

# Dealing with the Past in Northern Ireland: The Current State of Play

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## Introduction: Peace Dividend?

The IRA and loyalist military groups declared ceasefires in 1994. Three and a half years later, the Good Friday or Belfast Agreement was signed by all political parties, leading eventually, and after a number of major setbacks, to the establishment of a devolved, power-sharing Assembly and Executive.

To begin with, it is worth reminding ourselves how far Northern Ireland has travelled in terms of peace and potential conflict transformation during this period.

Take the military situation first. By August 2007 British army strength was down to 5000, one-sixth what it had been at the height of the conflict. In addition, the three Northern Ireland based regiments of the Royal Irish Regiment, totalling 3000, full-time and part-time, have been disbanded. The police complement has been reduced to 7,500, from 11,392 in 1999, with an additional 2,500 civilian staff.

The decommissioning of weapons of the various insurgent groups was a particularly protracted issue, but eventually the IRA decommissioned all its weapons in August 2005, followed by the UVF in 2009 and the UDA in 2010.<sup>1</sup>

In July 2000, the remaining politically motivated prisoners were released early under

terms of the Belfast Agreement. No amnesty was involved; they were released on licence. That means that they continue to have prison records. As a result, there is clearly an element of 'residual criminalisation', whereby politically motivated ex-prisoners experience obstacles in relation to employment, criminal injuries, adoption rights, visas for some foreign travel, etc.<sup>2</sup>

The Belfast Agreement led to the setting up of an Independent Commission on Policing under Chris Patten.<sup>3</sup> The Commission produced a radical report with almost 200 recommendations. However, it fell short in some respects, for example, in terms of curtailing the toxic independence of the Special Branch. Also, the government in effect gutted the report to assuage fears of unionists and the police themselves. At the same time, the RUC (Royal Ulster Constabulary) was replaced by the PSNI (Police Service of Northern Ireland). In addition, there was a reduction in numbers as well as a form of recruitment which required a 50/50 balance of Catholic and Protestant recruits. This was ended in March 2011, by which time the PSNI was said to be 28 percent

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1. Bill Rolston, 'Demobilization and Reintegration of Ex-Combatants: the Irish Case in International Perspective', *Social Legal Studies* 2007: 267-280.

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2. Bill Rolston. 2011. *Review of Republican and Loyalist Ex-Prisoners*, May, Belfast: OFMDFM; [http://www.ofmdfmi.gov.uk/final\\_literature\\_review.pdf](http://www.ofmdfmi.gov.uk/final_literature_review.pdf)

3. Independent Commission on Policing for Northern Ireland. 1999. *A New Beginning*.

Catholic, compared to approximately 8 percent in the final days of the RUC.<sup>4</sup>

Finally, as regards victims, the 1998 government appointed Bloomfield Report urged recognition of and compensation for victims of the conflict and established a memorial fund where payments could be made to the physically injured and bursaries were available, for example, for the education of their children.<sup>5</sup> A further step was the appointment of four Victims' Commissioners amid controversy in 2008. Currently there is one Victims' Commissioner. She relates to numerous victims' groups which offer support, counselling, self-help, and campaigning, etc. There is also a Victim's Forum whose role is to advise the Commissioner and the Executive. Many of these initiatives are at least partly funded by the Victims' and Survivors' Service. One of the main points of contention in this sector relates to who constitutes a victim. For some loyalist and unionist groups in particular, there is firm opposition to having that title conferred, for example, on an IRA person shot dead by the British army.

### Dealing with the past: an inventory

Like other societies coming out of a period of protracted violent political conflict, Northern Ireland is faced with the legacy of the conflict. The question that arises is how it has attempted to come to terms with that legacy, what policies have been derived for dealing with the past. A number of mechanisms will now be examined.

#### 1. Inquiries

There have been a number of official public inquiries, the most famous of which has been the Bloody Sunday/Saville Inquiry into the killing of 14 Civil Rights marchers by British paratroopers in Derry in 1972. Saville reported in June 2010, concluding that the dead were all innocent.<sup>6</sup> British Prime Minister David Cameron acknowledged that the deaths were

“unjustified and unjustifiable”.<sup>7</sup> On the other hand, no prosecutions have followed to date.

