

Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland

Christopher K. Connolly

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Connolly, Christopher K. (2006) "Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland," *Cornell International Law Journal*: Vol. 39: Iss. 2, Article 6.

Available at: <http://scholarship.law.cornell.edu/cilj/vol39/iss2/6>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland

Christopher K. Connolly†

Introduction	401
I. Truth Commissions in Theory and Practice.....	403
II. The Troubles and the Truth	411
A. The Good Friday Agreement	414
B. The British State	415
C. The Paramilitaries.....	418
III. Recent Attempts at Official Truth-Seeking in Northern Ireland	420
A. “We Will Remember Them”: Report of the Northern Ireland Victims’ Commissioner	420
B. Article 2 Decisions by the European Court of Human Rights	422
C. The Bloody Sunday Inquiry	425
IV. Basic Proposals for a Northern Ireland Truth Commission	429
Conclusion	433

Introduction

It’s to hell with the future and live on the past:
May the Lord in His mercy be kind to Belfast.¹

In Belfast, Northern Ireland, the fear and uncertainty of the past are slowly giving way to a welcome sense of optimism. The city, once scarred by security checkpoints, military patrols, and the destruction of bombing campaigns, is awash in new development projects, and tourists are visiting

† J.D. / LL.M. in International and Comparative Law, candidate, Cornell Law School, expected 2006; B.A., University of Virginia, 2000. This note was selected for presentation at the *Yale Journal of International Law* Young Scholars Conference, New Haven, Connecticut, March 4, 2006. The author thanks Professor Brice Dickson of Queen’s University, Belfast for his insightful comments, and Ariel Gordon, Will Feldman, and Eliot Walker for their valuable editing.

1. Maurice James Craig, *Ballad to a Traditional Refrain*, reprinted in TONY PARKER, *MAY THE LORD IN HIS MERCY BE KIND TO BELFAST* (1994).

in increasing numbers.² The prospect of a return to the sustained violence of the past is increasingly remote. In July 2005, the Irish Republican Army (IRA) announced an end to its armed campaign,³ and in September it reportedly fulfilled its promise to “completely and permanently dismantle [] its weaponry.”⁴ Responding to these initiatives, the British Army has scaled back its presence throughout Northern Ireland, halving the number of troops in the province and tearing down the watchtowers that cast a grim shadow over many neighborhoods.⁵

Behind these outward signs of rejuvenation, however, lurks the legacy of Northern Ireland’s decades-long conflict, known locally as “the Troubles.” Just weeks before the IRA announced the destruction of its weapons, Belfast witnessed its worst rioting in years as pro-British Protestants unhappy with the current peace process attacked policemen and destroyed property.⁶ The riots served as a reality check “[t]o anyone who thought the ‘Peace Process’ was all done and dusted and that it is now just a matter of truth and reconciliation.”⁷ Northern Ireland remains a deeply divided society: divided by national and religious identities, by contentious views of history, and by differing aspirations for the future.

Northern Ireland is not the first society to grapple with the question of transitional justice—that is, the question of how to deal with the legacies of past conflict as part of a larger process of political transformation.⁸ The wave of democratization that occurred throughout the world during the 1980s and 1990s forced many states to confront similar issues. Some of these states established truth commissions as mechanisms through which to achieve transitional justice.⁹ Among these, the Truth and Reconciliation Commission (TRC) in South Africa is the most well-publicized and influential example.¹⁰ The perceived successes of the South African TRC, as well as of the truth commission model in general, have made truth commissions a popular option for finding the truth and promoting justice in a wide range of post-conflict societies. Recently, the U.S. government has consid-

2. See Mary Jordan, *Pursuing Peace, and Prosperity*, WASH. POST, Oct. 21, 2005, at A18.

3. See Brian Lavery & Alan Cowell, *I.R.A. Renounces Use of Violence; Vows to Disarm*, N.Y. TIMES, July 29, 2005, at A1.

4. See Brian Lavery, *Destruction of I.R.A.’s Arms is Confirmed by Monitors*, N.Y. TIMES, Sept. 27, 2005, at A4.

5. See Jordan, *supra* note 2.

6. See Brian Lavery, *Protestants Say Anger and Alienation are Fueling Riots in Belfast*, N.Y. TIMES, Sept. 15, 2005, at A3.

7. Chris Moffat, *Reconciliation Goes Back to School*, FORTNIGHT, Oct. 2005, at 4.

8. See generally RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000) (exploring how societies making a transition from conflict to peaceful democracy cope with the injustices of the past).

9. See generally PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* (2002) (providing a comprehensive overview of all twenty-one truth commissions that operated between 1974 and 2002).

10. The literature on the TRC is extraordinarily large. Two useful introductions are: ANTIJE KROG, *COUNTRY OF MY SKULL: GUILT, SORROW, AND THE LIMITS OF FORGIVENESS IN THE NEW SOUTH AFRICA* (1998) and MARTIN MEREDITH, *COMING TO TERMS: SOUTH AFRICA’S SEARCH FOR TRUTH* (1999). Other sources are cited throughout this note.

ered establishing a truth commission to investigate Saddam Hussein's regime in Iraq,¹¹ while Spanish judge Baltasar Garzon, well-known for bringing criminal charges against former Chilean dictator Augusto Pinochet, has called for a truth commission to document the abuses carried out by the Franco regime, which ruled Spain from 1939 to 1975.¹²

This note examines the prospects for applying the truth commission model in Northern Ireland. It argues that, although Northern Ireland faces significant and unique obstacles to any form of official truth-seeking, the implementation of a transitional justice mechanism that confronts the legacy of the Troubles is crucial for the future of the peace process, and would serve as an important example for other societies undergoing similar processes of conflict resolution. Part I examines the theory and practice of truth commissions. Part II describes the Troubles and identifies aspects of the conflict that highlight both the need for some process of truth-seeking in Northern Ireland as well as the difficulties such a process would face. Part III critiques three recent truth-seeking initiatives in Northern Ireland: the Report of the Northern Ireland Victims' Commissioner, a series of decisions by the European Court of Human Rights, and the Bloody Sunday Inquiry. Part IV sketches the basic shape of a future Northern Irish truth commission, keeping in mind both the benefits and limitations of the truth commission model, as well as the particular historical and political circumstances of Northern Ireland. In doing so, it provides a framework for considering the applicability of the truth commission model in other post-conflict societies. The note concludes by asserting that a process of official truth-seeking is necessary in order for Northern Ireland to come to terms with its difficult past and build a more peaceful future.

I. Truth Commissions in Theory and Practice

What is meant by the term "truth commission"? In her comprehensive study of such bodies, Priscilla B. Hayner identifies a set of basic characteristics shared by all truth commissions. First, truth commissions focus on the past. Second, they investigate a pattern of abuses occurring over time, rather than a single event. Third, truth commissions are temporary bodies that normally operate anywhere from six months to two years and complete their work with the submission of a report. Finally, truth commissions are officially sanctioned or empowered by the state.¹³

Truth commissions often share similar goals. One common goal is to establish the "truth" by conducting an official inquiry into the facts of the

11. See WORKING GROUP ON TRANSITIONAL JUSTICE IN IRAQ, *TRANSITIONAL JUSTICE IN POST-SADDAM IRAQ: THE ROAD TO RE-ESTABLISHING THE RULE OF LAW AND RESTORING CIVIL SOCIETY* 6-15 (2003), available at <http://purl.access.gpo.gov/GPO/LPS36686> [hereinafter *TRANSITIONAL JUSTICE IN IRAQ*].

12. Daniel Trotta, *Spain's Garzon Calls for 'Truth Commission' on Franco*, REUTERS, Feb. 27, 2005.

13. HAYNER, *supra* note 9, at 14.

conflict and establishing a record of past abuse.¹⁴ Based on this official inquiry, truth commissions are often expected to “pave the way for . . . justice . . . and . . . reparation”¹⁵—that is, to serve as a foundation for criminal prosecutions or other judicial proceedings, to recommend institutional reforms, or to provide a basis for financial compensation to victims.¹⁶ More broadly, truth commissions are charged with healing the wounds of past violence and preventing future conflict. This may be achieved through the “three C’s”: cleansing of individuals, community-building, and consolidation of political change.¹⁷ Individual victims are given the opportunity to tell their stories and obtain official acknowledgment of their suffering.¹⁸ At the societal level, “moral reconstruction” is achieved by tackling the difficult issues raised by past wrongs¹⁹—a process often viewed as facilitating reconciliation between previously antagonistic segments of the community.²⁰ Lastly, by dealing openly and effectively with the past, truth commissions are viewed as essential for reinforcing the process of political transition and laying the foundation of the new political order.²¹

The extent to which truth commissions can, should, or do fulfill any of these goals is a matter of intense debate.²² It is necessary to recognize that, within the basic framework presented by Hayner, truth commissions vary widely in terms of their structures, mandates, goals, and achievements.²³ This is particularly important to note in light of the tremendous impact of the South African TRC,²⁴ whose influence has been so great that its unique

14. See Rodolfo Mattarollo, *Truth Commissions*, in *POST-CONFLICT JUSTICE* 295, 298-99 (M. Cherif Bassiouni ed., 2002); see also HAYNER, *supra* note 9, at 24-27.

15. Mattarollo, *supra* note 14, at 302.

16. *Id.* at 302-05; HAYNER, *supra* note 9, at 28-30.

17. TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT 22-23 (Henry J. Steiner ed., 1997).

18. See HAYNER, *supra* note 9, at 28.

19. TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, *supra* note 17, at 16-17.

20. See HAYNER, *supra* note 9, at 30-31.

21. See TEITEL, *supra* note 8, at 69 (“[A] historical inquiry and record that assimilates the evil past is necessary to restore the collective in periods of radical political change.”); TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, *supra* note 17, at 20 (“This process [of unveiling the truth] can help reclaim a public space around which a fractured sense of political community can once again be reconstructed.”).

22. See generally TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, *supra* note 17 (presenting a discussion between leading scholars of truth commissions in which issues such as the purpose of these bodies, their institutional design, and the applicability of the truth commission model to a wide range of conflict situations are addressed).

23. For a description of the ways in which the truth commission model has functioned in different contexts, see HAYNER, *supra* note 9, at 32-71.

24. The TRC has influenced the debate over truth commissions and transitional justice in a number of countries. See, e.g., Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT’L L. 47 (2004); Brandon Hamber, *Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 FORDHAM INT’L L.J. 1074 (2003); Catherine Jenkins, *A Truth Commission for East Timor: Lessons from South Africa?*, 7 J. CONFLICT & SECURITY L. 233 (2002); Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 COLUM. J. TRANSNAT’L L. 89 (2001).

structures are often viewed as paradigmatic of the entire truth commission model.²⁵ It is therefore useful to make three important, though often overlooked, observations about the nature of truth commissions.

