

# LEGAL REMEDIES TO COLLECTIVE TRAUMA IN NORTHERN IRELAND

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*How can a country legally address collective trauma? Northern Ireland faced this daunting question in 1998, when the signing of the Good Friday Agreement heralded the end of decades of sectarian violence known as the Troubles. More than two decades later, the social and economic damage of the Troubles lingers. Years of piecemeal reconciliation efforts have proved controversial and yielded inconsistent results. The “truth” of the Troubles remains a divisive issue, and the question of how Northern Ireland can achieve lasting reconciliation still looms. This Note offers an up-to-date review of transitional justice efforts in Northern Ireland and the ongoing need for a legal remedy. It conducts an in-depth analysis of four legal strategies as applied to post-Troubles Northern Ireland – criminal prosecution, appeals to the European Court of Human Rights, public inquiries, and truth commissions. After evaluating the four strategies in both historical and social context, this Note makes the case that a truth commission, as a flexible and comprehensive transitional justice mechanism, is the legal remedy best suited to address the collective trauma of the Troubles.*

I. INTRODUCTION .....	110
II. THE MEN BEHIND THE WIRE: CRIMINAL PROSECUTION DURING AND AFTER THE TROUBLES .....	111
A. Operation Demetrius and Denial of Due Process.....	111
B. Contemporary Prosecutions of Troubles-Era Crimes.....	114
C. Why Prosecution Is Not the Solution .....	116
III. APPEALS TO THE STRASBOURG COURT.....	117
A. Early Appeals to the Strasbourg Court.....	118
B. Contemporary Appeals to the Strasbourg Court.....	120
C. Why the Strasbourg Court Is Not the Solution .....	122

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IV. PUBLIC INQUIRIES .....	122
A. The Widgery Report: The First Bloody Sunday Inquiry .....	123
B. The Saville Report: The Second Bloody Sunday Inquiry.....	124
C. Why Public Inquiries Are Not the Solution.....	126
V. TRUTH COMMISSIONS.....	127
A. A History of Truth Commission Efforts in Northern Ireland.....	127
B. The Legacy Bill: Blanket Amnesty Disguised as a Truth Commission .....	130
C. Why Northern Ireland Needs a Truth Commission .....	133
D. Designing a Truth Commission for Northern Ireland.....	133
E. In Summary: Why Truth Commissions Are the Preferable Legal Remedy for Northern Ireland .....	135
VI. CONCLUSION.....	137

## I. INTRODUCTION

In the aftermath of collective trauma, communities are faced with the question of which legal remedy is best suited to promote justice and healing. From the Nuremberg trials to South Africa's Truth and Reconciliation Commission, there are countless examples of legal remedies for mass traumatic events, ranging from prosecutorial to conciliatory.

In 1969, years of tension between the Catholic minority and Protestant majority of Northern Ireland exploded into bloody conflict.<sup>1</sup> In the thirty years that the Troubles consumed Northern Ireland, over 3,700 people were killed and another 40,000 injured.<sup>2</sup> Proportional to population, the death toll of the Troubles is equivalent to ten times the number of Americans killed in the Vietnam War.<sup>3</sup> The damage caused by the decades of sectarian violence extended far beyond a body count. Over 50,000 Northern Irish households were forced to relocate during the Troubles due to harassment, threats, or intimidation.<sup>4</sup> As of 2013, 170,000 Northern Irish people had lost a relative or someone close to them to the Troubles.<sup>5</sup>

The Troubles were as much a war between neighbors as a conflict of nations. The collective victimization of Northern Irish communities was complicated by the fact the harm was often caused by paramilitary groups

1. Ronnie Munck, *The Making of the Troubles in Northern Ireland*, 27 J. CONTEMP. HIST. 211, 211 (1992).

2. Christine Bell, *Dealing with the Past in Northern Ireland*, 26 FORDHAM INT'L L.J. 1095, 1097 (2003).

3. *Id.* at 1097 n.9.

4. Siobhán McAlister et al., *Violence in the Lives of Children and Youth in "Post-Conflict" Northern Ireland*, 23 CHILD., YOUTH AND ENV'T 1, 2 (2013).

5. *Id.*

comprised of members of the community itself.<sup>6</sup> In addition to attacking opposing factions, nationalist and unionist paramilitary groups violently policed their own communities.<sup>7</sup> Thousands of Northern Irish people were beaten, shot, or forcibly banished from their own communities by paramilitary groups.<sup>8</sup>

A recurring concern in the Northern Irish peace process is that the *ad hoc* nature of transitional justice efforts contributes to social fragmentation and ultimately worsens the sectarian divide.<sup>9</sup> Efforts to address the Troubles are generally recognized as having been “piecemeal,”<sup>10</sup> and tension over conflicting memories of the past is still a source of ongoing division in Northern Ireland.<sup>11</sup>

This Note offers an up-to-date review of transitional justice efforts in Northern Ireland after the Troubles and the ongoing need for a legal remedy. After evaluating four predominant strategies – criminal prosecution, appeals to the European Court of Human Rights, public inquiries, and truth commissions – it concludes that a truth commission is the legal remedy best suited to address the collective trauma of the Troubles.

## II. THE MEN BEHIND THE WIRE: CRIMINAL PROSECUTION DURING AND AFTER THE TROUBLES

### A. Operation Demetrius and Denial of Due Process

“I don’t like Daddy going out at all because I think he will be shot or interned.”<sup>12</sup>

Criminal prosecutions have occupied a fraught role in Northern Ireland since its foundation. The Government of Ireland Act 1920 came into effect in May of 1921, partitioning Ireland and establishing Northern Ireland as a separately governed territory for the first time.<sup>13</sup> Within a year, the Northern

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6. ELISABETTA VIGGIANI, TALKING STONES: THE POLITICS OF MEMORIALIZATION IN POST-CONFLICT NORTHERN IRELAND 177 (2014).

7. Kieran McEvoy & Harry Mika, *Restorative Justice and the Critique of Informalism in Northern Ireland*, 42 BRIT. J. CRIMINOLOGY 534, 536 (2002).

8. *Id.*

9. Aoife Duffy, *A Truth Commission for Northern Ireland*, 4 INT’L J. TRANSITIONAL JUST. 26, 27 (2010).

10. *Northern Ireland Troubles Bill*, AMNESTY INT’L, <https://www.amnesty.org.uk/ni-troubles> (last visited Nov. 16, 2022).

11. JONATHAN EVERSLED, GHOSTS OF THE SOMME: COMMEMORATION AND CULTURE WAR IN NORTHERN IRELAND 23 (2018).

12. Extract from an interview by a Belfast child psychiatrist in M. FRASER, CHILDREN IN CONFLICT 23 (1973) quoted in David R. Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 HUM. RIGHTS 261, 283 (1976).

13. See Cormac Moore, *The Government of Ireland Act 1920*, 28 Hist. Ir. 38, 40 (2020) (reviewing

Ireland Civil Authorities (“Special Powers”) Act 1922 empowered the government of Northern Ireland to intern Northern Irish people without trial as a means of quelling public disorder.<sup>14</sup> Internment is imprisonment without charge or trial, distinct from pre-trial detention.<sup>15</sup> In 1971, the British and Northern Irish governments began to plan an internment program as a response to escalating violence by the Irish Republican Army (“IRA”), a nationalist paramilitary organization.<sup>16</sup> The internment program was known as Operation Demetrius.<sup>17</sup>

Operation Demetrius was a significant blow to the legitimacy of the rule of law in Northern Ireland. Some argue that this policy of internment without trial was “relatively humane” and could have successfully curbed the escalation of the Troubles if implemented differently.<sup>18</sup> This is not the case. Operation Demetrius was an unjustifiable suspension of civil liberties by design.

Security leaders in Northern Ireland were publicly opposed to internment before its implementation, including Sir Arthur Young, then the head of Northern Ireland’s police force.<sup>19</sup> Young produced multiple reports for the Northern Irish government explaining that internment would only inflame an already volatile situation.<sup>20</sup> He strongly opposed internment solely targeting members of the IRA, pointing out that loyalist paramilitaries comprised of the Protestant majority had also engaged in extremist behavior.<sup>21</sup>

Nevertheless, Operation Demetrius proceeded. The operation began at 4:00 am on August 9, 1971.<sup>22</sup> The British Army entered Northern Irish homes and forcibly arrested hundreds of men suspected of IRA involvement.<sup>23</sup> A witness living in a predominantly nationalist area

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the timeline of Northern Ireland’s creation).

14. Martin Doherty, *Tackling the Terrorists: The Experience of Detainment Without Trial in Northern Ireland*, 6 J. EUR. HIST. L. 76, 77 (2015).

15. Lowry, *supra* note 12, at 261.

16. TIM PAT COOGAN, *THE TROUBLES: IRELAND’S ORDEAL 1966–1995 AND THE SEARCH FOR PEACE* 125 (1995).

17. *Id.*

18. *See, e.g.*, Doherty, *supra* note 14, at 76 (stressing that Operation Demetrius was in response to a deteriorating security situation in Northern Ireland but acknowledging that it is almost universally regarded as a “colossal blunder”).

19. *Id.* at 77.

20. *Id.*

21. *See id.* at 77–78 (objecting to “unilateral” action against the IRA and arguing that “many extreme Protestants must be considered as candidates”).

22. *Id.* at 78.