There has been a series of other Inquiries which came about as a result of recommendations by retired Canadian Judge Peter Cory in 2004. After political negotiations between the British and Irish governments at a difficult point in the peace process, it was agreed that he be asked to examine six cases of alleged collusion between state forces and paramilitaries in a number of killings. He recommended inquiries in five of these cases, four relating to collusion between British forces and loyalist paramilitaries, and one to alleged collusion between Irish forces and the IRA.

Two RUC officers, Chief Superintendent Harry Breen and Superintendent Bob Buchanan were ambushed and killed by the IRA near the border in 1989. A tribunal was set up – the Smithwick Tribunal – to investigate allegations that members of An Garda Síochána (the Irish police) colluded with the IRA in the killings. The Tribunal has not yet concluded or reported.<sup>8</sup>

Loyalist Billy Wright, leader of the Loyalist Volunteer Force, was shot dead in prison in 1997 by other prisoners from the Irish National Liberation Army. An inquiry concluded that there was no collusion by prison officers and the British army in the murder. Critics have said that inquiry used a much weaker definition of collusion than that used by Cory.<sup>9</sup>

Nationalist civilian Robert Hamill, was beaten unconscious by a loyalist mob in 1997 while four police officers watched from a nearby vehicle. Robert Hamill died in hospital some days later. The report of the inquiry has not been published pending the possible prosecution of a police officer for aiding one of the crowd in destroying evidence.<sup>10</sup>

4. By comparison, only 9 percent of prison officers are Catholic. See *Irish News*, 27 July 2007.

5. Kenneth Bloomfield. 1998. *We Will Remember Them: Report of the Northern Ireland Victims' Commission*.

6. <http://webarchive.nationalarchives.gov.uk/201011103103930/http://report.bloody-sunday-inquiry.org/>

7. Bill Rolston. 2010. 'The Saville Report: A Personal Reflection', [http://statecrime.org/online\\_article/the-saville-report-a-personal-reflection/](http://statecrime.org/online_article/the-saville-report-a-personal-reflection/), June.

8. <http://www.smithwicktribunal.ie/smithwick/HOMEPAGE.html>

9. [http://cain.ulst.ac.uk/issues/collusion/docs/wright\\_140910.pdf](http://cain.ulst.ac.uk/issues/collusion/docs/wright_140910.pdf)

10. <http://www.roberthamillinquiry.org/the-public-hearings/transcripts/>

Solicitor Rosemary Nelson was killed by a bomb placed underneath her car by loyalists in 1999. An inquiry concluded that, while there was a sustained hate campaign conducted by both loyalists and the RUC against her, there was no collusion.<sup>11</sup>

Another solicitor, Pat Finucane, had been shot dead by loyalists in 1989.<sup>12</sup> The British government has assiduously resisted instituting an inquiry into collusion between the British army, the RUC Special Branch and the UDA (Ulster Defence Association) on the basis of 'national security' concerns. The Finucane family's belief is that this is because the chain of command involved in setting up and covering up the murder possibly goes to the top levels of the British political establishment. The government changed the law on tribunals to propose a public inquiry which would in effect be held mostly in private. When this was rejected by the Finucane family, the government instead appointed a British barrister, Desmond De Silva, to review privately the papers relating to the murder. He reported in December 2012 and concluded that he was "in no doubt that agents of the State were involved in carrying out serious violations of human rights up to and including murder. However, despite the different strands of involvement by elements of the State, I am satisfied that they were not linked to an overarching State conspiracy to murder Patrick Finucane".<sup>13</sup> Incidentally, De Silva also revealed that 85 percent of the intelligence used by loyalist paramilitaries to carry out murders and other attacks came from British military and RUC sources.

## 2. European Court of Human Rights

A number of cases have been successfully brought under Article 2 of the European Convention on Human Rights, which guarantees the right to life.