First, given that there is no universally applicable model of a truth commission, it follows that *each truth commission will reflect the unique political transition in which it is established*. In other words, truth commissions, like all mechanisms of transitional justice, are “alternately constituted by, and constitutive of, the transition.”²⁶ As a threshold matter, the decision to create a truth commission is profoundly influenced by the circumstances prevailing in the transitional society. In many instances, legal actors, such as the police and judiciary, are viewed as too weak or compromised to properly investigate, try, and convict or exonerate those accused of past crimes.²⁷ This was the case in Chile where key figures from the former military regime remained in positions of authority after the transition, effectively blocking the possibility of successful prosecutions and making a truth commission the more feasible option.²⁸ Furthermore, even where adequate prosecutions are at least technically possible—as was the case in South Africa—post-conflict societies might opt for the “soft law” approach offered by truth commissions in order to achieve broader transitional goals, such as the compilation of a thorough account of the conflict and the fostering of reconciliation between past enemies.²⁹

Once a truth commission has been established, its contours will continue to be defined by the nature of the past conflict and the imperatives of the political transition. In Chile, the critical role played by the former military regime in post-conflict society created a situation in which many past abuses were shielded from public scrutiny by a blanket amnesty provision,³⁰ and the National Commission on Truth and Reconciliation was prevented from publishing the names of perpetrators in its report.³¹ The truth commission created in Germany in 1992, following that country’s reunification, was also shaped by the particular nature of its transition. In order to account for the far-reaching, repressive tactics of the East German communist regime, the Commission of Inquiry for the Assessment of History and Consequences of the SED Dictatorship in Germany focused its atten-

25. See, e.g., TRANSITIONAL JUSTICE IN IRAQ, *supra* note 11, at 7 (linking the process of truth-seeking with the issue of amnesty and the goal of reconciliation, two central characteristics of the South African TRC, though not necessarily of the truth commission model in general).

26. TEITEL, *supra* note 8, at 6.

27. See Benjamin N. Schiff, *Do Truth Commissions Promote Accountability or Impunity? The Case of the South African Truth and Reconciliation Commission*, in POST-CONFLICT JUSTICE, *supra* note 14, at 325, 328.

28. See HAYNER, *supra* note 9, at 35–38.

29. See Schiff, *supra* note 27, at 328–29.

30. See HAYNER, *supra* note 9, at 97–98 (describing the amnesty program implemented by General Augusto Pinochet prior to his agreeing to relinquish control over the country).

31. See *id.* at 111–15. See generally REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Phillip E. Berryman trans., 2 vols. 1993) (detailing the findings of the Chilean commission).

tion on examining the massive files maintained by the East German government.³² In addition to allowing for extensive academic research into East Germany's authoritarian policies, this process opened up the files to scrutiny by former East German citizens³³ and formed the basis of a policy of lustration, whereby former functionaries of the East German regime were removed from public positions.³⁴

The South African TRC undoubtedly reflected the political realities of the transition from apartheid to non-racial democracy. Indeed, the establishment of a truth commission was a cornerstone of the entire transitional process.³⁵ Perhaps no aspect of the TRC was as influenced by South Africa's unique political considerations as its widely-discussed amnesty provisions, under which perpetrators of past abuses could receive immunity from both criminal and civil prosecutions provided they (1) submitted an application to the TRC fully disclosing their role in past crimes, and (2) demonstrated that these crimes were politically-motivated.³⁶ This amnesty program was viewed as an essential prerequisite in order for the white minority regime to relinquish power.³⁷ According to Richard J. Goldstone, Justice of the Constitutional Court of South Africa and judge for the International Criminal Tribunal for the Former Yugoslavia (ICTY), the TRC's amnesty program "was a political compromise more than a moral imperative. The political compromise was that there would be amnesties, but only in return for full confession, and that incentive-scheme is unique to the South African form of Truth Commission."³⁸

A discussion of the amnesty process in South Africa leads into a second critical observation on the nature of truth commissions: *conventional wisdom regarding the existence of a bright line between truth commissions (providing "truth" but little "justice") and criminal prosecutions (providing "justice" but little "truth") can be misleading.* Although there are certainly differences in both the degree and kind of "truth" and "justice" offered by these two mechanisms,³⁹ uncompromising proponents of the criminal

32. See HAYNER, *supra* note 9, at 61-62.

33. See *id.* at 62. Hayner notes:

Files of the East German Stasi, the omnipresent secret police, were made accessible for individual review. These files allowed those who had been victims of Stasi informers to discover who had been reporting on them and to confront those informers in person—either privately or, as was done on a number of occasions, in front of television cameras.

Id.

34. See *id.* at 13.

35. See Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.) (providing for the establishment of the TRC).

36. Promotion of National Unity and Reconciliation Act ss. 16-22. For the complete, official report on the amnesty process in South Africa, see 6 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (6 vols. 1998).

37. See MEREDITH, *supra* note 10, at 20-21.

38. Richard J. Goldstone, *Past Human Rights Violations: Truth Commissions and Amnesties or Prosecutions*, 51 N. IR. LEGAL Q. 164, 169 (2000).

39. See, e.g., Schiff, *supra* note 27, at 327-28, 332-40 (analyzing the basic differences between truth commissions and criminal prosecutions).

prosecution model⁴⁰ overlook the extent to which truth commissions can play a positive role in facilitating “justice.”

First, the findings of truth commissions can be used in the course of future criminal proceedings. This was the case with the world’s first significant truth commission report, which detailed the “disappearances” that occurred under the military junta that ruled Argentina between 1976 and 1983.⁴¹ Following its publication, prosecutors relied heavily on the evidence gathered in the report in order to bring charges against nine leading members of the military regime.⁴² The work of truth commissions played a similar role in attempts at prosecutions in Uganda and Haiti,⁴³ while in El Salvador the report of the United Nations-sponsored Commission on the Truth for El Salvador⁴⁴ arguably opened the door for the possibility of future prosecutions.⁴⁵ It should be noted that, to the extent that prosecutions in these countries were only marginally successful, this is not due to a failing of the truth commission model *per se*, but rather to larger deficiencies in the transitional process.⁴⁶ Even in South Africa, the TRC’s amnesty provision paradoxically facilitated prosecutions “[s]ince all parties to the South African conflict, including the security forces, agreed to a process that permits punishment of those who failed to apply or were denied amnesty”⁴⁷ Indeed, several high-ranking officials of the apartheid regime were brought to trial for their crimes.⁴⁸

Truth commissions can also advance non-prosecutorial forms of justice. In many instances, truth commission reports have recommended that reparations be paid to victims. Although disputes have inevitably arisen over the effectiveness and adequacy of such policies, reparations programs

40. See, e.g., Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537 (1991) (arguing that criminal prosecutions are the best method of establishing guilt or innocence, publicizing past criminality, and preventing future abuses).

41. The Argentine commission’s findings are detailed in *NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED* (1986).

42. See HAYNER, *supra* note 9, at 93-94.

43. See *id.* at 94-97.

44. FROM MADNESS TO HOPE: THE TWELVE YEAR WAR IN EL SALVADOR, REPORT OF THE UNITED NATIONS COMMISSION ON THE TRUTH FOR EL SALVADOR, U.N. DOC. S/25500 (1993).

45. See Paul Seils, *The Limits of Truth Commissions in the Search for Justice: An Analysis of the Truth Commissions of El Salvador and Guatemala and Their Effect in Achieving Post-Conflict Justice*, in *POST-CONFLICT JUSTICE*, *supra* note 14, at 775, 781-84.

46. See HAYNER, *supra* note 9, at 94-97 (explaining that the incompleteness of the political transitions limited the effectiveness of prosecutions in Uganda and Haiti); Seils, *supra* note 45, at 781-84 (identifying a broad amnesty provision passed by the Salvadoran government at the time of the truth commission’s report as the most significant obstacle to successful prosecutions).

47. See Paul van Zyl, *Unfinished Business: The Truth and Reconciliation Commission’s Contribution to Justice in Post-Apartheid South Africa*, in *POST-CONFLICT JUSTICE*, *supra* note 14, at 745, 755.

48. See MEREDITH, *supra* note 10, at 46-54 (recounting the trial and conviction of Eugene de Kock, infamous leader of a police death squad), 153-63 (describing charges against Dr. Wouter Basson, accused of developing a program of germ warfare to be used against Africans), and 355 (noting the trial and acquittal of Defense Minister Magnus Malan).

have been implemented in Argentina, Chile, South Africa, El Salvador, and Guatemala.⁴⁹ Additionally, truth commissions almost universally recommend institutional reforms in order to prevent future conflicts and human rights abuses: these have included recommendations to reform the judicial system, the armed forces, and the political system; uphold international human rights norms; prosecute certain offenders or remove them from positions of authority; and undertake further investigations into patterns of past abuse.⁵⁰ Lastly, at the most basic level, truth commissions allow victims to tell their stories publicly and receive official acknowledgment of their suffering, a process that carries benefits even where such acknowledgment is not reinforced through judicial proceedings.⁵¹

Conversely, it is worth noting that criminal prosecutions can play an important role in establishing truth. Even during periods of political transition, criminal justice mechanisms are the paradigmatic way in which a state determines what happened, who is to blame, and what should be done in order to compensate the victim.⁵² Records of trial proceedings can serve as useful repositories for the truth of painful events. For example, the records of the Nuremberg Tribunals and other prosecutions of Nazi war criminals have long served as sources of information regarding the Holocaust and other atrocities committed during World War II.⁵³ Even the ICTY and the International Criminal Tribunal for Rwanda (ICTR), despite their notable failings and deficiencies, have provided at least some degree of "truth" regarding the staggering violence associated with the genocides in Yugoslavia and Rwanda.⁵⁴

In any event, "truth" and "justice" are slippery terms that take on different meanings in different contexts. Regardless of the transitional justice mechanisms they choose to employ, all post-conflict societies must at some level face the question of whether they are seeking "individual" truth or justice, aimed at individual victims and perpetrators, or "overall" truth or

49. See HAYNER, *supra* note 9, at 328-31 (comparing the reparations programs in Argentina and Chile); Seils, *supra* note 45, at 784, 792-93 (highlighting the shortcomings of plans for reparations in El Salvador and Guatemala); van Zyl, *supra* note 47, at 755-58 (critiquing the reparations program in South Africa).

50. See HAYNER, *supra* note 9, at 320-27 (charting recommendations for institutional reform made by truth commissions in Argentina, Chad, Chile, El Salvador, Guatemala, South Africa, and Uganda).

51. See TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, *supra* note 17, at 23 (arguing that examination of individual cases of abuse can achieve a useful level of "public acknowledgement" of both victimization and guilt).

52. See TEITEL, *supra* note 8, at 30 ("Trials offer a way to express both public condemnation of past violence and the legitimation of the rule of law necessary to the consolidation of future democracy.").

53. *Id.* at 31-33 (discussing the significance of Nuremberg); see also HANNAH ADENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (rev. ed. 1964) (providing an account of Nazi war crimes through a firsthand report of Israel's trial of Nazi war criminal Adolf Eichmann).

54. See generally Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737 (1998) (arguing that the ICTY has contributed to the search for truth in the former Yugoslavia, and supporting the role of international criminal tribunals generally in the process of truth-seeking).

justice, aimed more broadly at society. Where truth is aimed at the individual level, truth commissions must exhaustively account for the suffering of all victims and the crimes of all perpetrators.⁵⁵ Similarly, criminal proceedings would require a comprehensive series of prosecutions relating to all offenses committed.⁵⁶ The reverse is true at the overall level: truth commissions can achieve societal truth by documenting and publicizing particular incidents notable for their “symbolic” representation of larger patterns of violence,⁵⁷ while criminal prosecutions can serve the interests of justice by punishing high-ranking perpetrators or those “small fish” whose crimes are particularly egregious.⁵⁸

In practice, post-conflict societies will aim, not for strict individual or overall truth and justice, but for a balance of the two—and this balance will inevitably involve trade-offs that leave some members of society unhappy. Thus, in South Africa, the families of three high-profile victims challenged the constitutionality of the TRC on the grounds that the process failed to produce truth and served to deny them justice by blocking the possibility of prosecution.⁵⁹ Additionally, at least one observer criticized the TRC for limiting the definition of “victims” to encompass only those who suffered serious bodily harm, thereby failing to account for those injured by apartheid’s unfair social and economic policies.⁶⁰ Meanwhile, in Rwanda, despite the best efforts of both the ICTR and Rwandan government to prosecute the many thousands of *genocidaires*, the sheer enormity of this task, and the time- and resource-consuming nature of individual prosecutions, have left many Rwandans feeling that justice has been far from done.⁶¹

55. See Hamber, *supra* note 24, at 1081–82 (arguing that the TRC in South Africa would have been more effective had it “emphasiz[ed] the imperative of finding the truth and doing as much justice as possible in every case”).