23. *Id.* at 78–79.

described immediate uproar as soldiers kicked in doors and streets flooded with women watching as detained men were beaten and dragged away.<sup>24</sup> Those interned did not include a single loyalist, although both loyalists and nationalists had engaged in violent tactics.

Contemporary critics characterized Operation Demetrius as a “moral, legal, and political disaster.”<sup>25</sup> In its eagerness to quell rising nationalism, the British government arbitrarily targeted Northern Ireland’s Catholic minority. A number of the interned men had no connection to the IRA and were instead merely members of local civil rights groups.<sup>26</sup> One Army order instructed that when a wanted man was not home, soldiers should arrest every man in the household over eighteen years old in his place.<sup>27</sup> Due to the haphazard execution of the Operation, more than one hundred detainees had to be released within forty-eight hours – often because the army had simply arrested the wrong person.<sup>28</sup> By November of 1971, more than half of the detainees had been released by the army without clarification as to why they had been arrested in the first place.<sup>29</sup> Government officials publicly maintained that only IRA members had been interned, but privately admitted this was not the case.<sup>30</sup> The Home Office in London acknowledged that a number of men had apparently been added to the Operation Demetrius arrest list for their “general left-wing attitudes.”<sup>31</sup>

Released internees brought stories back to their communities of beatings and brutal interrogation at the hands of soldiers.<sup>32</sup> Infamously, a subgroup of the detainees known as the “hooded men” were subjected to the “five techniques” of heightened interrogation: hooding, sleep deprivation, food deprivation, subjection to prolonged noises, and stress positions.<sup>33</sup> The “hooded men” asserted that they also had been violently beaten while in custody.<sup>34</sup>

Operation Demetrius was a fiasco. After its implementation, there was an immediate rise in violence, including street riots and gun fights between the British Army and the IRA.<sup>35</sup> The “one-sided” internment strategy was,

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24. CIARÁN DE BAROÍD, *BALLYMURPHY AND THE IRISH WAR* 72 (2000).

25. Lowry, *supra* note 12, at 323.

26. Doherty, *supra* note 14, at 79.

27. *Id.*

28. COOGAN, *supra* note 16, at 126.

29. Doherty, *supra* note 14, at 79.

30. *Id.*

31. *Id.* quoting TNA CJ 4/56, Home Office to Smith, 26 August 1971.

32. DE BAROÍD, *supra* note 24, at 74.

33. Doherty, *supra* note 14, at 79.

34. *Id.*

35. *Id.*

as Sir Arthur Young had warned, perceived as blatant targeting of Northern Ireland's Catholic minority by the government.<sup>36</sup> Both the Catholic nationalist groups (like the IRA) and Protestant loyalist groups (like the Ulster Volunteer Force) had contributed to sectarian violence, but no loyalists were among the nearly one thousand detained men.<sup>37</sup> The interned men became "the men behind the wire,"<sup>38</sup> symbols of the British government's tyranny and prejudice towards Northern Ireland's Catholic minority.

Violent reprisals between loyalists, nationalists, and the British military continued to spiral out of control in the months following Operation Demetrius. In the seven months following the operation, there were 1,130 explosions and 2,000 shootings in Northern Ireland.<sup>39</sup> 233 people were killed, most of them civilians.<sup>40</sup> The Operation exacerbated the Catholic minority's feelings of alienation and mistrust and led to increasing acts of terrorism.<sup>41</sup> Demetrius' haphazard internment of hundreds of Northern Irish men also significantly damaged the notion of fair trial in Northern Ireland.<sup>42</sup>

## B. Contemporary Prosecutions of Troubles-Era Crimes

Post-ceasefire, criminal prosecution has remained a controversial means of addressing the Troubles. Criminal trials arising from the Troubles have largely focused on the actions of non-state actors, rarely prosecuting state actors such as British soldiers.<sup>43</sup> In 2021, an unsuccessful attempt to prosecute two British soldiers for shooting unarmed IRA member Joe McCann nearly fifty years prior roused a political furor in England and Northern Ireland.<sup>44</sup> Northern Irish prosecutors sought to convict the two former soldiers, then in their eighties, of McCann's murder using interviews

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36. *Id.* at 80.

37. *Id.*

38. Paddy McGuigan, *Men Behind the Wire*, GENIUS, <https://genius.com/Paddy-mcguigan-the-men-behind-the-wire-lyrics> (last visited Nov. 23, 2022); North of Ireland, *Kids Singing "The Men Behind the Wire" in 1974*, FACEBOOK (Oct. 16, 2021), <https://www.facebook.com/northofire/videos/kids-singing-the-men-behind-the-wire-in-1974-the-men-behind-the-wire-is-a-song-w/910309086588436/>.

39. Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1932 (2004).

40. *Id.*

41. Lowry, *supra* note 12, at 314.

42. *Id.* at 325–26.

43. Angela Hegarty, *The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland*, 26 FORDHAM INT'L L.J. 1148, 1149–50 (2003).

44. See, e.g., Con Coughlin, *The Troubles Should Not Live on in British Courts*, THE NAT'L, <https://www.thenationalnews.com/opinion/comment/the-troubles-should-not-live-on-in-british-courts-1.1217953> (last visited Nov. 23, 2022) (reporting on the controversy).

gathered by the Historical Enquiries Team of the Northern Irish police.<sup>45</sup> The killing had happened nearly fifty years earlier, so when a judge ruled the interviews inadmissible the prosecutors had little other evidence to offer and the case collapsed.<sup>46</sup> Conservative British politicians accused Northern Irish prosecutors of conducting a witch hunt against British veterans.<sup>47</sup> For McCann's widow and children, the unsuccessful prosecution was yet another failed attempt at justice and proof that the British Army had acted with "impunity."<sup>48</sup>

Prosecutions of paramilitary killings have been similarly contentious, as exemplified by the prosecution arising from the murder of Jean McConville. The murder of McConville, a widowed mother of ten, by the IRA became one of the most notorious crimes of the Troubles.<sup>49</sup> The details of McConville's death are so shrouded that the reason for her killing is disputed – one theory is that McConville had been wrongfully accused of being an informer,<sup>50</sup> another is that she had been seen helping an injured British soldier.<sup>51</sup> What is undisputed is that in 1972, a group of masked men and women entered Jean McConville's Belfast apartment and dragged her away in front of her children.<sup>52</sup> As the group forced McConville out of her apartment building at gunpoint, one of her older children realized that the armed strangers were not, in fact, strangers – they were the family's neighbors.<sup>53</sup> Jean McConville never came home, and her body was not discovered for three decades.<sup>54</sup>

The first prosecution arising from McConville's murder was

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45. Julian O'Neill, *Joe McCann: Trial of Two Soldiers Collapses*, BBC NEWS (May 4, 2021), <https://www.bbc.com/news/uk-northern-ireland-56942056>.

46. Rory Carroll, *Trial of Ex-Soldiers Over 1972 Killing of Official IRA Member Collapses*, THE GUARDIAN (May 4, 2021, 2:16 PM), <https://www.theguardian.com/uk-news/2021/may/04/ex-soldiers-acquitted-1972-murder-joe-mccann-official-ira>.

47. Coughlin, *supra* note 44; *Joe McCann: Reaction to Soldiers' Trial Collapse*, BBC NEWS (May 4, 2021), <https://www.bbc.com/news/uk-northern-ireland-56981448>.

48. Carroll, *supra* note 46.

49. Lesley-Anne McKeown, *The Troubles: Former IRA Man Ivor Bell Cleared of Jean McConville Charges*, BBC NEWS (Oct. 17, 2019), <https://www.bbc.com/news/uk-northern-ireland-50044269>.

50. *Jean McConville: Ivor Bell to be Prosecuted for Aiding Murder*, BBC NEWS (June 4, 2015), <https://www.bbc.com/news/uk-northern-ireland-33005771>.

51. *Jean McConville: The Disappeared Mother-of-10*, BBC NEWS (Oct. 14, 2019), <https://www.bbc.com/news/uk-northern-ireland-27234413>.

52. PATRICK RADDEN KEEFE, SAY NOTHING: A TRUE STORY OF MURDER AND MEMORY 13–14 (2018).

53. *Id.* at 15.

