswell makes the statement that consideration of what a reasonable person would contemplate *is* relevant as the foundation for an inference of what the accused contemplated. But he cites no support for this statement. He simply

uses this inference to claim that Kane, Timmons and Kelly must have realized that murder was one possible outcome of their activities in Casement Park, and he accordingly finds them guilty of murder.

It is equally likely that Kane, Timmons and Kelly made no plan whatsoever to commit a crime. The prosecution did not allege that they conspired with the actual killers, expressly or impliedly. If the soldiers had been beaten to death in Casement Park, then it is possible that a case could be made against them. They would have been aiding the beating with the possible knowledge that the beating could end in the killing of the soldiers. This did not happen. The soldiers were taken away from Casement and shot in Penny Lane.

In the Casement trial against Kevin McCaughley, Mr. Justice MacDermott ruled that even a person at Penny Lane might not have realized that the soldiers would be killed. However, Kane, Timmons and Kelly were involved beyond Casement Park (and two of them claim that they did not go into Casement Park). Furthermore, the prosecution did not allege that Kane, Timmons and Kelly knew who killed the soldiers. A joint enterprise has therefore not been proved beyond a reasonable doubt and their convictions are unsatisfactory.

The severe sentences imposed on Kane, Timmons and Kelly may reflect the fact that the actual killers have not been apprehended. In relation to this it is important to recall a fundamental tenet of British common law tradition. The judge in **Abbott** expressed it well:

> *"Although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that the law should be maintained rather than that there should be a failure."*

South Africa

It is interesting to note that the law on common purpose has also given rise to considerable controversy in South Africa, which has a legal system partly based on English law and partly on Roman-Dutch law. Even there, where there have been numerous examples of "mob killings", the judges have stopped short of extending the law so that persons who have little connection with the killing can be convicted of murder.

In the Sharpeville Six case, **S.v. Safatsa and others** [1988] (1) SA 868, Botha JA and the other judges in the Appellate Division decided that a causal connection between the acts of every party to the common purpose and the death of the deceased need not be proved in order to sustain a conviction of murder in respect of each of the participants. This decision was heavily criticised throughout the common law world. Louis Blom-Cooper, writing in **The Times**, opined:

> *"What makes the case of the Sharpeville Six deeply worrying is the all-embracing application of a respectable legal doctrine to every member of a rioting mob, simply because he or she appears to be part of the mob at the scene of an unpredicted and perhaps unpredictable killing."*

Mr Blom-Cooper also pointed out that prosecutors in England, certainly after the notorious Craig-Bentley case in 1952, have been cautious not to throw the net of criminal liability in common purpose cases too wide (as, for example, in the Broadwater Farm case of 1985).

It must be stressed, however, that whatever the defects in the Sharpeville Six ruling, the decision still required the defendant to have the necessary guilty mind, *mens rea*, that is, an intention to kill.

It also required the evidence to show, as a matter of fact, that the accused actively associated with the acts of the mob which caused the death of the deceased. On both of these grounds it is possible to argue that Kane, Timmons and Kelly should have a defence, so that even under the harsh Sharpeville Six test they would be found not guilty of murder.

But the law on common purpose in South Africa has become less harsh since that test was laid down in December 1987. In **S. v. Mgedezi [1989] (1) SA 687** the Appellate Division emphasised that the doctrine of common purpose can lead to the conviction of a person who does not causally contribute to a prohibited consequence only if five prerequisites are satisfied, namely:

- (1) that the accused was present at the scene of the crime;
- (2) that the accused was aware of the crime being committed;
- (3) that the accused intended to make common purpose with the actual perpetrator;
- (4) that the accused manifested his or her sharing of the common purpose by performing some act of association with the conduct of the perpetrator; and
- (5) that the accused had the requisite *mens rea*.

It is obvious that these conditions would not all have been satisfied in the Kane, Timmons and Kelly cases.

It is for these reasons that the CAJ views the convictions of Pat Kane, Michael Timmons and Sean Kelly with particular concern. We doubt whether the relevant evidence existed properly to convict these men of murder. We therefore recommend that the cases be referred back to the Court of Appeal.

Furthermore we recommend that the ruling of Carswell J., extending the law on common purpose, be not followed in future cases.

2. Self-defence and mitigating factors

In the outcry over the Casement trials many people have argued that in general the defendants were defending themselves from what was widely perceived to be another indiscriminate attack by loyalist paramilitaries. Throughout the trials of the Casement accused, the defence has tried to use this claim of self-defence to exculpate the accused from conviction. Further, the defence has argued that the chaos of the situation combined with the speed at which the events unfolded prevented anyone from making a realistic analysis of what was occurring.

The law of self-defence was not disputed in the trials. A person may use such reasonable force to defend him/herself as s/he honestly believes is necessary in the circumstances. The amount of force considered reasonable depends on the nature and imminence of the threat, the likely consequences for the alleged aggressor and the result of the force used. The Crown has the burden of proving that the defendant did not hold a reasonable belief that force was necessary, but the Court can presume that the defendant understood the true facts unless the defendant produces evidence indicating otherwise.

The prosecution correctly pointed out that once the men were known to be helpless and subdued, self-defence no longer applies. The question at issue is the moment at which the defendants could no longer have believed that the soldiers were dangerous.

Mr. Justice Murray did acquit several of the accused because of the possibility that they believed they were acting in self-defence. One of the men acquitted, Robert Dornan, was involved with

Clarke and Reid in disarming one the soldiers when he was first pulled from the car. Others who were acquitted, were involved in minor ways when the car first pulled into the funeral. On the other hand, Patrick Fegan was convicted for having taken the keys out of the soldiers' car.

By the time the soldiers were dragged into Casement Park it is reasonable to argue that it must have been obvious they were no longer a threat to anyone. The situation around the car is more vague. Mr. Justice Murray found that when one of the soldiers was subdued on the bonnet of the car he no longer posed a threat to anyone. Based on that assertion he convicted Terence Clarke and Gerard Reid of grievous bodily harm. Those accused were part of the group beating the soldier on the bonnet. On the other hand, the conviction and subsequent successful appeal of Sean Lennon[7] shows that the judges themselves have had difficulty in deciding when precisely the law of self-defence no longer applies.

Mitigating circumstances

Contrary to much of the community outcry, none of the cases seems to be dramatically out of line with a proper application of the law of self-defence. The mitigating circumstances however, do seem to have been overlooked.

Three days earlier the interruption of a funeral resulted in three deaths and multiple injuries caused by several grenades and many rounds of gunfire. The mourners could reasonably have been expected to be nervous, frightened and agitated when the car containing the soldiers first appeared. Michael Stone himself was chased down and subdued by mourners from the funeral he attacked. It is noteworthy that no-one has been prosecuted in relation to Stone's disarming.

In their judgements on the Casement accused, the judges all claim to consider carefully the circumstances surrounding the killing of the soldiers. Those assertions lack credibility when one looks at the severity of many of the decisions. In the murder convictions of Kane, Timmons and Kelly, discussed above, Mr. Justice Carswell seems to have given no weight to defence assertions that the crowd were in the midst of a frenzied reaction to the horrific incident a few days earlier. He found that in just a few minutes the accused must have contemplated that their actions might aid IRA gunmen in the eventual killing of the soldiers, and that they acted despite that.

Not all the decisions, however, show an apparent disregard for the surrounding circumstances. Mr. Justice MacDermott showed considerable empathy for Kevin McCaughley, the man who had driven the taxi to Penny Lane. Despite the judge's finding that McCaughley even punched and kicked one of the soldiers before running from Penny Lane, Mr. Justice MacDermott admitted that McCaughley might not have realized that he was effectively aiding the soldiers' eventual killing.