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11. [http://cain.ulst.ac.uk/issues/collusion/docs/nelson\\_230511.pdf](http://cain.ulst.ac.uk/issues/collusion/docs/nelson_230511.pdf)

12. Bill Rolston. 2005. 'An Effective Mask for Terror': Democracy, death squads and Northern Ireland', *Crime, Law and Social Change*, 44: 181-203.

13. <http://www.patfinucanereview.org/report/volume01/executive-summary-and-principal-conclusions/>

In 1988 three IRA members were shot dead by British undercover operatives in Gibraltar. In 1995 the European Court of Human Rights concluded that, in shooting the unarmed people rather than arresting them, the British state had violated Article 2 by not doing everything feasible to ensure their right to life.<sup>14</sup>

A further ruling in 2002 was even more radical. In the case of Peter Shanaghan, a Sinn Féin member killed by loyalists in 1991, there was no suggestion that state forces had colluded with loyalists in the killing. However, the European Court found that the state had not done enough to investigate and prosecute the killers after the event, another breach of Article 2.<sup>15</sup>

These cases have had profound effects in Northern Ireland where all criminal justice and investigative arms of the state are under pressure and scrutiny to be Article 2 compliant.

## 3. Coroner's inquests

The Article 2 ruling also affects the Coroner's Service. Previously inquests in Northern Ireland had suffered from two major restrictions. Firstly, the law directed that the Coroner could only reach judgments of fact – who was killed, where, when and how – and had no power to order police or military witnesses to give evidence. Secondly, many inquests were held up for many years due to the state using such mechanisms as Public Interest Immunity Certificates. The longest such case has been that of the killing of republican activists Gervaise McKerr and two others in 1982; the inquest has begun on a number of occasions but has been repeatedly postponed by the coroner and has yet to occur.

The law has been changed with the result that now the coroner has the right to require police and army personnel to attend and give evidence. In addition, the Article 2 rulings mentioned above have brought extra pressure and incentive for the coroner to seek to clear up 29 legacy inquests – including the McKerr case – involving 50 deaths during the conflict.

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14. *McCann and Others V. United Kingdom*, <http://www.leeds.ac.uk/law/hamlyn/gibraltar.htm>

15. <http://www.patfinucanecentre.org/cases/shanagha.pdf>

#### 4. The Disappeared

Sixteen people were ‘disappeared’ during the conflict, that is, killed and secretly buried; all but one of the killings was carried out by the IRA; the one exception was an INLA killing. In 1999 the Independent Commission for the Location of Victims was established to obtain information which could lead to the recovery of the bodies. To date, nine bodies have been recovered. An interesting aspect of the Commission is its policy on confidentiality. Any information or evidence it receives is inadmissible in criminal proceedings; there are restrictions on the forensic testing of human remains and other items found; and the disclosure of information provided to the Commission is restricted.<sup>16</sup>

#### 5. Prosecutions

The transitional process has led to a number of developments in relation to prosecutions. First has been the establishment of an independent Public Prosecution Service. The police deliver evidence to the Service but do not themselves have any direct role in prosecuting people as they once had. In addition, there has been the establishment of the Criminal Cases Review Commission to investigate possible mis-carriages of justice during the conflict. To date it has overturned a number of convictions and is likely to continue to do so in a number of other cases currently being considered.

Theoretically, many of the mechanisms considered here – such as the Police Ombudsman and the HET examined below – could lead to approaches to the Public Prosecution Service for prosecutions. However, there have been relatively few prosecutions to date during the peace process deriving from politically motivated offences committed between 1969 and 2000. On the other hand, the Service has seen fit to resurrect a mechanism which was tried and discredited in the 1980s, known as the ‘supergrass’ system, that is, the use of accomplice evidence as the sole basis on which to bring a case to trial. One such case in 2012, involving 12 members of the UVF,

collapsed spectacularly.<sup>17</sup>

#### 6. Police Ombudsman

The Police Ombudsman has a number of roles, including investigating current police operations involving the discharge of firearms. As a result of the Article 2 rulings mentioned above, s/he was also given the task of investigating killings during the conflict which involved police as perpetrators.