54. Donald M. Beaudette & Laura Weinstein, *Why a 1972 Northern Ireland Murder Matters So Much to Historians*, WASH. POST (Nov. 6, 2019), <https://www.washingtonpost.com/outlook/2019/11/06/what-northern-ireland-legal-case-means-historians/>.

established nearly fifty years after her death.<sup>55</sup> Eighty-two-year-old Ivor Bell was charged with soliciting her murder after he was incriminated in audio tapes collected by the Belfast Project, an oral history project that gathered first-hand accounts from Northern Irish people who had participated in paramilitary activity during the Troubles.<sup>56</sup> On the tapes, the former paramilitary members described acts of violence and warfare that they had committed with the understanding that the tapes of their interviews would remain sealed until their death.<sup>57</sup> Although the Belfast Project's directors had promised participants that their recorded interviews would be kept confidential, American courts declined to uphold the confidentiality promise against access requests by the Police Service of Northern Ireland.<sup>58</sup>

The prosecution against Bell collapsed in 2019 when a Northern Irish judge ruled that crucial evidence from the Belfast Project was inadmissible.<sup>59</sup> Justice John O'Hara of the Liganside Crown Court held that the tapes implicating Bell in McConville's murder were inadmissible.<sup>60</sup> Justice O'Hara questioned the credibility of the tapes as evidence, reasoning that biased interviewers and a mistaken presumption of confidentiality could have encouraged Bell to lie and exaggerate during the recorded interview.<sup>61</sup> After ruling to exclude the tapes, Justice O'Hara instructed the jury to find Bell not guilty of charges, as there was "no evidence that the prosecution can put before you that supports the case."<sup>62</sup>

### C. Why Prosecution Is Not the Solution

The McCann and McConville murder trials both illustrate the limitations of criminal prosecutions of Troubles-era crimes taking place long after the acts were committed. Both prosecutions relied upon information gathered during historic inquiries. Both collapsed when a judge ruled that crucial interviews were inadmissible. Even with less politically contentious trials, like the McConville trial, there is a question of whether conviction of the perpetrator would be true justice. Using oral history projects as evidence for criminal prosecutions is ethically questionable, particularly when

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55. *Id.*

56. *Id.*

57. The New Yorker Radio Hour, *Who Killed Jean McConville?*, NEW YORKER, at 1:34 (Feb. 25, 2019), <https://www.newyorker.com/podcast/political-scene/who-killed-jean-mcconville>.

58. Beaudette & Weinstein, *supra* note 54.

59. Gerry Moriarty, *Jean McConville's Murder, the Boston Tapes, Gerry Adams and the Ivor Bell Trial*, THE IRISH TIMES (Oct. 17, 2019, 3:00 PM), <https://www.irishtimes.com/news/ireland/irish-news/jean-mcconville-s-murder-the-boston-tapes-gerry-adams-and-the-ivor-bell-trial-1.4053933>.

60. *Id.*

61. *Id.*

62. *Id.*



participants were promised anonymity and confidentiality. Beyond ethical concerns, the time elapsed since the crimes necessitated in both cases that a murder conviction would be largely based on unverified interviews.

The McConville murder trial also illustrates the shortcomings of prosecuting an elderly defendant decades after a crime occurred. The defendant, Ivor Bell, was already suffering from dementia by the time the trial began nearly fifty years after McConville's killing.<sup>63</sup> Bell was declared unfit to appear in court and would never have faced prison time regardless of the trial's outcome.<sup>64</sup> The conviction of elderly and incapacitated defendants is, at best, incomplete justice.

Based on this precedent, criminal prosecution would not be an effective means of comprehensively addressing the Troubles. Mass due process violations like Operation Demetrius undermined the Northern Irish public's faith in fair trials. Much of the evidence on Troubles-related crimes has been collected through legacy and history projects, which judges have been reluctant to admit. Additionally, law enforcement's ability to collect more evidence on these crimes is significantly limited by the decades that have passed since these crimes were committed. The foundation of public mistrust in conjunction with the severe limitations on available evidence makes criminal prosecution a decidedly insufficient means of addressing the lingering trauma of the Troubles.

Prosecution is also less politically feasible than it was even a few years ago. The British Government's Northern Ireland Secretary Brandon Lewis has publicly rejected the criminal justice model as a solution to the lingering damage of the Troubles.<sup>65</sup> Currently, Lewis and other conservative British politicians are seeking to end the prosecution of Troubles-related crimes with the Northern Ireland (Legacy and Reconciliation) Bill.<sup>66</sup>

### III. APPEALS TO THE STRASBOURG COURT

From the beginning of the Troubles, victims sought protection from the supranational court of human rights at Strasbourg.<sup>67</sup> Early applications were made to the European Commission of Human Rights, which was dissolved

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63. *Id.*

64. *Id.*

65. Brandon Lewis MP, Northern Ireland Secretary, British Parliament, Northern Ireland Troubles (Legacy and Reconciliation) Bill: Second Reading Opening Speech (May 24, 2022), <https://www.gov.uk/government/news/northern-ireland-troubles-legacy-and-reconciliation-bill-second-reading-opening-speech>.

66. *See infra* Section V.B.

67. Hurst Hannum & Kevin Boyle, *Ireland in Strasbourg: An Analysis of Northern Irish Proceedings Before the European Commission on Human Rights*, 7 IRISH JURIST 329, 329 (1972).

in 1998.<sup>68</sup> More recent applications have been made to the European Court of Human Rights, which also sits in Strasbourg. For the sake of consistency, this Note shall refer to both the European Commission of Human Rights and the European Court of Human Rights as the “Strasbourg Court.”

At first glance, the Strasbourg Court is a promising venue to resolve conflicts arising from the Troubles. The United Kingdom was one of the first states to ratify the European Convention of Human Rights (“ECHR”).<sup>69</sup> The Court is hailed as “the most advanced and effective” international court of human rights<sup>70</sup> and its judgments have a high compliance rate.<sup>71</sup> The Court also allows petitions by states and individual victims<sup>72</sup> – allowing individuals harmed by a Troubles-era human rights violation to directly seek supranational legal recourse. In reality, decades of appeals to the Strasbourg Court by the Irish government and individual victims have been largely unsuccessful and have not yielded any comprehensive results.

#### A. Early Appeals to the Strasbourg Court

A statute at the center of many early applications to the Strasbourg Court was the Northern Ireland Act 1972.<sup>73</sup> British Parliament passed the Act of 1972 to retroactively legalize British forces searching private property, disbanding assemblies, and arresting Northern Irish people on suspicion of intent to disturb the peace.<sup>74</sup> The brief Act uses broad language to confirm the legally protected status of British soldiers engaged in activities related to “maintenance of order in Northern Ireland.”<sup>75</sup> One contemporary critic emphasized that the British government rushed the Act through Parliament so quickly that it refused to wait for Northern Irish courts to

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68. Brochure, *The Court in Brief*, European Court of Human Rights, [https://echr.coe.int/Documents/Court\\_in\\_brief\\_ENG.pdf](https://echr.coe.int/Documents/Court_in_brief_ENG.pdf); Andrew Drzemczewski, *The European Human Rights Convention: Protocol No. 11 Entry Into Force and First Year of Application*, 21 HUMAN RIGHTS L.J. 357, 358 (2000).

69. *Human Rights: The UK's International Human Rights Obligations*, MINISTRY OF JUSTICE, (Mar. 30, 2022), <https://www.gov.uk/government/collections/human-rights-the-uks-international-human-rights-obligations#:~:text=The%20United%20Kingdom%20was%20one,came%20into%20force%20in%201953>.

70. MICHAEL D. GOLDHABER, *A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS* 2 (2007).

71. Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MOD. L. REV. 183, 184 (2008).

72. GOLDHABER, *supra* note 70, at 181.

73. Hannum & Boyle, *supra* note 67, at 333.

74. Paul O'Higgins, *The Northern Ireland Act 1972*, 35 MOD. L. REV. 295, 295 (1972).

75. Northern Ireland Act 1972, c. 10, § 1 (Eng.).

appeal to the House of Lords.<sup>76</sup> Thus barred from domestic appeal, both the Northern Irish government and individual Northern Irish citizens contested the Act at the Strasbourg Court.<sup>77</sup>

Applications to the Strasbourg Court against the Northern Ireland Act 1972 and the internment without trial of Northern Irish people were largely dismissed or withdrawn.<sup>78</sup> The Irish government ultimately withdrew its application challenging the Act.<sup>79</sup> One individual's petition against the Act was dismissed as "manifestly ill-founded" because the court found the petitioner was outside the ECHR's definition of "victim."<sup>80</sup> Some contemporary scholars argued that these applications to the Strasbourg Court should nevertheless be considered a success as they identified human rights violations in Northern Ireland even if no one was found "guilty."<sup>81</sup> However, these applications illustrate the limitations of appealing to a supranational human rights body. The applications against the Northern Ireland Act 1972 brought some attention to human rights violations in Northern Ireland but because the claims were withdrawn or dismissed, they were not fully validated by the Strasbourg Court.

Applications to the Strasbourg Court regarding the internment of Northern Irish people had similarly limited success. As discussed in Section II, a group of the men interned during Operation Demetrius known as the "hooded men" were subjected to particularly severe interrogation methods known as the "five techniques." The Strasbourg Court found that the "five techniques" were torture in 1976, though it overturned that ruling in 1978.<sup>82</sup> In its 1978 decision, the court acknowledged that the "five techniques" were inhumane and degrading treatment systematically employed with the object of extracting confessions, but held that such techniques did not rise to the level of torture.<sup>83</sup>

Whether the Northern Irish people interned as part of Operation Demetrius were tortured was contested before the Strasbourg Court as recently as 2018. The Irish government referred the case back to the Strasbourg Court after the British and Irish press revealed that, in 1977, the

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76. O'Higgins, *supra* note 74, at 298.

77. Hannum & Boyle, *supra* note 67, at 333.

78. *See id.* at 333–34 (explaining that the Irish government ultimately withdrew its petition against the Northern Ireland Act of 1972 and explaining how individuals' petitions were dismissed as inadmissible or ill-founded).

79. *Id.* at 333.

80. *Id.*

81. *Id.* at 334.

82. Doherty, *supra* note 14, at 80.

83. *Ir. v. U.K.*, App. No. 5310/71, ¶ 8 (Mar. 20, 2018), <https://hudoc.echr.coe.int/fre?i=001-181585>.