Social psychological factors

In an earlier trial, Mr. Justice McCollum refused to admit expert psychological evidence regarding the way people act when they are part of a crowd thus excited. He reasoned that he was in as good a position as anyone to imagine what the accused might have been feeling and thinking during the incident.

7 See Chapter 3, Case No 5.

The expert evidence in question would have come from Dr Andrew Coleman. He has testified, in two trials in South Africa, that social psychological factors may have contributed to township murders by excited and enraged crowds. His testimony was accepted by the courts in both cases and is regarded as something of a legal breakthrough[8]. In essence, the trials related to murders committed by crowds in the midst of township conflict. Among the factors which were cited as capable of inducing abnormal, aggressive behaviour were the following:

- **De-individuation**, brought on by dense crowding and dancing. In the Belfast incident, it could be argued that the crowd and the grief and ritual associated with a community affected by days of funerals would have caused a similar process;
- **A decrease in self-monitoring** which aggravates the influence of external rather than internal motivating factors. Under this process normal value judgements which might operate would become subordinate to the impact of the situation as it developed;
- **Frustration coupled with relative deprivation** leading to **anger and aggression.** In the South African context the poverty and alienation of the black community is well-understood and may have contributed to the appalling actions committed on people seen to be collaborators. A parallel process is arguable in the Belfast incident. The relative deprivation of West Belfast is well-known. To that might be added the experience of continual army patrols stopping, questioning and searching and conducting prolonged house searches. In the Belfast incident also, the car and its occupants were perceived, as a number of the judges acknowledge, as hostile *attackers*. This is an aggravating factor not present in the South African cases, where the murders were committed on defenceless people already in the grip of the crowd;
- **Conformity and obedience pressures** were cited in one of the South African cases as showing that "collective decisions...tend towards greater extremity than the individual opinions of the group members"[9]. The suggestion is that in certain circumstances, a crowd will act more and more beyond the bounds of reasonable behaviour. In other words and combined with the other factors mentioned, in a given situation of extreme stress, a collective decision to kill someone perceived to be part of an oppressing group may be more likely than dealing with them in a less reprehensible way.

Andrew Coleman sums up the possible value of this kind of evidence in mitigation as follows:

> *"Psychological testimony could play a much larger role than it has hitherto done at the point of sentencing.... Wherever a court has discretion to increase or decrease the severity of punishment in the light of aggravating or mitigating circumstances, expert psychological testimony is at least potentially illuminating. But the admissibility of expert evidence, at least in the liability phase of a criminal trial, is governed by strict common-law principles, and it is questionable whether courts will, in practice, admit such testimony. My own experience in Northern Ireland, for example, is that the courts are rather reluctant to admit non-clinical psychological evidence*[10].

In comparison to Mr. Justice McCollum's rejection of psychological evidence, American criminal law now incorporates a psychological defence known as **the battered woman syndrome**. Where a defendant is a woman who has been physically abused by her husband, and she kills him when other alternatives are available, she can still be found innocent of any crime. This applies even

8 See Dr Coleman's article: Psychological Evidence in South African Murder Trials, in The Psychologist. November 1991. See also Excluding Expert Evidence: A tale of ordinary folk and common experience, RD McKay and Andrew Coleman [1991] Criminal Law Review, p. 800 - 810.

9 op.cit. p. 484.

10 op.cit. p. 486.

when she kills her husband in his sleep. The reasoning is that she is psychologically unable to do anything else. This type of defence is also available in British law, though there is still no consensus on how and when it should apply. Thus, in one recent Court of Appeal decision in England[11], it could only apply if the woman was able to show that her reaction occurred immediately after severe provocation. More recently still **June Scotland** was cleared of murder even though she killed her husband by poison (finishing him off with a rolling pin) and not in immediate reaction to actual violence from him[12].

In a similar way many of the Casement accused may have had great difficulty acting differently from the way they did. Mr. Justice Murray acquitted several defendants because he assumed that they acted instinctively, not really knowing what they were doing, and without any criminal intent. A similar case can be made out for Kane, Timmons and Kelly regarding their murder charge. Expert psychological testimony might posit that there is no way they could have contemplated the ramifications of their actions. At the very least such testimony should be admissible as evidence. It was rejected, however, in favour of the "common sense" approach of Mr. Justice McCollum.

3. The use of film and video evidence for identifications

The Casement trials are among the first trials in the United Kingdom in which film and video evidence has been used extensively to form the core of the cases against the accused. Accordingly, many people are concerned over the precedents being set during the course of their use.

The film and video evidence being used consists of:
- the film taken from the army helicopter over the funeral (the heli-tele); and
- videos taken by the media people covering the event.

The latter evidence is generally fairly clear, but the video coverage ends when the corporals were taken into Casement Park. The cameramen on the ground were prevented from continuing their filming, a factor which may have persuaded the judges that what took place in Casement Park took on more sinister ramifications. The heli-tele film, in comparison, is not clear enough to distinguish people's faces, but runs the entire length of the event, from the beginning of the funeral to the get-away of the assassins who killed Corporal Howes and Corporal Wood.

The defendants have been allowed copies of the visual evidence. Astoundingly, this had to be ruled upon and did not happen as a matter of course. Sir Brian Hutton LCJ ruled on the matter in the first trial. However, the evidence has been given to the defence counsel in the form of compilation tapes, which contain all the evidence against a particular accused. These tapes have been given to counsel subject to several conditions:
- First, the tapes are to be used only in the preparation of the defence.
- Second, the defence counsel must keep the tapes in their possession.
- Third, they are prohibited from making copies and the tapes must be returned at the end of the trials.

One lawyer has reported that she had problems getting all the video evidence with which to prepare one of the cases. Apparently the prosecution only gave the lawyer what they were going to use

11 See for example R. v. Thornton [1992] 1 All E.R. 306.
12 See Independent on Sunday, 5th April 1992, "A crime to make justice falter" by Heather Mills.

against that particular defendant. The lawyer was not given all the videos available. As it turned out, the lawyer happened to see the defendant in a video at another of the Casement trials and that video was crucial for the defence of the client.

This denial of access to evidence to defence lawyers has been a matter of dispute in many important trials, including the celebrated miscarriage of justice cases in England. Defence lawyers for the Birmingham Six and Guildford Four were not given access to all available evidence. The Armagh Four case, currently returned to the Northern Ireland Court of Appeal, was stalled on the question of whether defence lawyers should be allowed to have access to an internal police inquiry into the original convictions. In that case, Peter Brooke the Secretary of State issued a Public Interest Immunity Certificate in relation to the material. The Court of Appeal eventually decided that this certificate should cover only the conclusions of the inquiry.

This approach by the prosecution is highly damaging to the interests of justice and fair play. It can only be right that all relevant material should be available to the defence. This concept of equality of arms has been accepted in European law[13] and is currently under consideration by the **Royal Commission on Criminal Justice** set up in the wake of miscarriages of justice mentioned earlier. Incomprehensibly, however, the Royal Commission's remit does not extend to Northern Ireland.

New technology and new techniques

A technique called "matching" was allowed by Sir Brian Hutton LCJ when he admitted the visual evidence. An expert analyzed the videos and the film and "matched" them all to synchronize the timing between them. Thus, it was possible to present the heli-tele film alongside several differen media videos and have them all depicting the same moment during the event. Further, the video and films were highlighted to show the specific alleged accused in a clear box, with the backgrounc shaded.

The accused have generally not contested identification made from the media videos, but there ha been uproar in relation to identifications made from the unclear heli-tele. The identifications wer based on the general characteristics of the accused, the clothing they were seen to be wearing in th media video, the colour of their hair, moustaches or beards, the way they walk, even the colour o their socks. The problems become even more pronounced when the heli-tele is alleged to sho particular actions by the accused. For example, defendants dispute claims that certain actions on th heli-tele film amount to assault.