56. See generally Orentlicher, *supra* note 40 (arguing that states have a duty to pursue an aggressive prosecutorial response to past crimes).

57. See Mattarollo, *supra* note 14, at 305–06 (suggesting that symbolic documentation of certain cases is the best method of establishing “overall truth” in most contexts).

58. See Akhavan, *supra* note 54, at 774–82 (highlighting the ways in which the ICTY might establish “optimal truth” and justice in the former Yugoslavia by prosecuting certain cases).

59. *Azanian People’s Organization (AZAPO) v. President of the Republic of S. Afr.* 1996 (4) SA 671 (CC) (S. Afr.) (upholding the constitutionality of the TRC in the face of a challenge brought by victims’ families, including the family of murdered Black Consciousness Movement leader Steve Biko).

60. Mahmood Mamdani, *Reconciliation Without Justice*, 46 S. AFRICAN REV. BOOKS 3 (1996). *But cf.* van Zyl, *supra* note 47, at 748–50 (pointing out that the TRC did, in fact, devote an entire volume of its report to explaining how apartheid operated as a system, thereby expanding its definition of victimization to encompass those harmed by broader patterns of discrimination and inequality (citing 2 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (6 vols. 1998))). The legacy of apartheid-era inequalities is undoubtedly a critical issue in South Africa. *See, e.g., Government of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (criticizing the South African government for failing to live up to its promises of housing reform, and finding that the state has a positive obligation to uphold the socioeconomic rights of the least privileged members of society).

61. See William A. Schabas, *The Rwanda Case: Sometimes It’s Impossible*, in *POST-CONFLICT JUSTICE*, *supra* note 14, at 499, 500 (“Rwanda has found its principled attempt to prosecute all who were responsible for genocide to be quite unrealistic.”).

The impossibility of achieving universal satisfaction with the work of any one transitional justice mechanism highlights a third observation about truth commissions: *truth commissions cannot single-handedly achieve all the goals of transitional justice, including the oft-cited goal of reconciliation.* Reconciliation implies a lack of bitterness in political and other public relationships, a dialogue between former enemies based on the present rather than the past, and a single, unified version of past events.⁶² Despite having been an explicit goal of only three truth commissions (in Chile, South Africa, and Sierra Leone),⁶³ and despite being dismissed as impractical and unattainable in places like Argentina and Sri Lanka,⁶⁴ the concept of reconciliation factors into practically every discussion of the truth commission model.⁶⁵

Truth commissions, however, “are not magic wands.”⁶⁶ Instead, they form part of a larger process of transitional justice that includes other initiatives, such as compensation schemes, prosecutions, and institutional reforms. In other words, truth commissions should not be viewed as the ultimate means by which to achieve the goal of reconciliation, but rather as a means by which to establish a foundation of shared historical truths upon which the entire complex process of post-conflict transition may rest. One scholar’s observation that “[a] fifth-grade history textbook might be a truth commission for the next generation”⁶⁷ captures the subtle yet profound way in which the work of truth commissions might ultimately help the cause of reconciliation in deeply divided societies by providing a basic, common view of history. The publication of a truth commission report is not an invitation to close the book on the past. Instead, it is an opportunity to understand the past, learn from it, and turn the page in favor of a more peaceful future.

These three observations—that truth commissions are highly political bodies, that they are capable of delivering both truth and justice, and that they are a stepping-stone rather than an endpoint for the goal of reconciliation—provide instructive guidelines for examining the role that truth commissions might play in any post-conflict society. They are particularly relevant to a discussion of prospects for a truth commission in Northern Ireland.

62. HAYNER, *supra* note 9, at 161–63. *But cf.* Hamber, *supra* note 24, at 1079–87 (contending that, in South Africa, the concept of “reconciliation” was used as a cover for denying victims’ rights in order to maintain political compromises).

63. See HAYNER, *supra* note 9, at 154–60 (describing the centrality of reconciliation to the agendas of the South African and Chilean truth commissions); 1 WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION 24–25 (3 vols. 2004) (identifying the promotion of “healing and reconciliation” as one of the Sierra Leone commission’s primary objectives).

64. See HAYNER, *supra* note 9, at 160–61.

65. See, e.g., TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, *supra* note 17, at 13–38.

66. *Id.* at 30.

67. *Id.* at 78.

II. The Troubles and the Truth

Even in comparison to the troubled histories of other deeply divided societies, Northern Ireland's history is particularly long, complex, and violent.⁶⁸ The roots of the modern conflict can be traced to the 1920 Government of Ireland Act, by which Britain partitioned the island of Ireland into two political entities: the twenty-six-county Irish Free State (later the Republic of Ireland), which became independent in 1921, and the six-county province of Northern Ireland, which remained part of the United Kingdom.⁶⁹ Partition polarized Northern Ireland's two antagonistic communities: the Unionist (or Loyalist) majority, mostly Protestant and descended from seventeenth-century British settlers, which viewed itself as politically, culturally, and economically British, and wished to remain within the United Kingdom;⁷⁰ and the Nationalist (or Republican) minority, overwhelmingly Catholic and of indigenous Irish descent, which viewed itself as politically, culturally, and economically Irish, and therefore opposed partition and desired inclusion in a united, independent Ireland.⁷¹ From 1921 to 1972, Northern Ireland was ruled by a local, Unionist-dominated parliament, and discrimination against Catholics existed in areas such as voting, education, housing, and employment.⁷² Discrimination, coupled with the lingering issues of national identity and the legiti-

68. Knowledge of the full context of the conflict in Northern Ireland is useful for discussing the applicability of the truth commission model, but falls outside the scope of this note. Fortunately, there is a wealth of helpful books on the subject. Historical accounts include: JONATHAN BARDON, *A HISTORY OF ULSTER* (1992) (providing a detailed history of the Irish province of Ulster—two-thirds of which comprise Northern Ireland—from the Stone Age through the beginning of the peace process in the early 1990s); TIM PAT COOGAN, *THE TROUBLES: IRELAND'S ORDEAL 1966–1996 AND THE SEARCH FOR PEACE* (1996) (offering a comprehensive background to the Troubles and recounting events through the 1994 paramilitary ceasefires); and DAVID MCKITTRICK & DAVID McVEA, *MAKING SENSE OF THE TROUBLES* (2003) (covering the conflict from the creation of Northern Ireland in 1920 through the 1998 Good Friday Agreement and subsequent developments). The best firsthand account of the Northern Ireland conflict remains JOHN CONROY, *BELFAST DIARY: WAR AS A WAY OF LIFE* (2d ed. 1995), which records the impressions of an American journalist living in the working-class Catholic neighborhoods of west Belfast during the turbulent early 1980s. For political science examinations of the Troubles, see JOHN MCGARRY & BRENDAN O'LEARY, *EXPLAINING NORTHERN IRELAND* (1995), which critiques the predominant political, historical, economic, social, and religious explanations of the Troubles, and JONATHAN TONGE, *NORTHERN IRELAND: CONFLICT AND CHANGE* (2d ed. 2002), which presents a concise political overview of the Troubles, with specific emphasis on aspects of the Good Friday Agreement.

69. Government of Ireland Act, 1920, 13 Geo. 5 (Eng.).

70. For historical and political background on Northern Ireland's Protestant community, see GEOFFREY BELL, *THE PROTESTANTS OF ULSTER* (2d ed. 1978); STEVE BRUCE, *THE EDGE OF THE UNION: THE ULSTER LOYALIST POLITICAL VISION* (1994); PETER TAYLOR, *LOYALISTS: WAR AND PEACE IN NORTHERN IRELAND* (1999); and SUSAN MCKAY, *NORTHERN PROTESTANTS: AN UNSETTLED PEOPLE* (2d ed. 2005).

71. For historical and political background on Northern Ireland's Catholic community, see CONROY, *supra* note 68; PETER TAYLOR, *BEHIND THE MASK: THE IRA AND SINN FEIN* (1997); and MARIANNE ELLIOTT, *THE CATHOLICS OF ULSTER* (2001).

72. The most well-known and scathing critique of this period in Northern Ireland's history is MICHAEL FARRELL, *NORTHERN IRELAND: THE ORANGE STATE* (2d ed. 1980), which argues that the state of Northern Ireland was inherently anti-democratic and discriminatory against both the Catholic minority and the local working-class as a whole. *But cf.*

macy of the Northern Irish state, prompted a civil rights movement in the late 1960s, which in turn precipitated a Unionist backlash and the onset of the recent Troubles.⁷³

From the late 1960s through the 1990s, over 3,700 individuals died as the result of political violence in Northern Ireland—a figure that would translate into roughly 500,000 deaths had a conflict of similar scale occurred in the U.S.⁷⁴ Parties to this conflict included both non-state and state actors: the IRA and smaller armed Republican groups; Loyalist paramilitaries, most notably the Ulster Defense Association (UDA) and Ulster Volunteer Force (UVF); the Royal Ulster Constabulary (RUC), the province's largely Protestant police force; and the British Army and secret service. Attempts at political settlement, notably the 1973 Sunningdale Agreement and 1985 Anglo-Irish Agreement, failed to achieve peace and stability.⁷⁵

A breakthrough came in 1994, when both the IRA and Loyalist paramilitaries declared ceasefires.⁷⁶ The 1998 Good Friday Agreement, negotiated by the governments of the UK and the Republic of Ireland, as well as the majority of Northern Ireland's political parties, grew out of this cessation of hostilities. The Agreement attempts to establish a workable solution to the Troubles by means of a three-tiered system: (1) a Northern Ireland Assembly in which power is shared by Unionists and Nationalists; (2) a North-South Ministerial Council focusing on issues of common concern to Northern Ireland and the Republic of Ireland; and (3) a British-Irish Council to coordinate the Northern Ireland policies of the UK and the Republic.⁷⁷

The Good Friday Agreement has produced what may be characterized as a fragile and incomplete peace in Northern Ireland. When the Assembly has been operational, Unionist and Nationalist politicians have worked reasonably well together on non-contentious issues such as health, education, and finance.⁷⁸ On more divisive issues, however, there has been little cooperation, and as a result Northern Ireland's local government has been suspended since October 2002.⁷⁹ Among such divisive issues, "decommissioning"—the term used to describe the process by which

ELLIOTT, *supra* note 71, at 383-94 (contending that, although discrimination against Catholics existed, it was neither as institutionalized nor prevalent as often described).

73. See MCKITTRICK & McVEA, *supra* note 68, at 53-75 (explaining Northern Ireland's descent into violence during the late 1960s and early 1970s).

74. Christine Bell, *Dealing with the Past in Northern Ireland*, 26 FORDHAM INT'L L.J. 1095, 1097 & n.9 (2003) (citing JOHN MCGARRY & BRENDAN O'LEARY, *THE POLITICS OF ANTAGONISM: UNDERSTANDING NORTHERN IRELAND* 11-12 (2d ed. 1996)).

75. See MCKITTRICK & McVEA, *supra* note 68, at 98-117, 149-66 (discussing the failure of these two initiatives to end the Troubles).

76. See *id.* at 184-213.

77. Agreement Reached in the Multi-Party Negotiations, U.K.-Ir., Apr. 10, 1998, 37 I.L.M. 751 [hereinafter Good Friday Agreement].

78. Colm Campbell & Fionnuala Ní Aoláin, *Local Meets Global: Transitional Justice in Northern Ireland*, 26 FORDHAM INT'L L.J. 871, 886 (2003).