The first Ombudsman, Nuala O’Loan, was fiercely independent and suffered at the hands of suspicious unionists and uncooperative police officers after uncovering massive collusion between the Special Branch and a UVF unit in North Belfast.<sup>18</sup> The second Ombudsman, Al Hutchinson, came in for increasingly severe criticism on a number of counts:<sup>19</sup> lack of effectiveness, lack of efficiency, lack of transparency and lack of independence. The last of these was perhaps the most telling: decision making within his office was monopolised by a group of former Special Branch officers at the top of the organisation.

The Committee on the Administration of Justice and other NGOs in 2011 called for Hutchinson to resign. His reply was that the job was impossible, with 137 historical cases to get through, 80 of which were referred from the HET. But the final nail in the coffin was a damning report from the Criminal Justice Inspectorate.<sup>20</sup> Hutchinson resigned in early 2012.

17. <http://www.guardian.co.uk/uk/2012/feb/22/belfast-supergrass-trial-loyalists-cleared>.

18. Statement of the Police Ombudsman for Northern Ireland on her Investigation of the Circumstances Surrounding the Death of Raymond McCord Junior and Related Matters, January 2007, <http://www.policeombudsman.org/publicationsuploads/BALLAST%20PUBLIC%20STATEMENT%2022-01-07%20FINAL%20VERSION.pdf>

19. CAJ, *Human Rights and Dealing with Historic Cases - A Review of the Office of the Police Ombudsman for Northern Ireland*, Belfast, June 2011, [http://www.caj.org.uk/files/2011/06/16/OPONI\\_report\\_final1.pdf](http://www.caj.org.uk/files/2011/06/16/OPONI_report_final1.pdf).

20. Criminal Justice Inspection Northern Ireland, *An inspection into the independence of the Office of the Police Ombudsman for Northern Ireland*, September 2011, <http://www.cjini.org/CJNI/files/fe/fee7c8c8-4e16-4492-ba70-febfaf39427f.pdf>

16. See Independent Commission for Victims’ Remains: <http://www.iclvr.ie/>, plus <http://thedisappearedni.co.uk/>

## 7. Historical Enquiries Team (HET)

The HET was set up as a specific section within the PSNI tasked to investigate all conflict-related deaths between 1969 and 1998, about 3,600. Most of these deaths had not led to prosecutions. The HET is possibly unique in terms of policing arrangements in transitional societies worldwide, and for that reason is being scrutinized carefully by a number of other police forces.

It is currently over half way through a more or less chronological revisiting of all cases. It has produced a number of reports calling into question previous official truths about a number of deaths, especially those involving state forces. In many such cases it has upheld the family and community version of events – for example, that the victim was unarmed at the time of death – rather than the official military version – that, for example, the victim was shot in self-defence when seen brandishing a weapon. As a result, many families have expressed satisfaction with the way the HET has conducted its affairs. However, a number of severe criticisms have been expressed, including the following:<sup>21</sup>

- Many, perhaps the bulk, of the investigations have been simple desk-based operations involving no new investigation.
- Given the absence or inadequacy of many previous police investigations, there is little in the way of a valuable paper trail in relation to the historic case and so little chance of a reassessment.
- There is increasing evidence that the HET has been less than robust in pursuing evidence from perpetrators who are former state operatives. Soldiers are not tracked down for fear of antagonising the Ministry of Defence, or when tracked down are interviewed as witnesses rather than suspects.
- Many of the people working for the HET are former RUC officers, including former Special Branch officers.

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21. Patricia Lundy. 2009. “Can the Past Be Policed? Lessons From the Historical Enquiries Team Northern Ireland”, *Law and Social Challenges* 11: 109-171.

## 8. Consultative Group on the Past<sup>22</sup>

In 2007 Robin Eames, former Primate of the Church of Ireland, and Denis Bradley, former Catholic priest, were appointed by the government to head up the Consultative Group on the Past to “consult across the community on how Northern Ireland society can best approach the legacy of the events of the past 40 years”.