Defence counsel have protested against the use of the heli-tele film altogether. They argue that is of such poor quality that identification from it should not be permitted. The judges themselv have often admitted that identification evidence from the heli-tele has not been conclusive in an of itself, but they combine the identifications with other evidence against the accused to obta convictions.

This was precisely the case with Sean Kelly. Mr. Justice Carswell admitted to having doubts th it was Kelly on the heli-tele, but then relied upon an adverse inference from Kelly's failure testify[14] to support the weak identification evidence and make his conviction. On appeal, the judg

13 See, for example Barbera, Massague and Jabero v Spain Comm Report 16.10.1986, Eur. Court HR, Series no 146 p. 45.

14 See Chapter 5. The limitation on the right to silence.

decided that the visual evidence against Kelly was enough to form the conviction, and thus avoided reliance on the controversial adverse inference. The fact that the initial trial judge specifically stated that the identification evidence was not strong enough to form a conviction makes the Court of Appeal decision in this case highly unsatisfactory. Normally an appeal court does not interfere with a judge's findings of facts.

Defence counsel also protested against the judges acting as their own witnesses by making their own identifications from the film and videos. They went on to argue that the judge as a witness cannot be cross-examined. Mr. Justice Kelly, in the appeal from the Murphy and Maguire case, addressed this point. He cited many sources, including **Cross on Evidence** and Murphy's **A Practical Approach to Evidence**, to illustrate the point that film is real evidence which can be examined by the judge. He further cited several cases to support this contention. In **R. v. Hamilton, Fairey and Noel** [15] the judge instructed the jury to consider video tapes as a vital and very helpful piece of evidence. In that case policemen had made identifications and the judge decided that the police identifications should carry equal weight with the identifications the jurors themselves were able to make.

In many of the Casement trials the judge has doubted the identification evidence put forth by policemen or others involved, and considered his own opinion of whether the accused was identifiable from the film. As has already been said, Mr. Justice Carswell doubted the reliability of the identifications against Kelly. In the most recent judgement, Sean Simpson was acquitted because the judge rejected testimony from approximately eight police officers as he simply could not say without doubt that the person in the film was Simpson.

Another factor which has caused strong doubts has been the reviewing again and again of particular shots which are alleged to depict certain of the accused. The police highlight particular sections and display the person they have identified as the accused with an arrow on screen or by highlighting as explained earlier. Comparisons with identification parades may be instructive inasmuch as a witness who required repeated looks might be argued to have reasonable doubt as to whether s/he can actually identify the person in question.

Defence counsel have also objected to the conditions under which police officers have identified suspects. The prosecution has had over 1500 police officers view the film and videos to see if they could identify anyone in them. Before viewing the evidence the officers were instructed on a piece of paper that they should not discuss with anyone who they were able to identify. In this way other officers would not be pre-disposed to finding any particular suspect.

However, with 1500 police officers having viewed the evidence, and the trials receiving such high profile media coverage, it is hard to imagine that the viewing officers had not heard that certain individuals were suspects. This situation is likely to create pre-dispositions among the identifying officers even though this problem would be extremely difficult to overcome.

Sir Brian Hutton LCJ made it clear from the beginning of the Casement trials that the only individuals who would be allowed to give identification testimony against an accused were those who had known the accused before making the identification. He supported this assertion with R. v. Grimes [1982] Crim. L. R. 674. The judge in that case held that someone who had known the accused

15 Unreported, 29 July 1986.

before identifying him in a video could testify against that person in the same way as an eyewitness could. If, however, the person had not known the accused previously, then his opinion would not be any more reliable than that of the judge or jury.

This principle has been applied throughout the trials. Sir Brian Hutton himself rejected identification evidence from the expert who had "matched the films". The prosecution argued that since the man had spent so much time analyzing the film he was in a good position to make identifications between suspects who were clearly visible in media videos, but not so readily identifiable from the heli-tele.

In a later decision Mr. Justice McCollum adhered strictly to the principle that the witness must know the suspect before being able to give identification evidence against him. He rejected the testimony of a witness who had seen the video, then seen the suspect McConnell, and then seen the video again. The fact that the witness had seen the suspect between viewings was not enough to satisfy the **Grimes** rule.

Finally, the defence has complained that the prosecution has had access to the most sophisticated video and screening equipment while the defence has had to operate on a small budget. The prosecution has highlighted the materials to show the alleged suspect through sophisticated highlighting techniques. One defence solicitor attempted to get the film and videos processed with various techniques to show how dramatically visual material can be changed to alter people's appearance. In the end, however, resources prevented him from doing this. Once again the question of equality of arms seems to have particular relevance to this matter.

Chapter 5: Aspects of Criminal Procedure

In addition to the particular issues mentioned in the last chapter, there are aspects of the criminal justice system in Northern Ireland which already take away many of the safeguards normally enjoyed in the rest of the United Kingdom and other common law jurisdictions. They relate to special legislation which has been put in place to facilitate the authorities in dealing with the conflict in Northern Ireland. Cumulatively, all these have, it is alleged, substantially disadvantaged the Casement Accused.

This section will focus on several of the more worrisome procedures employed:

- the Diplock Court system (trial by judge without a jury);
- methods of obtaining and using confession evidence;
- the use of secret witnesses; and
- the limitation of the right to silence.

1. The Diplock Courts

In a Diplock Court the judge plays the role of both judge and jury. Cases are held in a Diplock Court if the offence in question is scheduled as a "terrorist" offence. The Diplock Courts were first established under the **Northern Ireland (Emergency Provisions) Act 1973** in an attempt, it was argued, to overcome the perverse case outcomes caused by juries allegedly subject to intense bias or intimidation.

The evidence in support of juries being biased and subject to intimidation is highly questionable. Even if it was the case twenty years ago, the laws regarding who can be a juror have changed since then enabling a much broader spectrum of the population to become jurors. Prior to 1974 there was a property qualification attached to jury service which resulted in jurors being predominantly middle class male protestants. The **Juries (Northern Ireland) Order 1974** eliminated this property requirement.

Regarding juror intimidation, suggestions have been made that jurors could be anonymous. They could be shielded behind a curtain in the same way that certain witnesses are[16]. Jury trial was abolished too lightly at the start and there is no need now completely to eliminate the jury. Any difficulties which may still be felt to exist should not be insurmountable.

16 See Secret witnesses below.

The Republic of Ireland has a variation of the Diplock Court, but there the trial is decided by a panel of three judges. Even if it is decided that impartial and unintimidated juries are impossible, trial by a panel of judges would at least provide some protection against alleged bias.

In the absence of even this minimal safeguard the defendant is subject to the bias and judgement of one person, the judge. With the jury system, it is necessary that 10 out of the 12 agree that the defendant is guilty. Even if 9 of the jurors are biased against the defendant, three objective jurors who believe there is a doubt about the defendant's guilt can save that defendant from a conviction. In a Diplock Court it all depends on one judge.

In an ordinary trial, the judge decides what evidence is admissible, and the jury does not hear anything which is not admissible. In a Diplock Court, the judge can rule evidence inadmissible, but makes his final judgement having heard and considered the inadmissible evidence - he is supposed to put the inadmissible evidence out of his mind.

In a jury system, the defence has a right to screen the jurors for potential bias. In the Diplock system, it is extremely difficult to dismiss a judge because of a suspected prejudice. Yet, there are many factors pertaining to the judges' background and day-to-day life which might reasonably be expected to prejudice their judgement in certain cases. All of them (quite understandably in view of attacks on them or their colleagues) are protected from the paramilitaries by the security forces. Many judges come from an establishment background and would have little understanding of life in working class areas of Northern Ireland. Some of the justices served as advisors to the Stormont Parliament, prorogued as a result of social and political conflict in 1972. Lord Chief Justice Hutton himself was the Legal Advisor to the old Ministry of Home Affairs at Stormont.