79. See *Timeline: Northern Ireland Assembly*, BBC NEWS, Dec. 8, 2004, http://newswww.bbc.net.uk/1/hi/northern_ireland/2952997.stm.

paramilitary groups are expected to disarm and ultimately disband—has been particularly problematic.⁸⁰ So too have issues relating to the reform of Northern Ireland's policing system⁸¹ and the "early release" of paramilitary prisoners.⁸² As a result of these and other difficulties, overall support for the Good Friday Agreement has declined. This is evidenced by a trend towards political polarization. In Northern Ireland's 2003 local elections, IRA-allied Sinn Fein and the anti-Agreement Democratic Unionist Party (DUP) won the largest numbers of Catholic and Protestant votes, respectively, raising fears that the entire peace process might collapse.⁸³ The May 2005 national elections produced similar results: the DUP and Sinn Fein won a combined fourteen of Northern Ireland's eighteen seats at Westminster, further damaging prospects for cooperation and power-sharing at the local level.⁸⁴

80. For a valuable overview of the highly complex problem of decommissioning, see Kieran McEvoy & John Morison, *Beyond the 'Constitutional Moment': Law, Transition, and Peacemaking in Northern Ireland*, 26 *FORDHAM INT'L L.J.* 961, 982 & n.72 (2003), and RICHARD ENGLISH, *ARMED STRUGGLE: THE HISTORY OF THE IRA* 325–36 (2003), which discusses the heated debate over the decommissioning of the IRA.

81. Throughout Northern Ireland's history, the RUC was viewed by Nationalists as a pro-Unionist, anti-Catholic force. See GRAHAM ELLISON & JIM SMYTH, *THE CROWNED HARP: POLICING NORTHERN IRELAND* 150–76 (2000). The Patten Commission was established in order to recommend policing reforms, and its findings resulted in the creation of the new Police Service of Northern Ireland (PSNI). See INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND, *A NEW BEGINNING: POLICING IN NORTHERN IRELAND* (1999), available at <http://www.belfast.org.uk/report/fullreport.pdf> [hereinafter PATTEN REPORT]. For critique of the reforms, see Linda Moore, *Policing and Change in Northern Ireland: The Centrality of Human Rights*, 22 *FORDHAM INT'L L.J.* 1577 (1999), which asserts that international principles of human rights must form the basis of police reform in Northern Ireland, and Mary O'Rawe, *Transitional Policing Arrangements in Northern Ireland: The Can't and the Won't of the Change Dialectic*, 26 *FORDHAM INT'L L.J.* 1015 (2003), which argues that the changes implemented as the result of the Patten Report fall short of what was required in light of past abuses, thereby hindering the peace process.

82. The Good Friday Agreement provided for the release of paramilitary prisoners belonging to those organizations that maintained "complete and unequivocal" ceasefires. Good Friday Agreement, *supra* note 77, § 10. This provision was one of the Agreement's most controversial aspects. See generally Kieran McEvoy, *The Prisoners, The Agreement, and the Political Character of the Northern Ireland Conflict*, 22 *FORDHAM INT'L L.J.* 1539 (1999) (contending that the early release provision was essential in order to ensure that the paramilitaries and their political allies consented to the Agreement); Daniel F. Mulvihill, Note, *The Legality of the Pardoning of Paramilitaries Under the Early Release Provisions of Northern Ireland's Good Friday Agreement*, 34 *CORNELL INT'L L.J.* 227 (2001) (arguing that the early release of paramilitary prisoners was both problematic under international law and imprudent given the fragile nature of Northern Ireland's peace process).

83. See, e.g., Gerry Moriarty, *Political Geography of the North is Being Changed as Never Before*, *IRISH TIMES*, Nov. 27, 2003, available at <http://www.ireland.com/focus/ni-election/comment/2711.htm> (predicting that, as a result of the 2003 election results, "[t]here is a great danger that politics will remain stalled for some time to come").

84. For comprehensive information on the 2005 elections, see *Election '05: Northern Ireland*, BELFAST TELEGRAPH, May 9, 2005, available at <http://www.belfasttelegraph.co.uk/html/election05/index.htm>. See also DUP Issues Warning at Westminster, BBC NEWS, May 11, 2005, http://news.bbc.co.uk/1/hi/northern_ireland/4535503.stm (quoting DUP leader Ian Paisley as saying that the election results spelled the end for the "so-called [Good Friday] agreement").

Why is the Good Friday Agreement at risk? One explanation is that thus far, the peace process has failed to address the legacies of conflict. Northern Ireland has yet to establish “truth” in the form of a broadly-acceptable narrative of the Troubles upon which peace and reconciliation may be built. Three aspects of Northern Ireland’s unique transition illuminate the need for some form of official truth-seeking as part of the peace process, at the same time as they demonstrate the significant obstacles such truth-seeking would face: the nature of the Good Friday Agreement itself; Northern Ireland’s complex relationship with the British state; and the role of non-state actors (i.e. the paramilitaries) in perpetrating past violence and disrupting the current peace.

A. The Good Friday Agreement

In a sense, the Good Friday Agreement “is aimed at ‘dealing with the past.’”⁸⁵ Each dimension of the Agreement’s three-tiered structure can be explained by reference to the basic political difference at the heart of the Troubles: the Unionist desire to remain within the UK and the Nationalist goal of integration with the Republic.⁸⁶ In theory, this is a sound response to the conflict. In practice, however, it allows both sides to perpetuate political antagonism. The Agreement “was sold to different people on very different terms. Republicans saw it as transitional to a united Ireland, unionist supporters as a barrier precisely *against* such a development.”⁸⁷ As a result, there is a lack of agreement on what the Agreement is all about, and little movement from the basic political stances that existed prior to 1998.

This is due to the failure of the Good Friday Agreement to explore fully the roots of the Troubles. Conspicuously absent from the Agreement is the establishment of a “‘past-specific mechanism’ addressed at accountability or truth-telling.”⁸⁸ Instead, the Agreement relies upon “the ad hoc ‘pragmatic’ confidence-building approach . . . rather than offering a more comprehensive approach to the past.”⁸⁹ In essence, the Good Friday Agreement provides political compromise in a structural sense, but leaves important questions unanswered. What was the conflict about—was it fueled by partition and the inherent inequalities of the Northern Irish state,⁹⁰ or by IRA terrorism?⁹¹ Who are the victims? In Northern Ireland, as in other divided societies such as the Middle East or the Balkans, each

85. Bell, *supra* note 74, at 1106.

86. *Id.*

87. ENGLISH, *supra* note 80, at 298-99.

88. Bell, *supra* note 74, at 1106.

89. *Id.*

90. This is the view taken by Republicans. See generally GERRY ADAMS, *FREE IRELAND: TOWARDS A LASTING PEACE* (2d ed. 1994). “The very existence of the conflict shows that the undemocratic political structures imposed on the Irish people by Britain in 1921, and maintained today, have failed and are a continuing source of division and instability.” *Id.* at 169.

91. See BRUCE, *supra* note 70, at 6-10 (presenting the oft-advanced Loyalist argument that their violence developed only in response to the IRA’s terror campaign).

community “considers itself a historical victim and is unwilling to acknowledge that its community has also oppressed or excluded others.”⁹² What actions were justified? For example, the IRA has admitted to carrying out many of its atrocities, but largely insists that these were justifiable responses to the violence and repression of British and Unionist rule.⁹³ These questions all help to identify the big question left unanswered by the Good Friday Agreement: how should the people of Northern Ireland deal with their past, learn from it, and move on?

B. The British State

The role of the British state in Northern Ireland adds a unique dimension to the transitional process. Unlike other post-conflict societies, Northern Ireland functions as a subordinate polity of an advanced Western state with a formal commitment to liberal democracy.⁹⁴ Britain both is and is not part of the transition: it maintains ultimate political control over Northern Ireland and plays a leading role in shaping the transitional process, yet its government, institutions, and citizens are largely unaffected by the changes that occur.

The impact of the British connection plays out in two important ways. The first relates to issues of justice and the role of criminal prosecutions. The rule of law never applied to Northern Ireland in the same way as it did to other parts of the UK. Britain turned a blind eye towards the discriminatory practices of Northern Ireland’s Unionist government between 1921 and 1969, and after the outbreak of the Troubles it implemented practices of prolonged internment and secret, non-jury “Diplock Courts” that were employed liberally, especially against the Catholic community.⁹⁵ These and other abusive tactics were justified by emergency legislation that applied specifically to Northern Ireland.⁹⁶ Methods of interrogation amounting to “inhuman or degrading treatment” were used against paramilitary suspects.⁹⁷ In the mid-1980s, the Stalker Investigation into

92. TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, *supra* note 17, at 32 (describing prevalent sentiments of communal victimization in the former Yugoslavia).

93. *See id.* at 74–75.

94. Campbell & Ní Aoláin, *supra* note 78, at 872.

95. *See generally* KEVIN BOYLE ET AL., LAW AND STATE: THE CASE OF NORTHERN IRELAND (1975) (describing the British government’s ambivalence towards Unionist discrimination, as well as its practices of arrest, internment, and prosecution during the early years of the Troubles).

96. *See* DERMOT P.J. WALSH, THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND (1983) (providing an overview of British legislative responses to the Troubles). *See also* GERARD HOGAN & CLIVE WALKER, POLITICAL VIOLENCE AND THE LAW IN IRELAND 27–174 (1989) (concentrating on emergency legislation introduced in Northern Ireland since 1972); and Laura K. Donohue, *Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom* (Belfer Center for Science and International Affairs, John F. Kennedy School of Government, Harvard University, Working Paper No. ESDP-2000-01, 2000) (identifying Northern Ireland’s extensive emergency legislation as the blueprint for recent, UK-wide anti-terrorism provisions).

97. *See Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25, 58–62, 79–81 (1978) (holding that the “five techniques” employed during interrogations in Northern Ireland—forcing detainees to remain in “stress positions” for long periods of time, putting bags on

the actions of the RUC and British Army allegedly uncovered the existence of a “shoot-to-kill” policy in regard to members of the IRA.⁹⁸

Yet despite its deficiencies (and unlike the judicial systems in many other post-conflict societies), Northern Ireland’s courts, and the British judicial system in general, “worked” throughout the Troubles in the sense that they produced convictions of criminal offenders—especially those involved in paramilitary violence.⁹⁹ While some of these convictions were undoubtedly false,¹⁰⁰ and while in many cases the methods used in obtaining conviction were questionable, it is undeniable that a good number of perpetrators were rightly prosecuted and convicted.¹⁰¹ These prosecutions, combined with the tendency of paramilitary groups to claim public responsibility for their violent acts, means that the threshold question of “who did what to whom?” has in many instances been answered in Northern Ireland.¹⁰² This, in turn, allows Britain to contend that the justice system was basically effective, and to shy away from directly confronting its failures.

The extent to which Britain will continue to seek prosecutions in Northern Ireland remains to be seen. The ability to try, convict, and punish offenders is one of the cornerstones of state sovereignty and authority, yet Britain’s current approach to the use of criminal prosecutions for violence committed during the Troubles appears somewhat contradictory. On the one hand, in January 2006, the Police Service of Northern Ireland (PSNI) established a Historical Enquiries Team (HET) charged with investigating a total of 3,268 deaths that took place between 1968 and the signing of the Good Friday Agreement in 1998.¹⁰³ According to Peter Hain, Britain’s Secretary of State for Northern Ireland, it is “quite possible” that per-

detainees heads, exposing detainees to continuous white noise, depriving detainees of sleep, and depriving detainees of food and drink—constituted “inhuman or degrading treatment” under Article 3 of the European Convention on Human Rights).