British Secretary of State for Northern Ireland had informed the Prime Minister that a Cabinet Minister has endorsed the use of “methods of torture” in Northern Ireland. The government requested that the court revise its 1978 judgment to acknowledge that internees were not merely subjected to “inhuman and degrading treatment” but were, in fact, tortured.<sup>84</sup> The court dismissed the request for revision, once again declining to acknowledge the “five techniques” as torture.<sup>85</sup> After appeals spanning decades, the Irish government’s efforts to have the “five techniques” labelled as torture by the Strasbourg Court have all ultimately failed. This illustrates the arduous and often frustrating reality of seeking the vindication of Troubles-era wrongs before the Strasbourg Court.

### B. Contemporary Appeals to the Strasbourg Court

Battles to recognize and define Troubles-era human rights violations have continued before the Strasbourg Court in the decades following the Good Friday Agreement. In 2001, the Strasbourg Court held in a collection of four cases known as *Jordan et al.*<sup>86</sup> that the United Kingdom has violated the right to life guaranteed by Article 2 of the European Convention of Human Rights by failing to effectively investigate allegedly committed by security forces in Northern Ireland during the Troubles.<sup>87</sup> *Jordan et al.*, along with subsequent decisions *McShane v. The United Kingdom*<sup>88</sup> and *Finucane v. The United Kingdom*,<sup>89</sup> recognized the application of Article 2 to Troubles killings. These right to life cases represent a success for Troubles victims before the Strasbourg Court – but their positive impact for post-Troubles justice and reconciliation efforts is dubious. The British government responded to the *Finucane* verdict by launching a government

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84. *Id.*

85. *Id.* at 136–37.

86. *Jordan v. U.K.*, App. No. 24746/94, Judgment, Eur. Ct. H.R. (2001); *McKerr v. U.K.*, App. No. 28883/95, Judgment, Eur. Ct. H.R. (2001); *Kelly and Others v. U.K.*, App. No. 30054/96, Judgment, Eur. Ct. H.R. (2001); and *Shanaghan v. U.K.*, App. No. 37715/97, Judgment, Eur. Ct. H.R. (2001), <https://hudoc.echr.coe.int/eng?i=001-59450>.

87. Christopher K. Connolly, Note, *Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland*, 39 CORNELL INT’L L.J. 401, 423 (2006).

88. *McShane v. U.K.*, App. No. 43290/98, Judgment, Eur. Ct. H.R. (2002), <https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-60484&filename=CASE%20OF%20McSHANE%20v.%20THE%20UNITED%20KINGDOM.docx&logEvent=False>.

89. *Finucane v. U.K.*, App. No. 29178/95 (July 1, 2003) <https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=003-778561-794895&filename=Chamber%20judgment%20Finucane%20v.%20United%20Kingdom%2001.07.03.pdf&logEvent=False>.

inquiry into Patrick Finucane's killing.<sup>90</sup> Rather than furthering progress or reconciliation, the inquiry's findings were then selectively cited by various public figures in support of their entrenched positions.<sup>91</sup> A report subsequently published by the Council of Europe declared that the United Kingdom must take further action to satisfy its Article 2 obligations in the aftermath of *Jordan et al.*<sup>92</sup> The report's recommendations included ensuring that inquests conducted on suspicious deaths in Northern Ireland before the adoption of the Human Rights Act satisfied Article 2.<sup>93</sup>

In 2022, the court unanimously rejected an application known as *Gribben v. United Kingdom*.<sup>94</sup> The applicant was the sister of an IRA volunteer shot and killed by soldiers of the British Army in 1990.<sup>95</sup> Like the applicants in the *Jordan et al.* cases, the applicant argued that her brother's right to life under Article 2 of the ECHR had been violated by the British government's failure to conduct an effective investigation into his death.<sup>96</sup> After considering the parties' submissions, the court held that the inquest into the shooting had achieved its purpose despite "certain weaknesses" such as a juror's potential bias and the failure to appear of a soldier involved in the shooting.<sup>97</sup> Having held that the investigation was sufficiently thorough to satisfy Article 2, the court dismissed the applicant's claim because it was manifestly ill-founded.<sup>98</sup> *Gribben v. United Kingdom*, like the applications arising from the Northern Ireland Act 1972 and internment, shows that appeals to the Strasbourg Court are often a dead end for Northern Irish activists.

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90. Connolly, *supra* note 87, at 424–25.

91. *Reaction to the Stevens Inquiry*, THE GUARDIAN (Apr. 17, 2003), <https://www.theguardian.com/uk/2003/apr/17/northernireland.northernireland1>. See also Kevin Connolly, *Stevens Inquiry Exposes NI Divisions*, BBC NEWS (Apr. 17, 2003), [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/2957445.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/2957445.stm) (citing inquiry's findings).

92. Comm'r for Human Rights, Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom at 54, 57 (June 8, 2005), <https://www.statewatch.org/media/documents/news/2005/jun/coe-uk-report.pdf>.

93. *Id.* at 57.

94. *Gribben v. U.K.*, App. No. 28864/18, Eur. Ct. H.R. at 39 (Feb. 17, 2022). <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7262570-9889221&filename=Decision%20Gribben%20v.%20the%20United%20Kingdom%20-%20Northern%20Ireland%20Troubles%20legacy%20inquest%20case%20rejected%20as%20inadmissible.pdf>.

95. *Id.* at 2.

96. *Id.* at 23.

97. *Id.* at 38–39.

98. *Id.*

### C. Why the Strasbourg Court Is Not the Solution

In theory, appeals to the Strasbourg Court allow Northern Irish activists to avoid entrenched local divisions in their appeals to justice. In practice, petitions regarding the Troubles have often been dismissed rather than fully recognized by the court. Even when the Strasbourg Court has made decisions recognizing human rights violations arising from the Troubles, these have had limited direct impact. Although legal mechanisms addressing the lingering trauma of the Troubles might benefit from the support of international organizations, the Court has not proved to be an effective venue. While the Strasbourg Court theoretically offers unbiased supranational human rights protection, decades of appeals have yielded little progress.

## IV. PUBLIC INQUIRIES

The United Kingdom has favored the public inquiry model in addressing Troubles-era crimes. A public inquiry is a largely legal model investigating a particular incident; in contrast, a truth commission is a more political model with a broader scope of investigation.<sup>99</sup> Public inquiries have been utilized to address several key incidents of the Troubles, with varying levels of success. Notably, the British government has conducted two distinct public inquiries into the events of Bloody Sunday.

On January 30, 1972, British soldiers fired more than one hundred times on a civil rights march in Derry, Northern Ireland.<sup>100</sup> They killed fourteen Irish civilians, and the day that went down in history as Bloody Sunday.<sup>101</sup> Bloody Sunday represents the single biggest tally of civilian deaths resulting from a British military operation on United Kingdom soil since 1819.<sup>102</sup> This extreme incident of state violence intensified anti-British sentiment in Northern Ireland and invigorated IRA's rallying of support.<sup>103</sup> Reverend Edward Daly, a priest who helped carry victims away from the shootings on Bloody Sunday, stated that many of the incarcerated IRA members he spoke with told him they never would have joined if they had not witnessed Bloody

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99. Hegarty, *supra* note 43, at 1150–51.

100. Mervyn Jess, *Lord Saville: Prosecutions 'Not Bloody Sunday Inquiry Aim'*, BBC NEWS (Mar. 13, 2019), <https://www.bbc.com/news/uk-northern-ireland-47548352>.

101. Alan Cowell, *50 Years On, Bloody Sunday's Wounds are Still Felt*, N.Y. TIMES (Jan. 20, 2022), <https://www.nytimes.com/2022/01/29/world/europe/bloody-sunday-ireland.html> (explaining that thirteen died on that day and one died of their injuries later).

102. Henry McDonald & Owen Bowcott, *Bloody Sunday Report: 38 Years On, Justice at Last*, THE GUARDIAN (June 15, 2010, 4:26 PM), <https://www.theguardian.com/uk/2010/jun/15/bloody-sunday-report-soldiers-prosecuted>.

103. Cowell, *supra* note 101.

Sunday.<sup>104</sup>

#### A. The Widgery Report: The First Bloody Sunday Inquiry

The day after Bloody Sunday, the British government announced a public inquiry led by the English Lord Chief Justice Widgery.<sup>105</sup> In a confidential meeting at Downing Street, Prime Minister Edward Heath warned Lord Widgery that Britain was “in Northern Ireland fighting not only a military war but a propaganda war.”<sup>106</sup> Lord Widgery went on to conduct an inquiry with a biased procedure designed to benefit the British Army. For instance, Lord Widgery severely limited the scope of the investigation and conducted the proceedings with unusual speed.<sup>107</sup> He also chose to hold hearings outside of Derry, a convenience for the British Army and a barrier for local witnesses to give testimony.<sup>108</sup> Lord Widgery also departed from custom in choosing to preside alone over the expedited proceedings, limiting accountability on the panel.<sup>109</sup> Finally, the Widgery tribunal failed to call numerous key witnesses, including injured civilians and Dr. Raymond McClean, a physician who had treated and examined shooting victims on site.<sup>110</sup>

The Widgery Inquiry prioritized the political interests of Britain over judicial fact-finding to a shocking extent. The Widgery Report concluded, without conclusive evidence, that the Irish civilians had fired upon the British soldiers first.<sup>111</sup> Lord Widgery praised the soldiers’ honesty and concluded that there had been no breach of discipline.<sup>112</sup> He also concealed the soldiers’ statements from the public.<sup>113</sup> When the soldiers’ statements were declassified decades later it was revealed that the soldiers had given substantially inconsistent testimony.<sup>114</sup> One British paratrooper later testified to the Saville Inquiry that a lawyer appointed by the tribunal had censored facts that were unfavorable to the British Army from his witness

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104. *Id.*

105. *Initial Bloody Sunday Inquiry Labelled “Whitewash,”* BBC NEWS (June 11, 2020), <https://www.bbc.com/news/10146883>. [Hereinafter *Bloody Sunday “Whitewash”*].