Furthermore, there is also the thorny question of case-hardening. Several of the justices have heard more than one Casement trial. Mr. Justice McCollum has heard two of the seven Casement trials at first instance. Other Justices have heard Casement trials at first instance and presided over the appeal of others. Mr. Justice MacDermott actually dismissed himself from deciding the case against Sean Simpson because he had heard evidence against Simpson in the Kane, Timmons, Kelly appeal. The judges' familiarity with previous Casement trials can reasonably be assumed to have affected their opinions about the subsequent trials. There are, after all, only 10 Justices or Lords Justice who normally hear these cases.

There has been disagreement within the international human rights community as to whether or not Diplock courts are prejudicial to defendants. The most recent authoritative report, **Human Rights in Northern Ireland: A Helsinki Watch Report**, however, states:

> *Helsinki Watch is deeply concerned about the use of Diplock Courts. While not recommending their total abolition at this time, Helsinki Watch strongly urges the Northern Ireland authorities to reconsider their use in the light of suggestions that have been made as to how to provide fair trial to defendants and also to protect jurors who hear cases involving paramilitaries*[17].

17 Human Rights in Northern Ireland: A Helsinki Watch Report, New York, 1991, p. 92.

Diplock Courts and the Casement Accused

The Casement accused were all tried in Diplock Courts. While it is impossible to prove that the Diplock Court system substantively affected the rights of the accused, the glaring inconsistencies among the verdicts provide some evidence. When examining the judgements, it seems the attitude of the particular judge hearing the case was sometimes just as important as what the accused did.

The most dramatic inconsistency is between the convictions of Kane, Timmons and Kelly, and that of McCaughley. Without acknowledging it, Mr. Justice Carswell extended the law on common purpose to gain murder convictions against Kane, Timmons and Kelly. Mr. Justice MacDermott sat on that appeal, and deferred to his brother Carswell's conviction in those cases. Immediately after that appeal judgement was given, Mr. Justice MacDermott came out with his own judgement regarding McCaughley. Months had elapsed since both the Kane, Timmons, Kelly appeal trial, and the McCaughley trial, but Mr. Justice MacDermott was careful not to deliver his decision on McCaughley until the appeal decision had been given.

As was discussed above, Mr. Justice MacDermott acquitted McCaughley of the murder charge against him. McCaughley had driven the taxi to Penny Lane. He even helped subdue the soldiers in Penny Lane when they tried to run away, immediately before they were shot dead. And still, Mr. Justice MacDermott could not find convincing evidence that McCaughley knew that the men would be killed. Yet, somehow, Mr. Justice Carswell was able to find that Kane, Timmons and Kelly must have known.

Similar to Mr. Justice MacDermott in the case against McCaughley, Mr. Justice McCollum dismissed the murder charge against McConnell, despite the fact that McConnell had made a statement that he participated with the mob believing that the two men would eventually be killed. In his opinion on this matter, Mr. Justice McCollum explained that he did not believe that anyone could have been thinking so clearly in such a situation. He believed that McConnell only realized that the men would be killed in retrospect. Again, this provides a drastic comparison with the ruling against Kane, Timmons, and Kelly.

Throughout the justices' opinions it is possible to get a sense of their attitudes. As he describes the soldiers driving at speed towards the funeral Mr. Justice Carswell says, "Corporal Wood managed to get past the taxis... and mounted the footpath at some stage to do so". He does not mention that the soldiers could have simply reversed when they first came upon the funeral, a scene they had been briefed about and told to avoid. He also appears to view the funeral cortège as being made up of IRA members and their supporters, giving no weight to the possibility of community solidarity or simply curiosity as reasons for attendance at the funeral.

In his decision against McConnell and Others, Mr. Justice McCollum also displays subjective opinion which may have been detrimental to defendants. When discussing the funeral he mentions that members of the IRA must have been present. This has no bearing on those particularly accused, unless the prosecution was seeking to prove that one of them was a member of the IRA. No such allegations have been made against any of the accused, but it seems Mr. Justice McCollum is suspicious that any of the accused might have been members.

Mr. Justice McCollum convicted Sean Lennon of grievous bodily harm and false imprisonment. Lennon was found to have been involved only in the initial attack around the car. At that stage several other accuseds were acquitted on the basis that they might have believed the soldiers were dangerous. When Mr. Justice McCollum discusses his conviction of Sean Lennon, he goes to great

lengths to mention that Lennon's involvement in the funeral as a steward did not lead to "any unfavourable inferences." He further states that his conviction was in no way influenced by such considerations. He does stress, however, that Lennon seemed to play a leading role in the organization of the funeral. But he does not mention why this is relevant to his discussion of Lennon's guilt. Mr. Justice McCollum rejected Lennon's testimony that he was acting in self defence, despite there being no conclusive evidence to support that decision.

Mr. Justice McCollum sentenced Lennon to 15 years. On appeal the decision was found to be unsafe and unsatisfactory and Lennon was freed. By that time, however, Lennon had effectively served a three year sentence.

The weight of responsibility for judging cases involving the commission of serious criminal offences should not be left in the hands of any one person. Individual adjudicators inevitably have biases which subconsciously help form decisions. In the charged political climate of Northern Ireland this may tend to be even more so[18].

It is because of the issues raised in this section, among others, that CAJ re-states its call **for the return to jury trial** for scheduled offences. The arguments used to justify the introduction of Diplock courts no longer hold the same force, whether or not one accepts that they ever did. Adequate safeguards for the protection of juries have been suggested on a number of occasions and CAJ calls on the authorities to consider urgently how and when jury trial can be returned to the criminal justice system in Northern Ireland.

2. Methods of obtaining and using confession evidence

Even before the trial phase of an accused's case, criminal procedures can be prejudicial. The regime governing arrest, detention and questioning of those suspected of "terrorist" offences is notoriously controversial[19].

In 1987, 227 complaints of assault during the interrogation interview were made by these suspects. In 1988 the figure was 164, and in 1989 there were 191 such complaints[20]. Many people who make confessions later complain that they were forced into making them. The Castlereagh detention centre where all the Casement Accused were interrogated has been the object of furious controversy over the years. The treatment of suspects during interrogation in the mid '70s led to critical reports by both Amnesty International and the government-appointed Bennett Committee[21]. More recently,

18 For further reading on the Diplock Court system in general, see:
Korff, Douwe, **The Diplock Courts in Northern Ireland: A Fair Trial?** commissioned by Amnesty International, SIM Special No. 3, 1982;
Greer, S.C., and White, A. **Abolishing Diplock Courts**, The Cobden Trust, 1986;
A Briefing Paper on the Northern Ireland (Emergency Provisions) Bill, prepared by the Committee on the Administration of Justice; and
Jackson, John, a paper on three judge courts for the Standing Advisory Commission on Human Rights.

19 For further reading on police interrogations see:
Dickson, Brice (Ed.), **Civil Liberties in Northern Ireland**, Chapter 4, Committee on the Administration of Justice, Belfast 1990; and
Amnesty International, **United Kingdom Human Rights Concerns**, § 1.2, London, June 1991.

20 Figures taken from Amnesty International's 1991 report on the United Kingdom.

21 See: Amnesty International, **Report of a Mission to Northern Ireland** (1978); and

the **United Nations Committee Against Torture** expressed deep concern about the regime governing emergency detention in Castlereagh. This followed submissions to it by the Committee on the Administration of Justice and Amnesty International concerning recent allegations of ill-treatment during detention[22].