98. See ELLISON & SMYTH, *supra* note 81, at 116–33. Obstruction on the part of the British government and RUC ultimately prevented the investigation’s findings from being published. See generally JOHN STALKER, *THE STALKER AFFAIR* (1988) (providing a firsthand account of the investigation and subsequent cover-up).

99. See WALSH, *supra* note 96, at 79–106 (providing a thorough, albeit highly critical, examination of the court system in Northern Ireland during the early years of the Troubles).

100. The most widely-known failures of British justice in relation to Northern Ireland were the convictions of the “Guildford Four” and “Birmingham Six,” Irish men and women who were wrongfully convicted of bombing pubs in England in the 1970s. These convictions were overturned in 1989 and 1991, respectively—but not before those accused had served lengthy prison sentences. See ENGLISH, *supra* note 80, at 167–71.

101. According to official RUC statistics, 955 of the 2,788 murders committed between 1969 and 1998 resulted in someone being charged. Bell, *supra* note 74, at 1128.

102. See TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, *supra* note 17, at 68 (“The vast majority of deaths by paramilitaries in Northern Ireland have been acknowledged, and many of them have been investigated and have led to prosecutions in the courts.”).

103. See Press Release, Police Service of Northern Ireland, New Police Historical Enquiries Team (Jan. 20, 2006), available at http://www.psni.police.uk/index/media_centre/press_releases/pg_press_releases_2006/pr_2006_january/pr-police-historical-enquiries-team.htm (last visited Mar. 3, 2006).

petrators will face prison sentences as a result of the HET's work.¹⁰⁴ On the other hand, the now-discredited Northern Ireland (Offences) Bill¹⁰⁵ casts doubt on Britain's commitment to pursuing an aggressive prosecutorial response to past crimes. The Bill, designed to apply to "on-the-runs" (fugitive paramilitaries wanted in connection with violent crimes that occurred during the Troubles) as well as certain state actors involved in lethal force deaths, envisioned a process by which these offenders would face criminal convictions before a special tribunal, but would be freed on license without serving prison sentences.¹⁰⁶ The Bill was withdrawn in January 2006 amidst fierce criticism from all shades of Northern Irish political opinion that the plan amounted to an unwarranted amnesty for certain categories of offenders.¹⁰⁷

What role should criminal prosecutions play in Northern Ireland's transition? Future criminal trials need not be a detriment to the peace process insofar as they can make positive contributions to the need for truth and justice.¹⁰⁸ Nonetheless, it is also important to recognize that in Northern Ireland past perversions of justice have created hostility towards the judicial system. This is particularly apparent in the Nationalist community, where the experiences of arrest, internment, and prosecution are viewed as badges of honor rather than marks of shame.¹⁰⁹ Mistrust of the British legal system among certain segments of Northern Irish society undermines its effectiveness in aiding the transitional process.

The second way in which the British connection impacts the process of transition in Northern Ireland relates to incidents of violence for which British state actors are directly responsible. Officially, the British Army and security forces caused over 350 deaths in Northern Ireland—roughly ten percent of the total number of those killed during the Troubles.¹¹⁰ This figure includes incidents such as Bloody Sunday, in which it is widely believed that British paratroopers were responsible for the deaths of fourteen unarmed Catholic civil rights marchers.¹¹¹ Moreover, the British state has also been implicated in a number of other murders through collusion with Loyalist paramilitaries.¹¹² Rather than accept responsibility for these

104. *Murder Review Team to Begin Work*, BBC News, Jan. 23, 2006, http://news.bbc.co.uk/1/hi/northern_ireland/4636634.stm.

105. Northern Ireland (Offences) Bill, 2005, available at http://www.nio.gov.uk/northern_ireland_offences_bill.pdf (last visited Feb. 12, 2006) (withdrawn on January 10, 2006).

106. *Id.*

107. See *Government Scraps Fugitive Plans*, BBC News, Jan. 11, 2006, http://news.bbc.co.uk/1/hi/northern_ireland/4602314.stm.

108. See *supra* notes 52-54 and accompanying text.

109. See, e.g., CONROY, *supra* note 68, at 8-9 (describing the lack of stigma attached to arrest and incarceration in Nationalist communities).

110. See Bell, *supra* note 74, at 1127.

111. See *infra* Part III.C.

112. See ELLISON & SMYTH, *supra* note 81, at 134-49; see also *infra* Part III.B. See generally MARTIN DILLON, *THE DIRTY WAR* (1988) (detailing the often murky role played by the British intelligence services in perpetuating the Troubles); SEAN MCPHILEMY, *THE COMMITTEE: POLITICAL ASSASSINATION IN NORTHERN IRELAND* (1998) (alleging widespread

deaths, Britain has generally “concealed and distorted” the role of state actors in the conflict.¹¹³

Thus, for the goals of truth and justice to be achieved in Northern Ireland, the role of British state actors in perpetuating the conflict must be acknowledged. This is easier said than done. Britain has shown little inclination to allow its military and security personnel to face sanctions for offenses carried out in Northern Ireland.¹¹⁴ In many cases, the British state has ignored or actively covered up the role of state agents in past violence.¹¹⁵ Britain’s attitudes towards past state violence are predictable, and difficult to remedy, given that the transition in Northern Ireland does not go to the heart of the British state. Britain has little reason or incentive for exposing its institutions and individual actors to processes of accountability, and to the extent that groups in Northern Ireland desire such accountability, they do not enjoy the overall political leverage necessary to compel it.

C. The Paramilitaries

To an appreciable extent, notions of transitional justice assume state responsibility for the majority of past abuses.¹¹⁶ This was true in places such as Argentina, Chile, and South Africa. It was not the case in Northern Ireland, where non-state paramilitary organizations were responsible for the vast majority of deaths during the Troubles.¹¹⁷ As previously noted, the extent of paramilitary violence in Northern Ireland has been documented to some degree by means of public admissions and criminal prosecutions.¹¹⁸ Furthermore, as the early release provisions of the Good Friday Agreement¹¹⁹ and proposals for decommissioning¹²⁰ indicate, attention was paid to the paramilitary dimension of the conflict in constructing the framework for peace.

Nonetheless, important issues surrounding paramilitary violence remain unsolved. First, on the Loyalist side, there is the issue of collaboration with the British state in carrying out acts of violence.¹²¹ Second, for all paramilitary groups, but especially the IRA, the issue of justification

collaboration between Unionist politicians, Loyalist paramilitaries, and British state agents in the murder of Nationalists).

113. TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, *supra* note 17, at 70; *see also id.* at 68 (“The deaths which are denied are largely, if not solely, those which took place at the hands of government agents.”).

114. Between 1974 and 1994, thirty-four state agents were prosecuted for the use of force while on duty, leading to just eight convictions. FIONNUALA NÍ AOLAÍN, THE POLITICS OF FORCE: CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND 73 (2000).

115. *See infra* Parts III.B & III.C.

116. *See, e.g.*, TEITEL, *supra* note 8, at 27 (“In the public imagination, transitional justice is commonly linked with punishment and the trials of ancien régimes.”).

117. *See* Bell, *supra* note 74, at 1127.

118. *See supra* notes 99–102 and accompanying text.

119. *See supra* note 82 and accompanying text.

120. *See supra* note 80 and accompanying text.

121. *See supra* note 112 and accompanying text.

remains unresolved by the current peace process. Despite its cessation of hostilities and recent decommissioning of weapons, the IRA believes that its armed struggle was justifiable.¹²² Here, a comparison with the African National Congress (ANC) during the South African transition is useful. Like the IRA, the ANC believed that its past actions were justified; unlike the IRA, however, it found itself on the cusp of a legitimate political victory that confirmed this perception. As a result, the ANC was willing to undergo internal scrutiny in the form of two self-implemented truth commissions that investigated abuses among its activists.¹²³ These commissions were important in shaping the future TRC process.¹²⁴ In contrast, the Good Friday Agreement cannot necessarily be viewed as a victory for the IRA because it falls far short of the organization's long-held goal of a united Ireland. This has caused significant tension within the IRA between activists who support the Agreement and those who oppose it, and goes a long way towards explaining the difficulties that were faced in the process of decommissioning: IRA activists who believed their campaign was not complete were reluctant to hand over their weapons—an act viewed as tantamount to admitting defeat.¹²⁵

Third, paramilitary “punishment violence” presents unique problems for Northern Ireland's peace process. During the Troubles, in areas where paramilitary activity was strong, such organizations often became a law unto themselves, replacing state authorities as dispensers of “justice”:

The Northern Ireland conflict produced a brutal system of informal justice wherein both Republican and Loyalist paramilitaries assumed responsibility for the ‘policing’ of their areas through punishment beatings, shootings, and banishments. Thousands of individuals were shot in the knees, thighs, elbows or ankles, beaten with iron bars, baseball bats or hurling sticks, or forcibly excluded from their communities.¹²⁶

How should the peace process draw the line between politically-motivated violence and sheer criminality in relation to such incidents? One argument is that punishment violence represents an essentially criminal form of repression designed to maintain paramilitary hegemony within local communities.¹²⁷ Another argument, however, is that punishment violence was the inevitable result of the lack of legitimacy of the RUC and British Army

122. See *supra* notes 90, 93; see also ENGLISH, *supra* note 80, at 288 (noting that, in deciding to call its 1994 ceasefire and enter tentatively into the peace process, the IRA remained convinced that the conflict stemmed from “British policy and . . . unionist intransigence” rather than its own campaign of violence).

123. See HAYNER, *supra* note 9, at 60–61, 62–64 (describing the ANC's two internal truth commissions, and their influence on the work of the TRC).

124. See *id.* at 64 (noting that the success of its two internal truth commissions prompted the ANC to call for the creation of a truth commission for South Africa as a whole).

125. See ENGLISH, *supra* note 80, at 303–36 (examining the post-Agreement rift within the IRA and its impact on the process of decommissioning).

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

127. *Id.* See generally MALACHI O'DOHERTY, *THE TROUBLE WITH GUNS: REPUBLICAN STRATEGY AND THE PROVISIONAL IRA* (1998); Liam Kennedy, *Nightmares within Night-*

in certain (often Nationalist) areas—in other words, an outgrowth of Northern Ireland's political conflict.¹²⁸

Regardless of how punishment violence is viewed, the murder of Robert McCartney by members of the IRA in January 2005 demonstrates the extent to which paramilitary authority is often used to cover up or justify essentially criminal acts. Following a dispute in a bar, McCartney, who had no connection to either the IRA or its enemies, was dragged into the street and stabbed to death.¹²⁹ Witnesses to the murder were told by those responsible that the killing was an “internal I.R.A. matter,” and were threatened with vengeance if they cooperated with the police investigation.¹³⁰ Subsequently, McCartney's sisters embarked on a campaign to uncover the truth about their brother's murder, prompting similar calls for justice from the families of other victims.¹³¹ Faced with substantial public outrage, the IRA's initial response was to suggest an eye for an eye—it offered to shoot those responsible for the attack.¹³² Such a suggestion would be laughable did it not indicate the substantial capacity for extra-legal violence on the part of the paramilitary organizations that still hold sway in many parts of Northern Ireland.

III. Recent Attempts at Official Truth-Seeking in Northern Ireland

The history of the Troubles and the unique contours of the current peace process suggest that some form of official truth-seeking could help foster peace and stability in Northern Ireland, even as they make the process of truth-seeking notably difficult. It is important to recognize, however, that issues of truth, justice, and accountability have not been left entirely untouched by the transitional process. A discussion of recent efforts at official truth-seeking is essential for understanding how a truth commission might function in Northern Ireland.