106. GRAHAM DAWSON, *MAKING PEACE WITH THE PAST? MEMORY, TRAUMA AND THE IRISH TROUBLES* 105 (2007).

107. *Id.*

108. *Id.*

109. *Id.* (explaining that customarily Lord Widgery would have appointed two other judges to assist him).

110. *Id.* at 110.

111. *Bloody Sunday “Whitewash,” supra* note 105.

112. Henry Foy, *Bloody Sunday: Saville Report v Widgery Report*, THE GUARDIAN (June 15, 2010, 12:45 PM), <https://www.theguardian.com/uk/2010/jun/15/bloody-sunday-saville-report-widgery>.

113. DAWSON, *supra* note 106, at 106.

114. *Id.*

statement.<sup>115</sup> When the witness described the unjustified killing of civilians by his Army colleagues, the attorney said, “we can’t have that, can we?” and subsequently removed the incriminating testimony from the statement that was presented to the tribunal.<sup>116</sup> Dr. McClean also noted that the official post-mortem reports of the victims contradicted the post-mortem notes that he had provided to the tribunal.<sup>117</sup>

The Widgery Inquiry exemplifies the damage that biased judicial proceedings can do to an already-fraught situation. The Widgery Report was criticized as a politically motivated “whitewashing” of events.<sup>118</sup> Rather than holding the state accountable, the public inquiry provided an inaccurate official narrative that shielded the English government from criticism.<sup>119</sup>

## B. The Saville Report: The Second Bloody Sunday Inquiry

The family members of Bloody Sunday victims spent years publicly challenging the conclusions of the Widgery Report and mounting a campaign for a new investigation that included delivering a 40,000-signature petition to 10 Downing Street.<sup>120</sup> Finally, in January 1998, the British government made the unprecedented decision to establish a second judicial inquiry into the events of Bloody Sunday.<sup>121</sup> The inquiry produced the Saville Report,<sup>122</sup> which was published in 2010.<sup>123</sup> The report exonerated the civilian victims of wrongdoing and emphasized that the British military’s shooting of the victims was unjustifiable.<sup>124</sup> The report openly contradicted the Widgery Report’s conclusions on a number of key points.<sup>125</sup> Widgery praised the testifying British soldiers’ honesty while Saville concluded that they gave deliberately false statements.<sup>126</sup> Widgery argued that the soldiers were “entitled to fire” upon the crowd and had thus had not breached

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115. *Id.*

116. *Id.*

117. *Id.* at 111.

118. Foy, *supra* note 112.

119. Hegarty, *supra* note 43, at 1168.

120. David Young, *Bloody Sunday Families’ 50-Year Quest for Justice*, THE INDEPENDENT (Jan. 27, 2022), <https://www.independent.co.uk/news/uk/david-cameron-justice-john-major-derry-tony-blair-b2001856.html>;

*The Saville Inquiry: Q&A*, BBC NEWS (June 11, 2011), <https://www.bbc.com/news/10147362>.

121. DAWSON, *supra* note 106, at 82.

122. Named for the inquiry’s chairman, the English Judge Lord Saville of Newdigate. Bell, *supra* note 2, at 1103.

123. Jim Smyth, *Introduction: From Popular Mythology to History and Memory*, in REMEMBERING THE TROUBLES: CONTESTING THE RECENT PAST IN NORTHERN IRELAND 1, 5 (Jim Smyth ed., 2017).

124. McDonald & Bowcott, *supra* note 102.

125. Foy, *supra* note 112.

126. *Id.*



discipline, while Saville reported that there was a “serious and widespread loss of fire discipline among the soldiers.”<sup>127</sup>

The Saville Report also markedly diverged from the Widgery Report in the thoroughness of its investigation. The investigation chaired by Lord Saville was a twelve-year process.<sup>128</sup> The panel interviewed more than 900 witnesses, read the statements of 1,500 more, and ultimately produced a report of more than 5,000 pages.<sup>129</sup> In contrast, the Widgery tribunal sat for a mere three weeks before publishing a report — neglecting to call key witnesses including injured survivors.<sup>130</sup>

The Saville Report was heralded as a victory — a righting of the Widgery Report’s historic wrong.<sup>131</sup> The report compelled David Cameron, then the prime minister of the United Kingdom, to publicly apologize of the events of Bloody Sunday.<sup>132</sup> In a statement, livestreamed from the House of Commons to a crowd of up to 10,000 people in Derry’s Guildhall Square, Cameron stated that the Saville Report proved that the British military’s actions on Bloody Sunday were “unjustified and unjustifiable.”<sup>133</sup> Immediately following Prime Minister Cameron’s apology, the families of Bloody Sunday victims appeared to celebrate their loved ones’ exonerations with the crowd in Guildhall Square.<sup>134</sup> In one particularly symbolic moment, a victim’s relative tore the Widgery Report to pieces before the crowd.<sup>135</sup>

The Saville Inquiry exemplifies the particular success that a public inquiry can have on the resolution of collective trauma — success that may be unavailable in criminal proceedings. Lord Saville himself stressed that he had never intended to conduct a criminal investigation.<sup>136</sup> Former soldiers that participated in the Saville Inquiry were anonymized and assured that the evidence they provided would not be used in subsequent criminal proceedings.<sup>137</sup> Lord Saville explained without these assurances, soldiers

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127. *Id.*

128. Jess, *supra* note 100.

129. *The Second Bloody Sunday Inquiry*, THE MUSEUM OF FREE DERRY, <https://museumoffreederry.org/bloody-sunday-justice-campaign/the-second-bloody-sunday-inquiry/> (last visited Nov. 3, 2022).

130. *Bloody Sunday “Whitewash,” supra* note 105.

131. McDonald & Bowcott, *supra* note 102; Róisín Ingle, “*On Behalf of Our Country I am Deeply Sorry*” — British Prime Minister David Cameron, THE IRISH TIMES (June 16, 2010, 1:00 PM), <https://www.irishtimes.com/news/on-behalf-of-our-country-i-am-deeply-sorry-british-prime-minister-david-cameron-1.678609>.

132. Ingle, *supra* note 131.

133. McDonald & Bowcott, *supra* note 102.

134. Ingle, *supra* note 131.

135. *Id.*

136. Jess, *supra* note 100.

137. *Id.*

would have refused to answer questions out of fear of self-incrimination.<sup>138</sup> The extraordinary detail of the report allowed for a resounding vindication of Bloody Sunday's victims – and that detail would likely not have been possible in a criminal investigation.

### C. Why Public Inquiries Are Not the Solution

The public inquiry model is not without fault. The Widgery Report shows that, at their worst, public inquiries are little more than political propaganda. The discretion granted to judges chairing public inquiries renders the inquiries particularly vulnerable to being leveraged to protect state interests. The Widgery Report only added to the public perception of state wrongdoing,<sup>139</sup> and did little to uncover the truth of Bloody Sunday or to resolve the national trauma caused by the event.

The Saville Report stands in sharp contrast to the Widgery Report. While the Widgery Report was rushed through in weeks, the Saville Report was methodically conducted over a period of twelve years. The Saville Inquiry interviewed hundreds of witnesses, read well over a thousand statements, and produced a lengthy report widely heralded as a more just and truthful account of Bloody Sunday.<sup>140</sup> The Saville Inquiry was also the longest and most expensive judicial inquiry in British legal history.<sup>141</sup> The twelve-year process cost about £200 million<sup>142</sup> or \$280 million.<sup>143</sup> The length and prohibitive expense of this public inquiry indicate that the public inquiry model could not feasibly be applied to all the major events of a thirty-year sectarian conflict.

The limited scope of public inquiries is another potential concern. Public inquiries usually focus on a single event.<sup>144</sup> The Saville Inquiry, for example, dedicated twelve years of investigation to Bloody Sunday and ultimately vindicated a relatively small group of people. The United Kingdom could not possibly finance public inquiries on behalf of all of the 170,000 Northern Irish people who lost a relative or someone close to them to the Troubles.<sup>145</sup> On the other hand, the benefits of the Saville Report are certainly not limited to the victims and their families. The public jubilation of thousands of Derry civilians alongside the victims' families in Guildhall

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138. *Id.*

139. Bell, *supra* note 2, at 1104.

140. *See supra* Section IV.B.

141. Smyth, *supra* note 123, at 5.

142. Jess, *supra* note 100.

143. Cowell, *supra* note 101.

144. Hegarty, *supra* note 43, at 1151.

145. This statistic was published in 2013. McAlister *supra* note 4, at 2.

Square is just one snapshot of the Saville Report's impact.

Public inquiries have been the most successful of the legal efforts to bring out the "truth" of the Troubles, but they are not a feasible option to address the community-wide trauma of the Troubles due to their prohibitive cost and limited scope.