Despite all these complaints, confession evidence has formed the basis of the majority of cases against people accused of "terrorist" offences. In 1981, a study done by Dermot Walsh found that 89% of all those convicted in a Diplock Court had made confessions. These figures would appear to support the widely held view that the Castlereagh interrogation centre is "a conveyor-belt of confessions." The very statistic that 89% of all suspects made confessions must give one pause for thought about the methods employed by the detectives at Castlereagh. There is no reason to believe that the figure has declined over the past 11 years.

Under Article 74 of the **Police and Criminal Evidence (NI) Order 1989**, the prosecution must ordinarily prove that a confession was made without the use of oppression, or any tactic which might make the confession evidence unreliable. The **Northern Ireland (Emergency Provisions) Act of 1991**[23], however, governs suspects accused of "terrorist" offences. In those cases confession evidence is inadmissible only if the defence can put forth a *prima facie* case that oppressive tactics were used. This procedure places the burden of proof onto the defendant, and makes it extremely difficult to negate confessions obtained through coercion. After the confession has been taken, the accused generally has only his/her own testimony that oppressive tactics were used.

This special provision in the law clearly prejudices defendants. It has even been known for Diplock judges to allow an element of proven ill-treatment and consider the resulting confession admissible.

Other aspects of the regime governing detention give considerable cause for alarm:

- Suspects can be held for seven days in Castlereagh when they are arrested under the provisions of the **Prevention of Terrorism (Temporary Provisions) Act 1989**. This power has been found to be in breach of the UK's obligations under the **European Convention of Human Rights**[24]. Despite this, the UK has derogated from the Convention, maintaining that a state of emergency threatening the life of the nation exists.
- Under the EPA, a suspect's access to legal advice can be deferred for up to 48 hours. Furthermore, the police do not have to inform anyone that the suspect has been arrested nor where s/he is. This allows the suspect to be kept totally isolated in the hands of the RUC for two whole days. And even then, a short interview with a solicitor may be all that the suspect is granted before being left in the hostile interviewing environment once more.
- The **Independent Commission for Police Complaints** (ICPC) is the government-appointed body charged with supervising the investigation of complaints against the RUC and therefore with complaints arising out of detention in Castlereagh. Importantly, this body does not actually conduct the investigation but merely supervises the police investigating their colleagues. It is no particular surprise, therefore, that out of some 400 complaints lodged during the three year period from 1988 to 1991, not one allegation of ill-treatment relating to Castlereagh has been

Report of the Committee of Inquiry into Police interrogation Procedures in Northern Ireland, Cmnd 7479 (1979).

22 CAJ, Submission to the UN Committee Against Torture, November 1991.

23 First enacted in 1973.

24 Brogan et al v UK, Eur Ct., 29 November 1988.

substantiated. This is despite large compensation payments by the authorities to many of those alleging ill-treatment.

- Despite widespread concern, the government and the police are refusing to respond to calls for the introduction of video- and audio-recording of interrogations. Interrogations are currently monitored on closed-circuit cameras, a supposed safeguard introduced after the **Bennett Report**, but it has emerged that the monitors are not always watched and sometimes not even operating. Furthermore, the authorities have recently revealed[25] that they have no record of whether and how often interviews have been interrupted by officers monitoring the closed-circuit monitors.
  One of the benefits of having such an objective record would be to protect the police from false allegations. Also it would be possible to overcome the current situation where, when a complaint is being investigated, it is simply one person's word against the police officers involved. Given the relatively sophisticated ill-treatment alleged in recent complaints, there is less likelihood of medical evidence. Those in favour of video-recording include the government-appointed **Standing Advisory Commission on Human Rights**, the **ICPC** and Lord Colville, the government's own reviewer of emergency legislation.
- In the event, the Committee on the Administration of Justice feel that the one guarantee that nothing illegal will take place during interviews is to allow the detainee's legal representative to attend the interview with his/her client. This can happen with emergency detainees in Britain, as PTA arrests are governed by Codes of Conduct arising from ordinary rather than emergency legislation. The UN Committee Against Torture recommended this course of action to the UK government.

Detention and the Casement Accused

Patrick Kane made several incriminating admissions during interrogation. He alleged he did so because he feared the interviewing detectives. His family point out that Patrick is partially deaf and should have had someone with him during interviews as he was unaware of much that was going on. Kane had five interviews the first day he was held, starting at 10:30am and proceeding late into the night.

Michael Timmons also made incriminating statements which he later retracted. He claimed that the detectives told him it was the only way he could get bail. Timmons also had five interviews the first day he was held starting at 9:30am. The last one ended at 10:45pm. In both of these cases the confession evidence was relied upon for the convictions.

David McConnell, one of the Casement Accused, made several incriminating statements during his interrogation. While he did not complain about his interrogations, the detectives seem to have encouraged him to exaggerate his level of involvement, letting him boast about his participation without making him aware that he could be a suspect for murder. During trial several of McConnell's self-incriminating statements were proven to be false. He claimed to have seen one of the soldiers wearing a military type belt with bullet pouches. Neither of the soldiers had such a belt. He also admitted to breaking one of the car windows. This was seen from the video to be untrue. He admitted to having thought that the soldiers would be killed. Mr. Justice McCollum dismissed this piece of evidence because McConnell did not realize he might be charged with

25 In a reply to a parliamentary question by Lord Hylton. Relevant sections of the text are re-printed in CAJ's newsheet Just News for March 1992.

murder, and therefore did not contemplate the significance of what he was saying. The Justice ordered the murder charge against McConnell to be dropped after disallowing that part of the confession.

The majority of cases against the Casement Accused involve confession evidence. However, none of the complaints arising from these confessions allege any physical abuse. In these cases other visual evidence existed and the accused typically in their confessions attempted to explain what they were doing when the visual evidence was taken. Even if the accused said nothing the visual evidence was enough to create a *prima facie* case against them.

This is in contrast to many other cases of suspects being questioned in Castlereagh where there is no evidence except the police's suspicion. When this latter situation exists, there is great danger under the current regime that either physical or psychological ill-treatment may be an option used by interrogators. It is for this reason that civil libertarians, both in Northern Ireland and in the rest of the UK and Ireland, have been calling for an end to the use of uncorroborated confessions in criminal trials.

The existence of other evidence in the cases of the Casement Accused in some ways puts them outside the normal run of investigations in Northern Ireland. Thus these cases tend to support the view that the obtaining and use by the police and prosecution of evidence other than confessions makes the risk of ill-treatment - and the danger of false allegations by detainees - while under police custody less of a problem.

3. The use of secret witnesses

Because of the sensational and emotive nature of the killings of Corporals Wood and Howes, and the extremity of the public reaction to it, the issue of whether witnesses would be in danger of retribution in the event of their giving public evidence became an important trial issue. This was particularly so in the case of some journalists who felt that they would be at risk in appearing publicly as prosecution witnesses in the Casement Trials.

There have been occasions when journalists have been intimidated in the past. For example, a journalist was kidnapped in 1988 by the IRA, who questioned him about his sources. Similarly, the UDA threatened a TV journalist working on paramilitary racketeering[26].

Sir Brian Hutton LCJ ruled on the question of secret witnesses during the first trial of the Casement Accused, the trial of Alex Murphy and Henry Maguire, and this formed the basis for the rest of the trials. Media witnesses were allowed to give testimony from behind a thick curtain. The identities of the witnesses have been kept totally anonymous, and their faces exposed only to counsel for the prosecution and the defence. The accused, and his defence solicitors never learnt the identity of the witnesses.

During the application concerning the use of secret witnesses in the first trial the prosecution argued that the witnesses were afraid of testifying against alleged "terrorists", and that in order to secure their important testimony, their identities had to be withheld.