In their Report, they recommended, among other things:

- A Legacy Commission with a budget of £100 million, which would exist for five years and have four strands of work:
  - helping society towards a shared and reconciled future, through a process of engagement with community issues arising from the conflict;
  - reviewing and investigating historical cases;
  - conducting a process of information recovery;
  - examining linked or thematic cases emerging from the conflict.
- A Reconciliation Forum.
- A one-off ex-gratia recognition payment of £12,000 to the nearest relative of someone who died as a result of the conflict.
- The possibility of “a shared memorial to remember the conflict in and about Northern Ireland ...”

The British government did not respond with great enthusiasm to the Report. Also, in the face of vocal opposition, especially from victims’ groups representing unionist and loyalist victims, the government immediately ruled out the £12,000 payment. The government has taken no action and it appears as if the report and its recommendations have been scrapped.

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22. Consultative Group on the Past. 2009. *Report of the Consultative Group on the Past*; [http://cain.ulst.ac.uk/victims/docs/consultative\\_group/cgp\\_230109\\_report\\_sum.pdf](http://cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report_sum.pdf)

## Conclusions

In reply from questions raised by the European Council of Ministers, the British government argues that, while it does not have an overarching mechanism for dealing with the past (such as a truth recovery process), it has put in place a package of measures which, when combined, are the equivalent of such an overarching mechanism.<sup>23</sup>

There are some strengths and weaknesses apparent in each of the mechanisms described above. For example, in terms of strengths: the Police Ombudsman is formally independent of policing; the Coroner has successfully used his powers to demand the disclosure of protected police investigations involving allegations of collusion. At the same time, there are weaknesses: for example, the HET is not independent of policing: it involves the police investigating failures of the police; the Police Ombudsman's office has shown reluctance to use the powers available to it.

No doubt there are similar weaknesses in any transitional society. But there is a specific list of weaknesses in the case of Northern Ireland which, when combined, call into question the British government's claim that the package of measures is tantamount to a robust and fit-for-purpose way of dealing with the past. These weaknesses include the following:

1. There is a persistence of policing culture, including the undue influence of former Special Branch personnel, in the Police Ombudsman's office and the HET.
2. Intelligence agencies and the PSNI are still playing a key role in blocking disclosure, e.g. in relation to 'national security' issues.
3. There is a clear reluctance on the part of the state and its agencies to fully embrace the ideal of dealing with the past, shown not least in the summary rejection of the recommendations of the Consultative Group on the Past.

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23. Council of Europe, Committee of Ministers, Cases concerning the action of security forces in Northern Ireland – Stocktaking of progress in implementing the Court's judgments, June 2006, [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH\(2006\)4&Language=lanEnglish&Ver=rev2](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH(2006)4&Language=lanEnglish&Ver=rev2)

4. There is increasing evidence not merely of slow progress but of actual regression:
  - The HET now hands over any cases where there is the possibility of prosecution to a branch of the mainstream PSNI rather than handling it itself;
  - Where other societies practice lustration, that is excluding former operatives from positions in the new dispensation, the PSNI has rehired former officers to work in sensitive areas; for example, over 1000 RUC personnel, given huge redundancy payments as a result of the recommendations of the Patten Report, have been rehired and are working for the PSNI.
  - There is an increasing popularity of official apologies for the past, but also a suspicion that they are often a substitute for harder action and accountability.
  - There is a redefinition of collusion in public inquiries, and a consequent weakening of the impact of the conclusions reached by these inquiries.
  - There has been a significant U-turn in relation to an inquiry into the death of Pat Finucane.
5. There has been a failure to establish an overarching truth recovery mechanism (whether called a Truth Commission or something else) which seeks to look at the causes of the conflict.

The fundamental problem is the existence of a silo mentality: even if all of the mechanisms in the package of measures to deal with the past worked flawlessly, they are working independently and as such, they cannot provide the 'big picture' of the causes of the conflict. This is what, at best, overarching truth recovery mechanisms such as truth commissions set out to do. At best, legalistic as they are, the individual mechanisms in Northern Ireland arrive at conclusions about individual actions and individual culpability.

There is no overall mechanism for dealing with the Past.

The Consultative Group on the Past offered the possibility of precisely that.

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