A. “We Will Remember Them”: Report of the Northern Ireland Victims' Commissioner

In October 1997, the British Secretary of State for Northern Ireland appointed Sir Kenneth Bloomfield as Northern Ireland Victims' Commissioner, and charged him with looking “at possible ways to recognize the pain and suffering felt by victims of violence arising from the troubles of

mares: Paramilitary Repression in Working Class Communities, in *CRIME AND PUNISHMENT IN WEST BELFAST* (Liam Kennedy ed., 1995).

128. See McEvoy & Mika, *supra* note 126, at 536 (explaining that the lack of effective state authority in Nationalist areas created a need for paramilitary enforcement of societal norms, and that such enforcement was often popular among residents of the areas in which it occurred).

129. See Lizette Alvarez, *Killing in Belfast Puts I.R.A. on the Defensive*, N.Y. TIMES, Mar. 7, 2005, at A6.

130. *Id.*

131. Brian Lavery, *Families in Northern Ireland Break Silence About Killings*, N.Y. TIMES, Mar. 14, 2005, at A5.

132. See Alan Cowell, *I.R.A. Avowal on a Killing Ignites a Storm*, N.Y. TIMES, Mar. 9, 2005, at A8.

the last 30 years, including those who have died or been injured in the service of the community.”¹³³ Bloomfield released his report in April 1998, just weeks after the signing of the Good Friday Agreement.

In some respects, the Bloomfield Report represents a noble attempt to acknowledge and pay tribute to the innocent victims of the Troubles. The commission interviewed hundreds of victims and victims’ families,¹³⁴ and the report made at least a cursory attempt at quantifying the scale of injuries and wider effects of violence.¹³⁵ The Bloomfield Report offered a number of broad recommendations, including providing financial and medical assistance services to victims,¹³⁶ building a physical memorial,¹³⁷ and creating a new “Memorial and Reconciliation” holiday.¹³⁸

The report acknowledged the “firm view [of many victims] that all questions of memorialisation or compensation were secondary in their minds to the establishment of the full truth,”¹³⁹ and stated that many victims “argued strongly for the establishment of a Northern Ireland equivalent of the South African Truth and Reconciliation Commission.”¹⁴⁰ Nonetheless, the report did not explicitly recommend the establishment of a truth commission. Instead, it suggested that such a commission could only be created as part of an overall political settlement: “If any such device were to have a place in the life of Northern Ireland, it could only be in the context of a wide-ranging political accord.”¹⁴¹

The Bloomfield Report has been criticized as a failure of official truth-seeking insofar as it reinforces notions of a “hierarchy of victims”:

In terms of the issue of victims’ rights in Northern Ireland, it may be useful to note that there is, as in many countries, an ongoing battle over degrees of suffering. That is, many victims’ groups qualify their victimhood. It has become common for some groups to refer to themselves as “real” or “innocent” victims. Such qualifications indirectly imply, whether purposefully or not, that there must be “guilty” victims The phrase “hierarchy of victims” has become commonplace.¹⁴²

The Bloomfield Report devotes only two paragraphs in its sixty pages to victims killed by state actors,¹⁴³ and makes no recommendations as to how the gap in accountability for state-sponsored violence should be addressed. Conversely, in keeping with the Victims’ Commissioner’s mandate to recognize those who died “in the service of the community,”¹⁴⁴ the report

133. SIR KENNETH BLOOMFIELD, *WE WILL REMEMBER THEM: REPORT OF THE NORTHERN IRELAND VICTIMS’ COMMISSIONER 8 (1998)*, available at <http://www.nio.gov.uk/bloomfield.pdf> [hereinafter BLOOMFIELD REPORT].

134. *Id.* at 16–18.

135. *Id.* at 11–14.

136. *Id.* at 26–39.

137. *Id.* at 45–49.

138. *Id.* at 43–44.

139. *Id.* at 36.

140. *Id.* at 37.

141. *Id.* at 38.

142. Hamber, *supra* note 24, at 1090.

143. See BLOOMFIELD REPORT, *supra* note 133, at 36.

144. *Id.* at 8; see also *supra* note 133 and accompanying text.

explicitly affirms the “innocence” of policemen, soldiers, employees of the prison service, and other state agents who died in the conflict.¹⁴⁵ This categorization would undoubtedly be contested by many Nationalists and Republicans, who would view such state agents as no more (and quite possibly less) “innocent” than, for example, the three unarmed IRA activists shot dead by members of the British Army’s Special Air Service (SAS) in Gibraltar in 1988.¹⁴⁶ In other words, while acknowledging “the many ‘little people’ caught up in violence,”¹⁴⁷ the Bloomfield Report fails to adequately address the full spectrum of victimization resulting from the Troubles.

The British government’s appointment of Bertha McDougall as Interim Commissioner for Victims and Survivors of the Troubles in October 2005¹⁴⁸ has placed the debate over the “hierarchy of victims” back on Northern Ireland’s political agenda. McDougall is herself a victim of the Troubles: her husband, an RUC reservist, was killed by a Republican paramilitary splinter group, the Irish National Liberation Army (INLA), in 1981. Critics of the appointment contend that McDougall, like Bloomfield, will be predisposed to viewing certain victims of the Troubles, in particular state actors killed by paramilitaries, as more “innocent” than other victims, specifically members of paramilitary organizations killed by agents of the state.¹⁴⁹

B. Article 2 Decisions by the European Court of Human Rights

Article 2 of the European Convention on Human Rights establishes a “right to life”:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

145. BLOOMFIELD REPORT, *supra* note 133, at 30.

146. In 1988, three unarmed IRA activists who had intended to set off a car bomb during a changing-of-the-guard ceremony in Gibraltar were shot and killed by the SAS. Later, the European Court of Human Rights determined that this constituted an unlawful use of lethal force insofar as the three suspects could easily have been arrested rather than killed. *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) (1995).

147. BLOOMFIELD REPORT, *supra* note 133, at 30.

148. See Press Release, Northern Ireland Office, Peter Hain Announces Interim Commissioner for Victims (Oct. 24, 2005), <http://www.nio.gov.uk/media-detail.htm?newsID=12419>.

149. See Mark Devenport, *What Defines a Victim in NI?*, BBC NEWS, Oct. 26, 2005, http://news.bbc.co.uk/1/hi/northern_ireland/4375816.stm.

- c. in action lawfully taken for the purpose of quelling a riot or insurrection.¹⁵⁰

On May 4, 2001, the European Court of Human Rights (ECHR) decided four cases (known collectively as *Jordan et al.*) in which it held that the UK violated Article 2 by failing to carry out effective official investigations into fourteen deaths in Northern Ireland allegedly caused by the security forces.¹⁵¹ Subsequently, the ECHR handed down similar decisions in *McShane v. United Kingdom*¹⁵² and *Finucane v. United Kingdom*.¹⁵³ Taken together, these cases expand the ECHR's previous Article 2 jurisprudence by more clearly defining the procedural component of the right to life. According to the ECHR, in order to qualify as an effective official investigation, the state's response to lethal force deaths caused by state actors must be (1) prompt; (2) independent, meaning that the investigators must be institutionally and hierarchically separate from the state institution (e.g. the military or police) accused of causing the death; (3) effective, in the sense of producing evidence that can lead to prosecutions of responsible individuals where this is warranted; and (4) transparent, both to the public at large as well as to the family members of the victim.¹⁵⁴

Of the incidents prompting Article 2 cases before the ECHR, the murder of Patrick Finucane is perhaps the most widely-discussed and controversial. Finucane, a defense lawyer, was well-known in Northern Ireland for defending IRA suspects, and was a frequent target of death threats and other forms of intimidation.¹⁵⁵ In January 1989, several of Finucane's clients who had been held at Castlereagh interrogation center near Belfast reported that their interrogators had warned that Finucane would soon "meet his end."¹⁵⁶ On February 12, 1989, Finucane was murdered in front of his family in his Belfast home. The Ulster Freedom Fighters (UFF), a branch of the Loyalist UDA paramilitary group, claimed responsibility for the assassination.¹⁵⁷

150. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 2., Nov. 4, 1950, 213 U.N.T.S. 221.

151. *McKerr v. United Kingdom*, 2001-III Eur. Ct. H.R. 475. Relevant excerpts of the other three cases are available in the appendix to *McKerr*, 2001-III Eur. Ct. H.R. at 537, and are also available in full on the ECHR's website. European Court of Human Rights, <http://www.echr.coe.int/echr/> (last visited Apr. 7, 2006) (select "case-law" hyperlink; then follow "HUDOC" hyperlink; then enter applicant number of the following cases and click "Search"). *Jordan v. United Kingdom*, App. No. 24746/94, Judgment, Eur. Ct. H.R. (May 4, 2001); *Kelly et al. v. United Kingdom*, App. No. 30054/96, Judgment, Eur. Ct. H.R. (May 4, 2001); *Shanaghan v. United Kingdom*, App. No. 37715/97, Judgment, Eur. Ct. H.R. (May 4, 2001).

152. *McShane v. United Kingdom*, App. No. 43290/98, Judgment, Eur. Ct. H.R. (May 28, 2002), available at <http://www.echr.coe.int/echr/>.

153. *Finucane v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 1.

154. For a useful summary of the components of an effective official investigation as established in the *Jordan et al.* decisions, see Fionnuala Ní Aoláin, *Truth Telling, Accountability, and the Right to Life in Northern Ireland*, 5 EUR. HUM. RTS. L. REV. 571, 580-81 (2002).

155. *Finucane*, 2003-VIII Eur. Ct. H.R. at 8.

156. *Id.*

157. *Id.*

From the outset, the investigation into Finucane's death revealed the possibility that the RUC and British military intelligence either knew about, or were active participants in, the murder. A UDA member was found in possession of the gun used to kill Finucane, and during his subsequent interrogation he claimed to have acted as an RUC Special Branch informant for three years.¹⁵⁸ In 1990, a report by the Stevens Inquiry, established by the British government to investigate allegations of collusion between the security forces and Loyalist paramilitaries, led to the arrest of Brian Nelson.¹⁵⁹ Nelson, the UDA's chief intelligence officer and a primary planner of the Finucane assassination, worked as a double agent providing information to British military intelligence.¹⁶⁰ Nelson claimed that prior to Finucane's murder he had alerted his British handlers of the plot. Rather than attempt to protect Finucane, however, his superiors instead provided him with information on the lawyer which he then passed along to the UDA.¹⁶¹ Nonetheless, despite this significant evidence of state involvement in, or knowledge of, the plot to murder Finucane, the Department of Public Prosecutions (DPP) determined that there was insufficient evidence to warrant its involvement in the matter.¹⁶²

In keeping with the procedural right to life jurisprudence established in the *Jordan et al.* decisions, the ECHR did not make a determination as to whether or not state agents were actually responsible for Finucane's death. Instead, the Court found a violation of Article 2 based on the UK's failure to conduct an effective official investigation into the murder.¹⁶³ The Court also criticized the government for its failure to fully explore allegations of collusion, and to carry out the prosecution of suspects against whom it had uncovered evidence.¹⁶⁴

The ECHR's Article 2 decisions have prompted a limited response by the state. A British government inquiry under the leadership of John Stevens, the same senior British police officer who had chaired earlier investigations into allegations of collusion, recommended further investigation into Finucane's death.¹⁶⁵ The Stevens Inquiry stated that there was ample evidence of security force collusion in the murders of Finucane and others, and asserted that as a result of this collusion "innocent people were mur-

158. *Id.* at 9.

159. *Id.* at 11.

160. *Id.*

161. *Id.*

162. *Id.* at 12.