26 Helsinki Watch Human Rights in Northern Ireland, 1991, p. 133.

The defence only objected to hiding the witnesses' faces from the accused. Their argument stressed that denying the accused exposure to the witness might prevent the accused from realizing that the witness had seen him in a different place from that alleged by the police. Likewise, the witness might realize that he had seen the accused somewhere other than alleged. Beyond these arguments, however, hiding the identity of a witness from the accused and his solicitor seems to contradict the fundamental right to confront one's accuser.

Hutton LCJ accepted completely the crown's petition to hide the identity of certain witnesses, and his decision was accepted by the Court of Appeal. He justified his decision with a reference to **Attorney General v. Leveller Magazine (1979) A.C. 440.** In that case Lord Diplock reiterated the importance of holding trials open to the public, but went on to say that if the interests of justice require changing some procedures then those procedures should give way. Hutton LCJ explained that in this case the only way to hear the relevant testimony was by granting the witnesses anonymity. Further, he reasoned that justice was better served by hearing the testimony and not allowing the accused to see the witness, than by not hearing the testimony.

Hutton LCJ stressed that giving the witness anonymity should not prejudice the accused. The accused can still cross-examine the witness through his counsel. Further, granting the witness anonymity was not an admission that the witness had something to fear from the particular accused, but merely a safeguard to ensure that the witness would testify.

An article by Gilbert Marcus entitled **Secret Witnesses**[27] scrutinized Sir Brian Hutton's justification for keeping the identity of the witness from the accused. As Gilbert Marcus points out, none of the cases Hutton LCJ cited expressly approved of keeping the identity of the witness from the accused. Hutton LCJ simply stated in his opinion that he believed the rights of the accused to confront his accusor were "not of such weight to prevail over (the witnesses' interest in anonymity)."

Marcus pointed out that legal systems around the world regard the right of the accused to confront his accuser as paramount. He emphasized in particular a South African case, **State v. Leepile 1986(3) SA 661(W).** In that case the witness was specifically shown to be at great risk from testifying. This has not been illustrated in the Casement trials where the judge simply accepted the witnesses' fears *prima facie*. Before making a judgement, the court should have scrutinized specific evidence alleged by the witness desiring anonymity.

But, despite the evidence of risk, the judge in Leepile, Ackermann, J., refused to conceal the witness' identity from the accused because he thought the defendant would be irreparably prejudiced. Judge Ackermann gave three reasons to support his conclusion:

- First, with the witness' identity unknown, no investigation could be made into the witness' background;
- Second, anonymity makes it difficult to contradict the witness' testimony;
- Third, "[anonymity] heighten[s] the witness' sense of impregnability and increase[s] the temptation to falsify or exaggerate."

In Marcus' words, withholding the identity of the witness from the accused is "wholly out of keeping with the requirements of fair procedure."

27 Published in Public Law, Summer 1990, pp. 207 - 223.

Both the **European Convention on Human Rights**, and the UN **International Covenant on Civil and Political Rights** guarantee to the accused the right to examine witnesses against him. The appeal court in the case against Murphy and Maguire cited a qualification to the European Convention which allows the public or press to be excluded from all or part of a trial if the interest of justice is great enough. The question remaining is whether the interest in justice is great enough to exclude the accused himself from an aspect of the case against him.

A recent case before the **European Court of Human Rights** has addressed that issue. In **Windisch v. Austria (25/1989/185/245)** the European Court found that evidence from anonymous sources can be used, but cannot contribute significantly to a conviction. In that case, the testimony of the anonymous witness was found to involve "such limitations on the rights of the defence that Mr. Windisch cannot be said to have received a fair trial."

Another case before the European Court stressed the importance of an accused being able to cross-examine the witnesses against him. This is pertinent to a discussion of secret witnesses because effective cross-examinations of such witnesses are impossible. In **Unterpertinger v. Austria (1/1985/87/134)** evidence was given against the accused by his ex-wife and step-daughter. Their testimony was submitted in writing and they were not available for examination before the court. The European Court found that reliance on this testimony precluded the accused from receiving a fair trial.

It is clear therefore that under international law, witnesses should not, as a general principle, be kept anonymous. CAJ believes that this principle should be applied in Northern Ireland. Only when truly exceptional circumstances have been shown to exist, should this principle be breached.

Secret witnesses and the Casement Accused

Most of the secret witnesses in the Casement trials have been media people who have given testimony to verify their photographs or films. The only secret witness in the Casement trials whose evidence has been disputed by the defence has been Witness E. He has testified that he heard the soldiers cry out around the car in English accents, and heard a local man shout that the men were SAS. His testimony is significant because it indicates that the crowd around the car must have known the men were English soldiers. This would mean that self-defence against another Michael Stone-type of attack would be inapplicable.

During the third trial Mr. Justice Murray referred to Witness E as argumentative and thoroughly unreliable. It has not been alleged that Witness E intentionally misled the court. But his testimony is so clearly mistaken that it leads one to wonder if he was at the funeral at all. He testified, among other things, that he had seen the soldiers' car parked along Sleamish Way before it approached the funeral. This contradicts the visual evidence and everyone else's testimony on the subject. Regarding his testimony about hearing an English accent, Mr. Justice Murray asserted that all he could hear from the videos was a wild cacophony and that it must have been impossible to hear any accent specifically. Yet, Witness E has been called and heard at every Casement trial. Witness E's testimony gives credence to Justice Ackermann's fear that allowing witnesses to be anonymous will heighten their sense of impregnability.

Witness E's testimony may have been instrumental in the conviction of those accused of offences conducted around the car. None of the judges has claimed to rely on Witness E's testimony in his opinion, but the testimony was heard and it is not unreasonable to regard it as prejudicial to the defendants' cases.

On the other hand, however, if the testimony of the secret witnesses was not central to the case against the accused, then the interest of justice in having the testimony would not be great enough to outweigh eliminating a fundamental right of the accused. Hutton LCJ's decision to allow witnesses anonymity represents a dramatic departure from traditional fair trial principles, and sets a dangerous precedent for the future.

4. The limitation of the right to silence

The **Criminal Evidence (NI) Order 1988** has dramatically restricted the right to silence. Before the enactment of that order suspects had the right to remain silent during police questioning, and at trial. Certainly, the right not to incriminate oneself is widely recognised in international law as being of fundamental importance in safeguarding innocent accused from wrongful conviction. The main provisions of the **Criminal Evidence (NI) Order 1988** are as follows:

- Article 3 of the Order allows an adverse inference to be drawn against an accused who says nothing to the police and then proffers a defence account at trial. The rationale behind this Article is that the accused might wait to learn what the evidence is against him, and then manufacture an excuse, a technique known as "the legal ambush";
- Article 4 allows an adverse inference against the accused if that accused does not testify at trial and there is a strong case against him/her;
- Article 5 allows the adverse inference if the accused refused to respond to questions about substances found on his/her person which link him/her to a crime;
- Finally, Article 6 allows the adverse inference when a suspect refuses to tell police why s/he was in a particular place at the time of an alleged crime.

These Articles of the Criminal Evidence Order can operate in two distinct ways. If an individual decides to remain silent in any of these situations, the judge or jury can take an adverse inference against him/her to support a conviction. Alternatively, and perhaps more frequently, the existence of these Articles makes remaining silent in these situations less attractive. Thus, suspects are more likely to make statements during police interrogations and at trial. Further, the police interrogators are able to use these Articles in a threatening way to extract confession evidence.

The attack on the right to silence and the Casement Accused

The first Casement trial began before the **Criminal Evidence (NI) Order** was in effect. Thus, the order did not affect Murphy and Maguire. It has, however, specifically touched several of the other cases. This partial applicability of the legislation to trials arising out of the same incident is itself unjust.