## V. TRUTH COMMISSIONS

Truth commissions are ad hoc transitional justice mechanisms designed in consultation with the communities they serve.<sup>146</sup> Truth commissions have been employed in the aftermath of international human rights violations since the 1980s, with the goals of discovering truth, establishing collective memory, and, ultimately, promoting forgiveness.<sup>147</sup> According to the Office of United Nations High Commissioner for Human Rights, the core principles of a truth commission are national choice, a comprehensive traditional justice strategy, country-specific design, political will and operational independence, and international support.<sup>148</sup>

The flexibility and comprehensive approach of the truth commission model would allow it to address the complexity of Northern Ireland's ongoing social polarization more effectively. In the years following the Troubles, a broad coalition, including former British Prime Minister Tony Blair, a key player in the Good Friday Agreement,<sup>149</sup> and Northern Irish nationalist groups, has voiced support for a Troubles truth commission.<sup>150</sup> However, to date, there has been no comprehensive truth commission to address the legacy of the Troubles.<sup>151</sup>

### A. A History of Truth Commission Efforts in Northern Ireland

While transitional justice efforts have thus far fallen short of establishing a truth commission in Northern Ireland, there have been attempts to facilitate truth and reconciliation in the aftermath of the Troubles. The Bloomfield Report is one early example. In 1997, the British Secretary of State for Northern Ireland tasked Sir Kenneth Bloomfield with investigating "possible ways to recognize the pain and suffering felt by

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146. *Id.* at 7 (discussing how people talked about the Troubles and the impact of the Conflict on their communities).

147. ONUR BAKINER, TRUTH COMMISSIONS: MEMORIES, POWER AND LEGITIMACY 2–3 (2016).

148. Office of the U.N. High Comm'r for Human Rights, Rule-of-Law Tools for Post-Conflict States: Truth commissions, 5–6, U.N. Doc. HR/PUB/06/1 (2006).

149. Damien McElroy, *Bitter Legacy Means Northern Ireland Needs a South African-Style Truth Commission*, THE NAT'L, <https://www.thenationalnews.com/opinion/comment/bitter-legacy-means-northern-ireland-needs-a-south-african-style-truth-commission-1.1223124> (last visited Nov. 16, 2022).

150. DAWSON, *supra* note 106, at 81.

151. *Id.* at 83.

victims of violence arising from the [T]roubles.”<sup>152</sup> Bloomfield, the former Head of the Northern Ireland Civil Service, published a report (“Bloomfield Report”) emphasizing the necessity of a victim-centered approach for post-Troubles reconciliation.<sup>153</sup> Some give the Bloomfield Report credit for the numerous victims’ groups that were subsequently established in Northern Ireland.<sup>154</sup> The report also acknowledged that many victims of the Troubles strongly desired a truth and reconciliation commission for Northern Ireland.<sup>155</sup>

The Bloomfield Report did not establish a truth commission, though Bloomfield did formally recommend that the potential benefits of a truth commission “at some stage” should be considered.<sup>156</sup> Bloomfield warned that “‘truth’ can be used as a weapon as well as a shield,” and that any effective truth commission in Northern Ireland must necessarily be the product of broad political agreement.<sup>157</sup>

While the Bloomfield Report offered a broad set of recommendations for government, employers, and victims’ rights organizations,<sup>158</sup> it also presented a fundamentally flawed analysis of the Troubles. The British government positioned itself as a “neutral arbiter” rather than an active participant in the conflict.<sup>159</sup> Bloomfield himself acknowledged in the report that many of the victims he interviewed doubted that he could prepare a report with appropriate objectivity.<sup>160</sup> The Bloomfield Report was also criticized for presenting a version of the “truth” of the Troubles that excluded victims killed by state actors.<sup>161</sup> The report included victims of state violence in two paragraphs of its sixty pages<sup>162</sup> and made no recommendation regarding the accountability gap between paramilitary and state-sponsored violence.<sup>163</sup>

More recent efforts to address the Troubles have acknowledged the potential benefits of a truth commission. In 2007, then-Secretary of State for Northern Ireland Peter Hain established a Consultative Group on the Past

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152. Connolly, *supra* note 87, at 420.

153. DAWSON, *supra* note 106, at 82.

154. *See, e.g.*, DAWSON, *supra* note 106, at 82.

155. Connolly, *supra* note 87, at 421.

156. KENNETH BLOOMFIELD, WE WILL REMEMBER THEM: REPORT OF THE NORTHERN IRELAND VICTIMS COMMISSIONER SIR KENNETH BLOOMFIELD, 50 (1998).

157. *Id.* at 38.

158. *Id.* at 50–51.

159. DAWSON, *supra* note 106, at 82.

160. BLOOMFIELD, *supra* note 156, at 36.

161. Connolly, *supra* note 87, at 421.

162. *Id.*

163. *Id.*

with the objective of obtaining “true and lasting reconciliation.”<sup>164</sup> In an effort to gauge public opinion on the best method of post-Troubles reconciliation, the Consultative Group met with 141 groups in Northern Ireland, held various public meetings, and received feedback online and through letters.<sup>165</sup>

The Consultative Group proposed a Legacy Commission, which would essentially function as a truth and reconciliation commission.<sup>166</sup> The Legacy Commission was designed to be conducted under British law, with three commissioners agreed upon by the British and Northern Irish governments.<sup>167</sup> The Consultative Group also suggested that the chair of the commissioners be foreign rather than local<sup>168</sup> – likely a wise choice given the entrenched internal divisions regarding the truth of the Troubles.

The Consultative Group’s recommendations were largely criticized or ignored by the public.<sup>169</sup> Some criticized the Consultative Group’s lack of transparency, particularly its failure to publish any of the quantitative and qualitative data collected during its public consultation process.<sup>170</sup> Others took issue with the report failing to distinguish between victims of paramilitary acts and victims of state-sponsored violence.<sup>171</sup> Republican activists and Northern Irish victims’ groups argued that the Consultative Group’s motives were fundamentally suspect because the Group had been created by the British government.<sup>172</sup>

The government of the United Kingdom soundly rejected the Legacy Commission’s proposal. A report published by the Northern Ireland Affairs Committee balked at the level of collaboration proposed by the Consultative Group.<sup>173</sup> The report declared that any Legacy Commission should be the responsibility and policy choice of Northern Ireland’s government.<sup>174</sup> The committee also argued that a Legacy Commission would not have a significant positive impact because there were already mechanisms for post-

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164. Duffy, *supra* note 9, at 27.

165. *Id.* at 28.

166. *Id.* at 32.

167. *Id.* at 30.

168. *Id.*

169. Landon Hancock, *Transitional Justice and the Consultative Group: Facing the Past or Forcing the Future?*, 11 ETHNOPOLITICS 204, 205 (2012).

170. Duffy, *supra* note 9, at 28.

171. Hancock, *supra* note 169, at 205.

172. *Id.* at 208.

173. NORTHERN IRELAND AFFAIRS COMMITTEE, THE REPORT OF THE CONSULTATIVE GROUP ON THE PAST IN NORTHERN IRELAND, 2009–10, HC 171, ¶ 51, (UK), <https://publications.parliament.uk/pa/cm200910/cmselect/cmniaf/171/171.pdf>.

174. *Id.*

Troubles reconciliation.<sup>175</sup>

In contrast, the Northern Ireland Human Rights Commission agreed with the Consultative Group that a society-wide reconciliation mechanism was necessary to heal from the Troubles<sup>176</sup> and stopped short of rejecting the Legacy Commission proposal in its entirety.<sup>177</sup> However, the Commission noted shortcomings, including that the proposed Legacy Commission provided for limited cross-examination and did not provide for public hearings.<sup>178</sup>

#### B. The Legacy Bill: Blanket Amnesty Disguised as a Truth Commission

While the British government's response to the Legacy Commission proposal argued that a truth commission would add unnecessarily to existing mechanisms, the government did later propose its own Troubles information recovery body in the Northern Ireland Troubles (Legacy and Reconciliation) Bill ("Legacy Bill"). Unfortunately, it illustrates that a truth commission proposal can be ineffective – even harmful – if not carefully designed to address ongoing community trauma in Northern Ireland.

In July 2021, the government of the United Kingdom announced a proposal to end prosecutions related to the Troubles.<sup>179</sup> The proposal immediately received backlash from human rights groups, academics, and victims' families.<sup>180</sup> United Nations experts argued that the plan would function as "blanket impunity for the grave human rights violations."<sup>181</sup> The Northern Ireland Office of the British government defended the proposal as necessary to end the "cycle of investigations into the Troubles,"<sup>182</sup> and proceeded to draft the Northern Ireland Troubles (Legacy and Reconciliation) Bill.

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175. *See id.* ¶ 30 (listing mechanisms such as the Office of the Police Ombudsman and the Commission for Victims and Survivors in Northern Ireland).

176. *Id.* ¶ 3.

177. *See id.* ¶ 8 (recognizing that "a number of proposals in the Consultative Group's report should be built upon").

178. *Id.* ¶ 111.

179. Suzanne McGonagle, *Denis Bradley: Legacy Commission Should be Chaired by a Former US President or Senior American Figure*, THE IRISH NEWS (July 29, 2021, 1:00 AM), <https://www.irishnews.com/news/northernirelandnews/2021/07/29/news/denis-bradley-legacy-commission-should-be-chaired-by-a-former-us-president-or-senior-american-figure-2402340/>.