163. *Id.* at 27. The Court found:

The proceedings following the death of Patrick Finucane failed to provide a prompt and effective investigation into the allegations of collusion by security personnel. There has consequently been a failure to comply with the procedural obligation imposed by Article 2 of the Convention and there has been, in this respect, a violation of that provision.

Id.

164. *See id.* at 26-27.

165. SIR JOHN STEVENS, STEVENS ENQUIRY: OVERVIEW AND RECOMMENDATIONS (2003), available at http://news.bbc.co.uk/1/shared/spl/hi/northern_ireland/03/stevens_inquiry/pdf/stevens_inquiry.pdf.

dered or seriously injured.”¹⁶⁶ In terms of practical changes to the ways in which investigations into allegations of state violence are carried out, the British government has changed Northern Ireland’s rules of criminal procedure so as to allow the state to compel witnesses to provide information regarding state violence to coroner’s inquests.¹⁶⁷ The Police Ombudsman for Northern Ireland, established following the Good Friday Agreement, is charged with carrying out independent investigations into complaints against the PSNI.¹⁶⁸ Shortly before the *Finucane* decision was handed down, the Police Ombudsman released a report examining the relationship between the security forces and Northern Ireland’s legal community, and considering ways in which this relationship might be improved.¹⁶⁹

The ECHR’s findings of violations of Article 2 in relation to state violence in Northern Ireland have therefore prompted some truth-seeking responses by the British government. But how far will such responses actually go in establishing the truth and requiring accountability? Attempts to comply with Article 2 face the reluctance on the part of the British government to be held accountable for its actions in Northern Ireland. Recent reports from the Council of Europe express significant concern over the extent to which the UK’s reforms in Northern Ireland have satisfied the state’s obligations under Article 2 in light of the ECHR decisions.¹⁷⁰ Meanwhile, the murder of Patrick Finucane remains a point of contention between the British state, Nationalists, and Unionists, all of whom dispute the circumstances in which the killing took place and reject the Stevens Inquiry’s findings on various grounds.¹⁷¹

C. The Bloody Sunday Inquiry

On January 30, 1972, British paratroopers opened fire on a civil rights march in Derry, killing fourteen civilians in an incident that became

166. See *Stevens Statement: Key Extracts*, BBC NEWS, Apr. 17, 2003, http://news.bbc.co.uk/1/hi/northern_ireland/2956557.stm.

167. See MARK KELLY, NORTHERN IRELAND HUMAN RIGHTS COMMISSION, *THE RIGHT TO LIFE: A PRACTICAL GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 22* (2005), available at <http://www.nihrc.org/documents/pubs/rights/TheRighttoLife.pdf>.

168. Police Ombudsman for Northern Ireland, <http://www.policeombudsman.org> (last visited Feb. 11, 2006).

169. RESEARCH BRANCH, POLICE OMBUDSMAN FOR NORTHERN IRELAND, *A STUDY OF THE TREATMENT OF SOLICITORS AND BARRISTERS BY THE POLICE IN NORTHERN IRELAND* (2003), available at <http://www.policeombudsman.org/Publicationsuploads/solresearch.pdf>.

170. Council of Europe, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom*, ¶¶ 156-185 (June 8, 2005), available at <http://www.statewatch.org/news/2005/jun/coe-uk-report.pdf>; Council of Europe, Committee of Ministers, *Action of the Security Forces in Northern Ireland: Measures taken or envisaged to ensure compliance with the judgments of the European Court of Human Rights in the cases against the United Kingdom listed in Appendix III*, Interim Resolution ResDH(2005)20, 40 E.H.R.R. SE26 (Feb. 23, 2005).

171. Kevin Connolly, *Stevens Inquiry Exposes NI Divisions*, BBC NEWS, Apr. 17, 2003, http://news.bbc.co.uk/1/hi/northern_ireland/2957445.stm.

known as Bloody Sunday.¹⁷² Bloody Sunday remains the largest single instance of the killing of civilians by the security forces in Northern Ireland.¹⁷³ In many respects, it was and remains a watershed moment in the history of the Troubles. Bloody Sunday sparked a surge of Nationalist violence, and greatly increased recruitment for the IRA.¹⁷⁴ It alienated the British Army from the Nationalist community and severely damaged notions of the rule of law in Northern Ireland.¹⁷⁵ Bloody Sunday also played a major role in the British government's decision to prorogue Northern Ireland's Unionist-dominated local parliament and implement direct rule of the province from London in March 1972.¹⁷⁶

The Widgery Tribunal, convened in the wake of Bloody Sunday, only added to the anger and controversy surrounding the event. The tribunal absolved the paratroopers of any wrongdoing, and suggested that the demonstrators who were killed had posed a threat to safety and security.¹⁷⁷ From the outset, these findings were rejected by the Nationalist community, which viewed them as a whitewash by the British government and further proof of Britain's unwillingness to uphold the rule of law in Northern Ireland.¹⁷⁸ In the years following Bloody Sunday, further investigations into the day's events revealed overwhelming evidence that the fourteen dead marchers were innocent of all wrongdoing (at the most, some of them might have engaged in stone-throwing), and that the actions taken by the paratroopers in confronting the Derry civil rights march amounted to a massacre of innocent civilians.¹⁷⁹

On January 29, 1998, Prime Minister Tony Blair called for the establishment of a second Bloody Sunday Inquiry in order to reexamine the incident.¹⁸⁰ The Inquiry began its work in 1998 and is expected to release its report in 2006.¹⁸¹ To date, it is the largest and most expensive public inquiry in UK history.¹⁸²

172. For an overview of the events of Bloody Sunday, see Angela Hegarty, *The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland*, 26 *FORDHAM INT'L L.J.* 1148, 1162-65 (2003).

173. Bell, *supra* note 74, at 1103-04.

174. See ENGLISH, *supra* note 80, at 150-52.

175. Hegarty, *supra* note 172, at 1164-65.

176. See *id.* at 1165.

177. See *TRIBUNAL UNDER THE TRIBUNALS OF INQUIRY (EVIDENCE) ACT 1921, INQUIRY INTO THE EVENTS ON 30 JANUARY 1972 WHICH LED TO LOSS OF LIFE IN CONNECTION WITH THE PROCESSION IN LONDONDERRY ON THAT DAY, 1972*, H.L. 101, H.C. 220.

178. See Hegarty, *supra* note 172, at 1165-68.

179. See generally DON MULLAN, *BLOODY SUNDAY: MASSACRE IN NORTHERN IRELAND* (1997) (providing eyewitness accounts of the incident indicating that the actions of the British soldiers were not provoked by violence on the part of the victims).

180. See Tony Blair, Prime Minister, Statement to the House of Commons (Jan. 29, 1998), available at The Bloody Sunday Inquiry, <http://www.bloody-sunday-inquiry.org> (last visited Apr. 10, 2006).

181. See The Bloody Sunday Inquiry, Frequently Asked Questions, <http://www.bloody-sunday-inquiry.org/index2.asp?p=7> (last visited Apr. 10, 2006).

182. See *id.* For a discussion of the British public inquiry model, see Hegarty, *supra* note 172, at 1156-59.

Instead of examining the full breadth of violence during the Troubles, the Bloody Sunday Inquiry concentrates on a single defining event in Northern Ireland's history.¹⁸³ As such, it does not fall within the basic definition of a truth commission.¹⁸⁴ Nonetheless, the Inquiry has attempted to place Bloody Sunday within the larger political and social context of Northern Ireland during the early years of the Troubles. For example, in his opening statement to the Inquiry's tribunal, the British government's counsel went to great lengths in order to describe the tensions prevailing in Derry and elsewhere in Northern Ireland at the time Bloody Sunday occurred.¹⁸⁵ The Inquiry also received expert reports concerning the historical background to Bloody Sunday from two of Northern Ireland's leading academics.¹⁸⁶

The Bloody Sunday Inquiry is by no means, however, a perfect template for official truth-seeking in Northern Ireland. The British public inquiry model upon which the Bloody Sunday Inquiry is based is highly complicated, rooted in legal formalism, and often adversarial—leading one commentator to suggest that “those seeking a legal model for a truth commission in Northern Ireland [should] . . . look elsewhere.”¹⁸⁷ Moreover, although the Inquiry's final report must be released before its merits and drawbacks can be assessed properly, the Bloody Sunday Inquiry has been constrained by further attempts by the British state to prevent its security forces from being held accountable for their actions. Soldiers involved in Bloody Sunday received significant legal assistance during the Inquiry, and were granted the right to refuse to testify openly before the tribunal.¹⁸⁸ Consequently, in order to hear testimonies from military witnesses, the tribunal moved its proceedings from Derry to London. Soldiers and policemen were disguised or screened off during their testimony, and in the transcripts of the proceedings they are identified by letters (e.g. “Soldier X”) rather than by their names.¹⁸⁹ As a result, although the goal of the Inquiry is to establish the truth regarding Bloody Sunday, and although the Inquiry does not explicitly rule out the possibility of criminal prosecutions

183. Blair, *supra* note 180 (stating that the Inquiry is only charged with looking into “the events of Sunday, 30th January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day”).

184. See *supra* note 13 and accompanying text.

185. Hearing Transcripts, Mar. 27, 2000, Bloody Sunday Inquiry, available at The Bloody Sunday Inquiry, *supra* note 180 (follow “Hearing Transcripts” hyperlink; follow “Transcript Library” hyperlink).

186. PAUL ARTHUR, EXPERT REPORT E6: HISTORICAL BACKGROUND TO BLOODY SUNDAY (2000), available at <http://www.bloody-sunday-inquiry.org/reports/ereports/Archive/Arthur.pdf>; PAUL BEW, EXPERT REPORT E7: HISTORICAL BACKGROUND TO BLOODY SUNDAY (2000), available at <http://www.bloody-sunday-inquiry.org/reports/ereports/Archive/Bew.pdf>.

187. Hegarty, *supra* note 172, at 1173.

188. Lord Saville of Newdigate v. Widgery Soldiers, [2001] EWCA (Civ) 2048 [57].

189. See The Bloody Sunday Inquiry, *supra* note 180 (follow “Hearing Transcripts” hyperlink).

resulting from its proceedings,¹⁹⁰ it appears that whatever “truth” emerges from the Inquiry’s report will be only partial, and that “justice” in the form of criminal sanctions against those responsible for the fourteen deaths will be difficult, if not impossible, to achieve.

In addition to the Bloody Sunday Inquiry, three additional public inquiries into allegations of state violence have recently been convened in Northern Ireland. The Hamill, Nelson, and Wright inquiries, all of which deal with the issue of collusion between paramilitary organizations and agents of the state,¹⁹¹ were created in response to reports by Canadian judge Peter Cory, who found that sufficient evidence of collusion existed in these cases to warrant further investigations.¹⁹² Like the Bloody Sunday Inquiry, these three inquiries focus on highly significant and emotive events. As such, they are at least theoretically well-positioned to provide meaningful insight into the past, to uncover patterns of collusion between the state and paramilitary groups, and to allow for the perpetrators of violence to be held accountable for their actions. In practice, however, the inquiries are likely to be limited in their effectiveness by the new Inquiries Act, 2005.¹⁹³ Critics of the Act argue that it undermines the effectiveness of public inquiries by allowing the British government to set their terms of reference and limit public access to inquiry findings—even by going so far as to prohibit the publication of certain information on the basis of “public interest.”¹⁹⁴ The Wright Inquiry was converted to the Inquiries Act in November 2005,¹⁹⁵ arguably to be used as a test run by the British government in order to strengthen its case for applying the Act in future inquir-

190. See *The Bloody Sunday Inquiry, Frequently Asked Questions*, <http://www.bloody-sunday-inquiry.org/index2.asp?p=7> (last visited Apr. 10, 2006).