As has already been mentioned, Sean Kelly refused to give more than one particular statement to his interrogators, and refused to testify in court. Mr. Justice Carswell decided that an adverse inference could be drawn from this behaviour according to Article 4 of the **Criminal Evidence (NI) Order 1988**. He used this adverse inference to support what he acknowledged was weak identification evidence and form a conviction. Ironically, one of the reasons given by Sean Kelly's family for his refusal to testify was that he had seen the way in which his co-accused Pat Kane had been treated under cross-examination. He simply felt that he could not stand up to the experience.

On appeal, the justices maintained the conviction against Kelly, but decided that the identification evidence was strong enough for the conviction, and that the invocation of Article 4 was not necessary. In this way they refused to decide whether the application of Article 4 was appropriate.

Arguments against its application in this case contended that the Articles of the Order were meant only to buttress already strong evidence, and not to make up for weaknesses in identification evidence.

As a result of the Appeal ruling, Article 4 is not now officially a basis of Kelly's conviction. But Mr. Justice Carswell's admission that the identification evidence against Kelly was weak leads one to question the appeal justices' decision that the identification evidence was beyond doubt. Generally, it seems that an appeal court would not over-rule the judge of first instance on an issue of identification. One possible conclusion this leads to is that Article 4 did indeed form the basis of Kelly's conviction, and the appeal justices did not want to have the conviction stand on that basis.

In the recent decision regarding Sean Simpson, the prosecution argued that the judge should take an adverse inference according to Article 3 or Article 4. Simpson did refuse to answer police questions, though he denied being involved with the murders. Simpson also refused to testify at trial. In this case, however, Mr. Justice Higgins decided that a reasonable doubt existed about the identification evidence and refused to invoke Article 3 or 4 to gain a conviction. He specifically stated that those Articles do not change the burden of proof in cases, and claimed that the prosecution had not met their burden.

One of the Casement Accused, Barry McMullan, refused to testify during trial. McMullan did admit to pushing the crowd which was pushing one of the soldiers toward Casement Park. Mr. Justice Higgins reasoned that McMullan must have realized that the soldiers were no longer dangerous. But he used the adverse inference of Article 4 to support his conviction for grievous bodily harm and false imprisonment.

Generally, there seems to be great confusion as to how the provisions of the **Criminal Evidence Order** ought to be applied. This does not just relate to lay people but extends to the bench. Much judicial discussion relates to the weight of evidence necessary before a judge can invoke an adverse inference and thereby secure a conviction. There also appear to be differences among the judiciary relating to the caution used by the police prior to interviews with suspects.

If such confusion arises even among judges, this must be even more so for suspects facing interrogation. Perhaps just as significantly, it has also become extremely difficult for solicitors to advise clients how to respond to questions from the police. This has grave implications for the possibility of proper legal advice and defence and places solicitors in an invidious position when trying to advise their clients. Certainly many detainees allege that the legislation is used straightforwardly by police to intimidate suspects into saying something, anything to prove their innocence.

The right not to incriminate oneself is regarded in international law as an important guarantee for fair trial procedures. Article 14 (3) (g) of the **International Covenant on Civil and Political Rights** provides that:

> *(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:.....(g) Not to be compelled to testify against himself or confess guilt.*

On its own, the **Criminal Evidence (NI) Order** would be of significant concern. But coming as it does on top of many other incursions into human rights and civil liberties enjoyed in other jurisdictions, the attack on a suspect's right to remain silent gives cause for real doubts that the system is capable of independently dispensing justice. The recent Helsinki Watch report concludes:

Helsinki Watch believes that the Criminal Evidence Order unjustifiably erodes the right to silence. There is no persuasive evidence that limits on this important right are warranted by considerations of law enforcement or public safety. If the procedures regarding pre-trial interrogation were changed to permit full and fair opportunity for consultation with counsel, comment upon the assertion of the right to silence might be appropriate in some circumstances. Short of such a major change in current procedure, the right to silence should be safeguarded.

It is impossible to calculate the impact the Articles of the **Criminal Evidence (NI) Order 1988** had on the accused who decided to give testimony. Undoubtedly, however, the force of possible adverse inferences being drawn against the accused would encourage a person to talk where s/he otherwise might not[28].

5. Discriminatory administration of the prosecution system

Much of what has caused concern over the Casement trials has been the large scale of the arrests and prosecutions. Additionally, the Director of Public Prosecutions has expended an unusually vast amount of resources on the investigation. Not only is there the expense of the investigations and media equipment but also the public expense of defending all those on trial. Many solicitors and barristers have been tied up for long periods on these cases. Mention has already been made of the small numbers of judges available for Diplock trials. The same is true for defence lawyers. With the courts tied up on the Casement trials, many others have had to wait. Remand periods in Northern Ireland are excessively long. In a recent report on Crumlin Road jail, Lord Colville said:

I invited (prisoners) to say how long they had been held on remand since their original remand into custody by the magistrate...The general impression of the prisoners was that they would have to wait for 18 months to 2 years for a trial. I have heard of a case in which a prisoner was entirely acquitted after 2 years on remand.[29].

Thus far, over 200 people from West Belfast have been arrested and held in connection with the killings. 41 men have been charged and there has been no indication that the investigation is closed. Questions arise as to why the prosecution has waited over three years to make arrests of people who were clearly known early on to have been at the funeral.

The Chief Constable of the RUC has been quoted as saying that every murder should be given equal resources. Yet, some estimates suggest the prosecutions in the Casement trials have involved over £100,000 in media equipment alone. 1500 RUC men have been organized to view the visual evidence. Additionally, 39 officers have been assigned full time to the Casement investigations. Normally 3 or 4 officers would investigate a murder.

28 For further reading on the curtailing of the right to silence in Northern Ireland see: Greer, S. and Morgan, R. **The Right to Silence Debate**, Bristol and Bath Centre for Criminal Justice, 1990.
On how to apply the Order, see: **The Sixteenth Report of the Standing Advisory Commission on Human Rights**, Report for 1990-91, Annex H, Ordered by the House of Commons, London, June 1991.

29 Viscount Colville, **The Operational Policy in Belfast Prison for the Management of Paramilitary Prisoners from Opposing Factions** CM1860, London 1992, pp. 23-24.

The astounding number of arrests and prosecutions is in stark contrast to the figures of prosecutions arising out of killings by soldiers and policemen. In the last 20 years there have been nearly 350 civilians killed by members of the security forces. Yet, in that same time-frame only 30 prosecutions have resulted, eight of them in the past year. These statistics indicate a very different approach, particularly since none of the Casement Accused has been charged with actually shooting Corporals Wood and Howes.In this regard, the recent charging of six soldiers in relation to the deaths of two joy-riders, Karen Reilly and Martin Peake, is instructive. While one soldier has been charged with the murder of Karen Reilly, three of the soldiers have been charged with the attempted murder of Martin Peake.

Chapter 6: Conclusions and Recommendations

The terrible events of March 1988 remain etched in people's minds as one of the most intense periods of the Troubles. One prevalent reaction in the local community to the string of trials arising out of the killing of Corporal Howes and Corporal Wood has been to affirm the innocence of all those convicted. Thus relatives of the Casement Accused say that an instinctive community response occurred when the soldiers' car appeared and, up to the final moments, no-one but the gun-men who suddenly appeared knew that the soldiers would be killed. The effect of the mass of arrests, it is argued, has been further to criminalize the population of West Belfast and cement the alienation felt by many in that area.

The trials, say relatives of the Casement Accused, have an air of show trials about them as the state doggedly and determinedly exacts its vengeance long after the event. A local priest, Fr Tom Toner, has said that:

> *the horror and shame in Andersonstown at the murders has been replaced by anger at this vengeance.*

It was because of the strength of feeling in the local community, and concerns about the fairness of trials in general in Northern Ireland, that the **Committee on the Administration of Justice** decided to undertake its own study of the issues related to the aftermath of the killing of Corporal Howes and Corporal Wood. The discussion contained in this publication has led CAJ to a number of conclusions, some relating to the specific cases, others being more general in their application.