180. Connla Young, *Fresh Concerns Raised About British Government Legacy Proposals*, THE IRISH NEWS (June 21, 2021, 1:00 AM), <https://www.irishnews.com/news/northernirelandnews/2021/06/21/news/fresh-concerns-raised-about-british-government-legacy-proposals-2361692/>.

181. *UK Plan Thwarts Access to Truth Over Northern Ireland 'Troubles'*, UN NEWS (Aug. 10, 2021), <https://news.un.org/en/story/2021/08/1097522>.

182. Young, *supra* note 180.

The Legacy Bill trades amnesty for memorialization. The bill establishes the Independent Commission for Reconciliation and Information Recovery (“ICRIR”),<sup>183</sup> a truth recovery body designed to preclude criminal investigation and prosecution related to the Troubles. On the day the Legacy Bill goes into effect, it will prohibit the criminal investigation of any Troubles-related offense.<sup>184</sup> The bill establishes the ICRIR as a new information recovery mechanism in exchange for ending criminal investigations into Troubles-era crimes – an exchange that has proved controversial. The bill is unanimously opposed by Northern Ireland’s political parties.<sup>185</sup> The Irish government also opposes the bill, arguing that it would “undermine rather than assist reconciliation.”<sup>186</sup> Amnesty International published poll results showing that a majority of adults in the United Kingdom opposed immunity in exchange for information on Troubles-era killings.<sup>187</sup>

The immunity provisions of the Legacy Bill are its most contentious. Critics of the Legacy Bill argue that it establishes blanket amnesty and permanently shields human rights violators from accountability.<sup>188</sup> Human rights groups have condemned the bill for offering conditional immunity to Troubles-era offenders who agree to cooperate with the ICRIR. Amnesty International characterized the bill as “de facto amnesty designed to make perpetrators of heinous crimes untouchable.”<sup>189</sup> In a joint statement, the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions expressed concern that the Legacy Bill “appears to conflate reconciliation with impunity, as well as oppose legal accountability.”<sup>190</sup> In a statement

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183. Northern Ireland Troubles (Legacy and Reconciliation) Bill 2022-23, HL Bill [37] Preamble (UK).

184. *Id.* at cl. 37.

185. *Troubles Legacy Bill: MP in Tears Remembering Murdered Cousin*, BBC NEWS (July 18, 2023), <https://www.bbc.com/news/uk-northern-ireland-66238504>.

186. Julian O’Neill, *Troubles Legacy: Sir Declan Morgan Hopes Dublin Will Back Legacy Body*, BBC NEWS (June 12, 2023), <https://www.bbc.com/news/uk-northern-ireland-65867538>.

187. Press Release, *Northern Ireland: Majority of the UK Public Are Against the Troubles Bill – New Poll*, AMNESTY INT’L UK (June 23, 2023), <https://www.amnesty.org.uk/press-releases/northern-ireland-majority-uk-public-are-against-troubles-bill-new-poll>.

188. See, e.g., *Northern Ireland Troubles Bill*, AMNESTY INT’L UK, <https://www.amnesty.org.uk/ni-troubles> (last visited Nov. 16, 2022) (documenting the reasons for opposition to the Bill, including impunity of wrongdoers, lack of justice for victims, and noncompliance with the principles of justice).

189. Press Release, *Northern Ireland: MPs Must Reject Troubles Bill Which Would Sound ‘Death Knell for Justice’ for Conflict Victims*, AMNESTY INT’L UK (May 24, 2022), <https://www.amnesty.org.uk/press-releases/northern-ireland-mps-must-reject-troubles-bill-which-would-sound-death-knell-justice>.

190. Press Release, *UK: Flawed Northern Ireland ‘Troubles’ Bill Flagrantly Contravenes Rights*

explaining that the Legacy Bill likely violates the European Convention on Human Rights, Council of Europe Commissioner for Human Rights Dunja Mijatović commented that the bill would be publicly perceived as intended to “shield veterans from investigations and prosecutions.”<sup>191</sup>

In contrast, the bill’s sponsors argue that the memorialization of wrongdoing is more valuable than the limited possibility that wrongdoers could be successfully prosecuted.<sup>192</sup> Northern Ireland Secretary Brandon Lewis also emphasized the improbability of successful prosecutions when the majority of Troubles-related cases are over forty years old.<sup>193</sup> A representative of the British government’s Northern Ireland Office characterized the bill as a means to end “the cycle of investigations” into Troubles-era crimes.<sup>194</sup> Representatives of the Northern Ireland Veterans Movement also defended the plan, characterizing it as a necessary measure to protect soldiers from “political” prosecutions.<sup>195</sup>

While the House of Lords voted to remove the immunity provision from the Legacy Bill, it was quickly reversed by the House of Commons.<sup>196</sup>

A truth commission would be a valuable transitional justice method for Northern Ireland – but only if conducted in good faith and in cooperation with the public. As it stands,<sup>197</sup> the Northern Ireland Troubles (“Legacy and Reconciliation”) Bill carries on from the Widgery Inquiry a tradition of shielding the British armed forces from legal accountability, even at the cost of legitimacy.

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*Obligations, Say UN Experts*, U.N. OFF. OF HIGH COMM’R (Dec. 15, 2022), <https://www.ohchr.org/en/press-releases/2022/12/uk-flawed-northern-ireland-troubles-bill-flagrantly-contravenes-rights>.

191. Julian O’Neill, *Troubles Legacy Bill: ‘Significant Risk’ Law Struck Down by Courts*, BBC NEWS (Aug. 31, 2022), <https://www.bbc.com/news/uk-northern-ireland-62738736>.

192. See, e.g., Eimear McGovern, *Brandon Lewis Says UK’s Troubles Legacy Bill Will Put Information for Families at Its Core*, BELFAST TELEGRAPH (May 24, 2022, 9:37 PM), <https://belfasttelegraph.co.uk/news/politics/brandon-lewis-says-uks-troubles-legacy-bill-will-put-information-for-families-at-its-core-41683723.html> (quoting Northern Ireland Secretary Brandon Lewis’s explanation that the Legacy Bill represents a conscious choice to prioritize information recovery over the “vanishingly small” prospect of successful prosecutions).

193. *Id.*

194. Young, *supra* note 180.

195. Julian O’Neill, *Troubles’ Prosecutions: Military Veterans Give Support to Troubles’ Plan*, BBC NEWS (Aug. 18, 2021), <https://www.bbc.com/news/uk-northern-ireland-58253891>.

196. Richard Wheeler, *MPs Overturn Attempts to Remove Immunity Clause from Troubles Legacy Bill*, EVENING STANDARD (July 19, 2023), <https://www.standard.co.uk/news/politics/chris-heatonharris-irish-government-uk-government-mps-northern-ireland-b1095224.html>.

197. As of the writing of this note, the House of Lords was scheduled to review the revised amendments provided by the House of Commons on September 5, 2025. For the current status of the bill, see <https://bills.parliament.uk/bills/3160/stages>.



### C. Why Northern Ireland Needs a Truth Commission

The “truth” of the Troubles has always been contentious. Northern Irish journalist Lyra McKee wrote that, after the Good Friday Agreement, warring factions turned “from guns to history books.”<sup>198</sup> In the years following the Good Friday Agreement, conflict over the truth of the Troubles has continued along sectarian lines through symbolic acts of aggression such as the defacement of memorials<sup>199</sup> and actual violence.

McKee continued to write on Northern Irish struggles, particularly inherited trauma, until she was shot to death on the streets of Derry in 2019.<sup>200</sup> She had been observing and live tweeting a riot by the New IRA – a group of young people drawn to the IRA’s more extreme pre-ceasefire rhetoric.<sup>201</sup> McKee was killed more than two decades after the signing of the Good Friday Agreement.<sup>202</sup> McKee devoted her life to writing about fractured community and generational trauma in Northern Ireland. Her death underscored Northern Ireland’s ongoing need for a significant reconciliation mechanism.

A legal remedy is still very much needed, and truth commissions are best suited to address the ongoing impact of the Troubles.

### D. Designing a Truth Commission for Northern Ireland

A successful truth commission in Northern Ireland should be designed to maximize local participation but should perhaps be chaired by an international organization to avoid perception of bias. An international chair is in line with the desires of the Irish people. A study of Northern Irish attitudes towards a truth commission found that 91.5% of participants would not trust the British government to conduct a truth commission.<sup>203</sup> The Irish government fared even worse, with 97.1% of participants saying they would not trust it to direct a truth commission.<sup>204</sup> In contrast, about half of the study participants said they would trust an international organization, like the

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198. Lyra McKee, *Lyra McKee’s Last Article: We Were Meant to Be the Generation That Reaped the Spoils of Peace*, THE GUARDIAN (Mar. 28, 2020, 6:00 AM), <https://www.theguardian.com/news/2020/mar/28/lyra-mckee-last-piece-ceasefire-babies-growing-up-northern-ireland-in-90s>.

199. Ian McBride, *The Truth About the Troubles*, in REMEMBERING THE TROUBLES: CONTESTING THE RECENT PAST IN NORTHERN IRELAND 9, 13 (Jim Smyth ed., 2017).

200. Susan McKay, *The Incredible Life and Tragic Death of Lyra McKee*, NEW YORKER (July 26, 2019), <https://www.newyorker.com/news/postscript/the-incredible-life-and-tragic-death-of-lyra-mckee>.

201. *Id.*

202. *Id.*

203. Duffy, *supra* note 9, at 27.

204. *Id.* at 29, n.11.

United Nations, to direct a truth commission for Northern Ireland.<sup>205</sup> The findings of the study are corroborated by public backlash against the Consultative Group on the Past, exemplified by the common accusations of government bias and ineffective accountability measures.<sup>206</sup> While some truth commissions have been created by a presidential or parliamentary mandate, there is historical precedent of the United Nations directing truth commissions.<sup>207</sup>

While Northern Ireland has yet to establish a full truth commission, the chairs of a commission could look to a plethora of historic examples in designing a truth commission tailored to the needs of the Northern Irish people. For example, they could mirror the East Timorese model of activists and politicians collaborating with the United Nations to establish a truth commission.<sup>208</sup> On the other hand, it would not be advisable for a Northern Irish truth commission to replicate East Timor's hybrid prosecutorial model, which prioritized evidence gathering for criminal prosecutions over developing a complete narrative.<sup>209</sup> Like South Africa's truth commission, a Northern Irish truth commission should maintain autonomy and resist any political pressure to alter its conclusions.<sup>210</sup> It is also important that a truth commission report contextualizes the violence of the Troubles in the long history of repression and segregation in Northern Ireland, avoiding the error some past truth commissions have made in neglecting historical context.<sup>211</sup>

Truth commissions are expected to meet a high standard of accuracy, but commission proceedings have a more adaptable approach to evidence than criminal proceedings.<sup>212</sup> While the fact-finding of criminal trials is limited to particular criminal charges, truth commissions are expressly designed to create a complete record of past human rights violations for the affected population.<sup>213</sup> Truth commissions weigh forensic evidence, historical narrative, and witness testimony that may include perpetrators as well as victims.<sup>214</sup> Commissions evaluate these diverse sources of

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205. *Id.* at 29.

206. Hancock, *supra* note 169, at 208.

207. BAKINER, *supra* note 147, at 25.

208. John Roosa, *East Timor's Truth Commission: Introduction to Pacific Affairs Special Forum*, 80 PAC. AFF. 563, 563-64 (2007).

209. ALISON BISSET, TRUTH COMMISSIONS AND CRIMINAL COURTS 85 (2012).

210. BAKINER, *supra* note 147, at 26.

211. *Id.* at 65-66 (explaining that other truth commissions, including those in El Salvador and Chile, have failed to provide sufficient and accurate historical explanation).

212. *See id.* (explaining how truth commissions find the "truth" of human rights violations by combining forensic investigation and historical narrative).

213. BISSET, *supra* note 209, at 34.

214. BAKINER, *supra* note 147, at 65.

information with the objective of constructing a complete narrative of the human rights violations without the goal of criminal punishment.<sup>215</sup> Further, truth commissions have greater flexibility to consider moral and political implications of evidence. Not limited by the restrictions of criminal procedure, truth commissions have the flexibility to consider sociohistorical context and analyze social divisions in their search for a truthful record.<sup>216</sup>

Community-based justice is best suited to address intra-community trauma. As a community-based legal remedy, truth commissions are well suited to address the Troubles' legacy of intra-community violence. The societal damage caused by decades of British military oppression cannot be discounted, but members of Northern Irish communities have also traumatized one another. A truth commission could be developed in consultation with those communities<sup>217</sup> and, through public outreach, grant survivors a platform to testify about their experiences to the community.<sup>218</sup>

Some, like Northern Irish journalist Denis Murray, argue that too much time has passed since the ceasefire for a truth commission to be successful.<sup>219</sup> However, truth commissions are better suited to overcome this gap than judicial processes like criminal trials. Criminal proceedings such as the Joe McCann and Jean McConville murder trials have collapsed due to evidentiary limitations.<sup>220</sup> Furthermore, scholars have not identified timeliness as a key factor in the success of truth commissions. In fact, past truth commissions have investigated events as long as forty-five years after they had occurred.<sup>221</sup> Based on his study of every truth commission completed by 2014, Onur Bakiner argues that a key factor for the impact of truth commissions is whether they are created with participatory rather than exclusionary processes, thereby encouraging civil society mobilization.<sup>222</sup> Other researchers have confirmed that public accessibility and community involvement are key to truth commissions' legitimacy.<sup>223</sup>

## E. In Summary: Why Truth Commissions Are the Preferable Legal

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215. *Id.*

216. *See id.* at 66 (surveying the varied historiographical strategies of twenty-three truth commissions).

217. U. N. OFF. OF HIGH COMM'R, *supra* note 148, at 7.

218. *Id.* at 18–19.

219. Malcolm Brabant, *Northern Ireland Troubles Commission is Opening Old Wounds*, PBS NEWS WEEKEND (June 26, 2021), <https://www.pbs.org/newshour/show/northern-ireland-troubles-truth-commission-is-opening-old-wounds>.

220. *See supra* Section II.B.

221. BAKINER, *supra* note 147, at 25.

222. *Id.* at 149. (supporting this conclusion with the analysis of thirteen different truth commissions).

223. ANGELA D. NICHOLS, *IMPACT, LEGITIMACY, AND LIMITATIONS OF TRUTH COMMISSIONS* 27 (2019).

### Remedy for Northern Ireland

A truth commission could offer a more conclusive resolution to conflict over the truth of the Troubles after decades of frustrating piecemeal efforts. A comprehensive truth commission would prevent the cycle of rehashing Troubles-era trauma though numerous prosecutions and inquiries addressing only isolated incidents. The contentious “cycle of investigations” could end.<sup>224</sup>

Legal remedies to the Troubles should promote community-wide reconciliation, not exacerbate division. Criminal trials are inherently retributive and target specific actors for punishment. They resolve particular incidents but “do not connect the individual isolated cases into any larger scheme.”<sup>225</sup> Thus, criminal prosecution is an inadequate means of addressing the Troubles. Criminal trials can be perceived as a form of “victor’s justice” rather than a mechanism of reconciliation.<sup>226</sup> As demonstrated by recent examples such as the Joe McCann murder trial, prosecution of crimes related to the Troubles can be perceived as politically motivated witch hunts.<sup>227</sup> There are also evidentiary concerns posing barriers to effective prosecutions – Troubles-era crimes were committed decades ago and often were not appropriately investigated at the time. In contrast, truth commissions seek broad community involvement and do not prioritize retribution. A truth commission could provide a more complete narrative of the Troubles without the retaliatory public image of criminal prosecution.

Applications to the Strasbourg Court allow victims to avoid entrenched divisions in the governmental and judicial systems of the United Kingdom, but decades of applications have yielded limited benefits. The Strasbourg Court has dismissed many complaints about Troubles-era human rights violations.<sup>228</sup> Even when the Court has heard related cases and decided in favor of the Northern Irish people, there has been little observable impact on conditions in Northern Ireland.<sup>229</sup> Northern Ireland needs a legal remedy with greater community involvement to effectively address its trauma.

Finally, truth commissions are a form of public investigation with a much broader scope of investigation than public inquiries.<sup>230</sup> The United

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224. McElroy, *supra* note 149.

225. TERESA GODWIN PHELPS, SHATTERED VOICES: LANGUAGE, VIOLENCE, AND THE WORK OF TRUTH COMMISSIONS 63 (2004).

226. NICHOLS, *supra* note 223, at 16.

227. Coughlin, *supra* note 44.

228. *See supra* Sections III.A, III.B, III.C.

229. *See supra* Sections III.B, III.C.

230. Hegarty, *supra* note 43, at 1151.

Nations has noted that truth commissions can cost more than five to ten million U.S. dollars,<sup>231</sup> but the cost of the Saville Inquiry was equivalent to 280 million dollars.<sup>232</sup> In a three-decade conflict involving approximately 34,000 shootings and 14,000 bombings, a significant swath of Northern Ireland's population experienced some kind of traumatic event.<sup>233</sup> Conducting the number of public inquiries necessary to address these events would be a prohibitively expensive piecemeal approach. Public inquiries, which have been limited to specific incidents of violence, are too limited in scope to address decades of conflict, while truth commissions are more comprehensive.

## VI. CONCLUSION

Years after the official end of the Troubles, Northern Ireland is still evidently in need of public resolution of lingering trauma and ongoing community divisions. Competing memories of the Troubles— including who escalated the conflict in the 1970s, and the legitimacy of the IRA's actions — continue to be unresolved.<sup>234</sup> In the “war over memory,” reconciliation efforts have tended to occur within rather than between divided groups.<sup>235</sup> Criminal prosecution, applications to the Strasbourg Court, and public inquiries cannot provide the comprehensive, community-wide justice mechanism that Northern Ireland needs. Thus, truth commissions are the legal remedy best suited to address the collective trauma of the Troubles.

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231. U.N. OFF. OF HIGH COMM'R, *supra* note 148, at 6.

232. Cowell, *supra* note 101.

233. Brendan P. Bunting et al., *Trauma Associated with Civil Conflict and Posttraumatic Stress Disorder: Evidence from the Northern Ireland Study of Health and Stress*, 26 J. TRAUMATIC STRESS 134, 134 (2013).

234. DAWSON, *supra* note 106, at 84.

235. *Id.*