- 1. CAJ has considerable concern about many aspects of the trials relating to the killings of Corporal Howes and Corporal Wood. CAJ has particular concern in respect of the convictions of **Patrick Kane, Michael Timmons and Sean Kelly**. CAJ calls for their cases to be referred back to the courts for a full re-hearing.

- 2. The **need for anonymity of witnesses in these cases has not been proved**. CAJ would point to the South African example cited (**State v Leepile**) as well as the European examples as cautionary evidence of the strictness of international opinion regarding likely prejudicial effects of using secret witnesses. CAJ would recommend, in the absence of the courts reversing the judgement of Hutton LCJ in the trial of Murphy and Maguire, that the matter be brought before international mechanisms in Europe or at the United Nations. CAJ would further **urge the judiciary in Northern Ireland to take a much more cautious approach in future cases where hidden witnesses are proposed.**

(See pages 33 - 36)

- 3. Mr Justice Carswell's widening of the scope of the law on common purpose seems one of the most dramatic aspects of the trials being discussed. CAJ would **urge the courts to display reluctance to follow that interpretation.**
  (See pages 16 - 20)

- 4. Mitigating factors such as those followed in the South African cases seem eminently applicable to the Casement trials. CAJ urges the courts **to consider the applicability of expert testimony in any future hearings** arising out of the deaths of Corporals Howes and Wood. Furthermore the relevance of such testimony should be considered in any future similar cases.
  (See pages 20 - 23)

- 5. Consideration should be given by authorities to **the parameters for the use of film and video evidence.** The strides made by visual and audio technology have far outdistanced the consideration of safeguards which would apply for more traditional identification evidence. Opinion should be sought on the techniques of matching, highlighting and stretching of images.
  (See pages 23 - 26)

- 6. A major safeguard to cope with the previous point would be the agreement by the prosecuting authorities **to make all evidence available to the defence in good time for the trial. This should include access to the same level of technology as the prosecution.**
  (See pages 23 - 26)

- 7. CAJ would recommend to the authorities **that if further police time is to be devoted to investigating the incident it should be focussed on the apprehension and prosecution of the two people who actually shot** Corporals Howes and Wood.

- 8. More generally, CAJ re-states its call **for the return to jury trial** for scheduled offences in Northern Ireland. The arguments used to justify the introduction of Diplock courts no longer hold the same force, whether or not one accepts that they ever did. Adequate safeguards for the protection of juries have been suggested on a number of occasions. The following proposed by Greer and White[30] are endorsed:
  (1) Prospective jurors need not know until they arrive at the courthouse whether they have been called for a scheduled or non-scheduled case.
  (2) Jurors in scheduled offence cases should be concealed from the public.
  (3) The number of permissible peremptory challenges of jurors should be limited to three.
  (4) Jury foremen in scheduled offence cases should be exempt from the obligation of disclosing whether a particular verdict was unanimous or by a majority.
  (5) Court administrators should look favourably upon applications from people living in those parts of Northern Ireland in which Loyalist and Republican paramilitaries wield considerable influence who seek to be excused jury service for scheduled offence cases.
  (See pages 27 - 30)

- 9. Regarding detention, CAJ has recommended a number of safeguards which were put before the UN Committee Against Torture[31]. The primary ones concern:

30 Greer, S.C., and White, A. Abolishing Diplock Courts, The Cobden Trust, 1986. See also A Briefing Paper on the Northern Ireland (Emergency Provisions) Bill, prepared by the Committee on the Administration of Justice, 1990.

the **introduction of audio and video recording of interviews**; and
the **right of detainees to have their lawyer present during interrogations.**
(See pages 30 - 32)

- 10. As regards the use of confession evidence CAJ calls for **an end to the reliance on uncorroborated confession evidence.** The call for an end to the use of uncorroborated confessions has been made many times in England and Wales in the wake of recent miscarriage of justice cases.
(See pages 32 - 33)

- 11. CAJ reiterates its call for **the repeal of the Criminal Evidence (NI) Order 1988** which has severely curtailed the right to silence. The apparent confusion, among even the judiciary, as to its application further erodes the likelihood of a fair trial in Northern Ireland. In addition, the legislation makes its even more difficult for lawyers to advise their clients. A greater burden is therefore put on the defence in a situation where normal safeguards such as jury trials do not exist.
(See pages 36 - 38)

31 CAJ's submission to the UN Committee Against Torture, 1991.

Appendix : Relevant Provisions of International Law

European Convention on Human Rights

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;
b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court of in order to secure the fulfilment of any obligation prescribed by law;
c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
f. the lawful arrest of detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security ina democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
   a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b. to have adequate time and facilities for the preparation of his defence;
   c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

International Covenant on Civil and Political Rights

Article 7

No one shall be subjected to torture or to cruel, inhuman ro degrading treatment or punishment. In particular, no one shall be subject without his free consent to medical or scientific experimentation.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detnetion. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge orother officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to rlease. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasionarise, for execution of the judgement.

4. Anyone who is derpived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. a. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons:

b. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a comp0etent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order

(*ordre public*) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

c. To be tried without undue delay;

d. To be tried inhis presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

g. Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholluy or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

List of CAJ Publications

No. 1 **The Administration of Justice in Northern Ireland:** the proceedings of a conference held in Belfast on June 13th, 1981 (no longer in print).
No. 2 **Emergency Laws in Northern Ireland:** a conference report, 1982 (no longer in print)
No. 3 **Complaints Against the Police in Northern Ireland,** 1982. (price £0.50).
No. 4 **Procedures for handling complaints against the Police,**1983 (updated by pamphlet no. 16)
No. 5 **Emergency Laws: suggestions for reform in Northern Ireland,** 1983 (photocopy available).
No. 6 **Consultation between the police and the public,** 1985.
No. 7 **Ways of protecting minority rights in Northern Ireland,** 1985 (price £1.00).
No. 8 **Plastic Bullets and the Law,** 1985 (updated by pamphlet no.15).
No. 9 **The Blessings of Liberty:** An American Perspective on a Bill of Rights for Northern Ireland, 1986 (price £1.50).
No. 10 **The Stalker Affair:** More questions than answers, 1988 (price £1.50).
No. 11 **Police Accountability in Northern Ireland,** 1988 (price £2.00).
No. 12 **Life Sentence and SOSP Prisoners in Northern Ireland,** 1989 (price £1.50).
No. 13 **Debt - An Emergency Situation?** A history of the Payments for Debt Act in Northern Ireland and its effects on public employees and people on state benefits. 1989 (price £2.00).
No. 14 **Lay Visitors to Police Stations in Northern Ireland,** 1990 (price £2.00).
No. 15 **Plastic Bullets and the Law,** 1990 (price £2.00).
No. 16 **Cause for Complaint.** The system for dealing with complaints against the police in Northern Ireland 1990 (price £2.00).
No. 17 **Making Rights Count.** Includes a proposed Bill of Rights for Northern Ireland, 1990 (price £3.00).
No. 18 **Inquests and Disputed Killings in Northern Ireland,** 1992 (price £3.50/IR£4.00)
No. 19 **The Casement Trials: A Case Study on the Right to a Fair Trial in Northern Ireland,** 1992 (price £3.00/IR£3.50)
Civil liberties in Northern Ireland: The C.A.J. Handbook, 1990 (price £4.95).
A Briefing Paper on the Northern Ireland (Emergency Provisions) Bill, 1991 (Photocopy available, price £3.00).
Human Rights in Northern Ireland: A submission to the United Nations Human Rights Committee, 1991 (price £1.50).
Submission to the United Nations Committee Against Torture, November 1991 (price £1.50).
Submission to the Royal Commission on Criminal Justice, November 1991 (price £1.50)