191. Robert Hamill, a Catholic youth, was beaten to death by a Loyalist gang in 1997, allegedly within sight of an RUC patrol that failed to intervene. See *Robert Hamill Inquiry*, <http://www.roberthamillinquiry.org> (last visited Feb. 13, 2006). Rosemary Nelson, a human rights lawyer, was killed when a bomb attached to her car exploded in 1999. Prior to the murder she had been the recipient of threats and abuse from RUC officers. See *Rosemary Nelson Inquiry*, <http://www.rosemarynelsoninquiry.org> (last visited Feb. 13, 2006). Billy Wright, jailed leader of the Loyalist Volunteer Force (LVF) paramilitary organization, was murdered by Republican fellow-prisoners under suspicious circumstances in 1997. See *Billy Wright Inquiry*, <http://www.billywrightinquiry.org> (last visited Feb. 13, 2006).

192. CORY COLLUSION INQUIRY REPORT: ROBERT HAMILL (2004), available at [http://www.nio.gov.uk/cory_collusion_inquiry_report_\(without_appendices\)_robert_hamill.pdf](http://www.nio.gov.uk/cory_collusion_inquiry_report_(without_appendices)_robert_hamill.pdf); CORY COLLUSION INQUIRY REPORT: ROSEMARY NELSON (2004), available at [http://www.nio.gov.uk/cory_collusion_inquiry_report_\(without_appendices\)_rosemary_nelson.pdf](http://www.nio.gov.uk/cory_collusion_inquiry_report_(without_appendices)_rosemary_nelson.pdf); CORY COLLUSION INQUIRY REPORT: BILLY WRIGHT (2004), available at [http://www.nio.gov.uk/cory_collusion_inquiry_report_\(without_appendices\)_billy_wright.pdf](http://www.nio.gov.uk/cory_collusion_inquiry_report_(without_appendices)_billy_wright.pdf).

193. Inquiries Act, 2005, c. 12 (Eng.), available at <http://www.opsi.gov.uk/acts/acts2005/20050012.htm>.

194. See Northern Ireland Human Rights Commission, *The Inquiries Bill: A Briefing from the Northern Ireland Human Rights Commission* (Jan. 2005), <http://www.nihrc.org/documents/landp/147.doc>; British-Irish Rights Watch, *The Inquiries Bill: An End to Public Inquiries* (Nov. 29, 2004), <http://www.birw.org/Public%20Inquiries.html>.

195. See Jane Winter, British-Irish Rights Watch, *Director’s Report: November 2005*, (Nov. 30, 2005), <http://www.birw.org/report%202005/Nov%2005.html> (noting that

ies—particularly any inquiry established to deal with the murder of Patrick Finucane. Judge Cory recommended further investigation into Finucane's murder in his 2004 reports,¹⁹⁶ but concerns over the fairness and effectiveness of the Inquiries Act have led Finucane's family to refuse to cooperate in the establishment of an inquiry into the solicitor's death.¹⁹⁷

IV. Basic Proposals for a Northern Ireland Truth Commission

In all deeply divided societies, the process of transitional justice both shapes, and is shaped by, the contours of the political settlement.¹⁹⁸ A discussion of Northern Ireland's violent past and its current fragile peace demonstrates that it is a society that could benefit from some form of official truth-seeking. Nonetheless, given the complexities of the Northern Ireland situation, such truth-seeking faces significant obstacles. Does Northern Ireland require a more stable political settlement before it can seek truth, or does it need the common ground which the truth might provide before it can truly achieve a just and lasting peace?

This note contends that a process of official truth-seeking would benefit Northern Ireland's peace process. Specifically, the truth commission model provides a blueprint from which a truth-seeking process suitable to meet the needs of Northern Ireland might be built. In order to understand what a Northern Ireland truth commission might look like, it is therefore necessary to return to the general observations this note has made regarding truth commissions.¹⁹⁹

First, as is the case with truth commissions in other post-conflict societies,²⁰⁰ *a Northern Ireland truth commission must reflect the complex political reality in which it operates.* The May 2005 elections demonstrate the extent to which political opinion in Northern Ireland remains bitterly divided.²⁰¹ In order for a truth commission to succeed, the province's major political parties must support the process. So, too, must the myriad community groups and human rights organizations that have involved themselves in victims' rights and other issues in the wake of the Good Friday Agreement.²⁰²

As the actors responsible for the majority of the violence during the Troubles, paramilitary organizations must also cooperate in the establishment of a truth commission—or else be so marginalized by their political

the Wright Inquiry was converted despite the opposition of Billy Wright's family, their lawyers, and concerned non-governmental organizations).

196. CORY COLLUSION INQUIRY REPORT: PATRICK FINUCANE (2004), available at [http://www.nio.gov.uk/cory_collusion_inquiry_report_\(with_appendices\)_pat_finucane.pdf](http://www.nio.gov.uk/cory_collusion_inquiry_report_(with_appendices)_pat_finucane.pdf).

197. See Chris Thornton, *Finucane Family Locked in Wrangle*, BELFAST TELEGRAPH, Oct. 26, 2005, at 1.

198. See *supra* note 25 and accompanying text.

199. See *supra* Part I.

200. See *supra* notes 26-38 and accompanying text.

201. See *supra* note 84 and accompanying text.

202. See Bell, *supra* note 74, at 1126-30, 1136-38 (describing the role of victims' rights groups, non-governmental organizations, and community-based initiatives in aiding the truth-seeking process).

allies that they effectively become ostracized from Northern Ireland's political dialogue. Paramilitary consent might be difficult to obtain; nonetheless, it is impossible to envision a successful truth commission operating in a society where the threat of organized violence continues to impede political discussion. The IRA's decision to end its campaign of armed violence and put its weapons beyond use is a step in the right direction; Loyalist paramilitary groups must now follow suit.²⁰³ By cooperating in a truth commission process, paramilitaries would be able to engage in debates with the rest of society regarding the justifiability or unlawfulness of their past actions.

The governments of the United Kingdom and Republic of Ireland must also support the implementation of a truth commission. Britain, in particular, must be wholeheartedly committed to the process. This note has shown the extent to which the British government has avoided accepting responsibility for acts of state violence.²⁰⁴ A Northern Ireland truth commission would prove a hollow endeavor insofar as it is incapable of dealing with the significant number of incidents in which British state actors contributed to the violence of the Troubles. Britain must be willing to take responsibility for its failures in Northern Ireland, and must allow its individual actors to be held accountable for their crimes. A crucial aspect of this requirement is for Britain to fulfill its obligations under Article 2 of the European Convention on Human Rights, as outlined by the recent ECHR decisions.²⁰⁵

Any method of truth-seeking that falls solely under the auspices of the British state, however, is likely to be regarded with suspicion by large segments of Northern Irish society owing to the failures of the British system during the Troubles.²⁰⁶ For this reason, while a viable truth commission must operate with explicit governmental consent, it must also operate independent of direct governmental oversight. An international dimension would help provide a Northern Ireland truth commission with legitimacy. The current peace process provides precedent for such a dimension: the Good Friday Agreement itself was brokered with significant international assistance, most notably from former U.S. Senator George Mitchell.²⁰⁷ Similarly, the committee charged with overseeing the decommissioning of Northern Ireland's paramilitaries is composed of international observers,²⁰⁸ and the Bloody Sunday Inquiry's tribunal contains judges from

203. There is evidence that Loyalist groups are moving in this direction. See Henry McDonald, *UVF Says the War is over at Last*, THE GUARDIAN (UK), Feb. 12, 2006, available at <http://observer.guardian.co.uk/politics/story/0,,1708038,00.html> (reporting that the UVF has announced plans to disband, though not to surrender its arsenal of weapons).

204. See *supra* Parts II.B, III.B, & III.C.

205. See *supra* Part III.B.

206. See *supra* notes 94-109 and accompanying text.

207. See generally GEORGE J. MITCHELL, *MAKING PEACE* (1999) (providing a firsthand account of the former Senator's role—and the role of the U.S. government in general—in the negotiations leading up to the Good Friday Agreement).

208. See McEvoy & Morison, *supra* note 80, at 983 & n.72.

Canada and Australia.²⁰⁹

Obtaining the necessary political consent for a Northern Ireland truth commission will undoubtedly be a daunting process, especially insofar as the truth-seeking process is conceptualized as a monolithic enterprise. A Northern Ireland truth commission should build slowly through smaller, confidence-building initiatives. Despite their flaws, both the Bloomfield Report and the Bloody Sunday Inquiry hint at how such consensus-building might work. Like the Bloomfield Report, a Northern Ireland truth commission should highlight the suffering of all victims while avoiding the “hierarchy” that undermines the Victims’ Commissioner’s work.²¹⁰ Its goal in this regard should be to spark cross-community sympathy and to break down the victims’ mentality that traps both Unionists and Nationalists by emphasizing their own suffering while failing to recognize the suffering of the other side.²¹¹

Furthermore, like the Bloody Sunday Inquiry, a Northern Ireland truth commission might initially take the approach of investigating a series of critical events, rather than tackling complex macro-issues surrounding the Troubles.²¹² Such a process, if pursued impartially and thoroughly, could flesh out key aspects of the conflict. Instead of being guided by the most salient issues left unresolved by the Good Friday Agreement,²¹³ and allowing those issues to direct its examination of the Troubles in their entirety, a Northern Ireland truth commission would prove most effective if it deals with critical events first, and slowly builds to the point where an overall picture of the conflict emerges. In other words, a truth commission should follow a bottom-up, rather than top-down, approach. The use of the public inquiry model is therefore a step in the right direction, but only insofar as these inquiries are not restricted in their work by the Inquiries Act.

Second, recognizing that “truth” and “justice” are inseparable concepts in the process of transition,²¹⁴ *a Northern Ireland truth commission must not sacrifice justice in its pursuit of truth.* Owing to the continued role of the British state in Northern Ireland,²¹⁵ as well as the often criminal nature of paramilitary violence,²¹⁶ prosecutions can and should play a role in Northern Ireland’s transitional process. Where evidence of responsibility for past violence exists, perpetrators should face prosecution. Nonetheless, the decision whether or not to prosecute in a particular situation should be influenced by the needs of society as a whole. Northern Ireland must walk a fine line between perpetuating past divisions through the unbridled pursuit of retribution, and perpetuating those same divisions by turning a

209. Bloody Sunday Inquiry, *supra* note 180, Frequently Asked Questions (follow “Questions & Answers” hyperlink).

210. *See supra* Part III.A.

211. *See supra* note 92 and accompanying text.

212. *See supra* Part III.C.

213. *See supra* notes 90–93 and accompanying text.

214. *See supra* notes 39–61 and accompanying text.

215. *See supra* notes 94–115 and accompanying text.

216. *See supra* notes 126–132 and accompanying text.

blind eye towards the need for justice. As in other post-conflict societies, walking that fine line in Northern Ireland will undoubtedly create discontent amongst some segments of society.²¹⁷ The goal of criminal prosecutions should be to minimize that discontent while maximizing overall societal good.

Britain must cooperate in the search for justice by accepting accountability for acts of state violence. The ECHR's Article 2 decisions place a procedural obligation on the UK to conduct effective official investigations into incidents where state actors are allegedly responsible for the unlawful use of deadly force.²¹⁸ Additionally, the UK must seek continued reform of Northern Ireland's policing and judicial systems in order to ensure that both sides of the community view these systems as fair.

Justice—both for individual victims and society as a whole—implies more than just the conviction of wrongdoers. To that end, reparations programs and other methods of assistance for victims of the Troubles, as recommended by the Bloomfield Report, should play an integral role in the transitional process.²¹⁹ Already, the British government and Northern Irish political bodies have established reparations schemes for the families of both civilian victims and members of the security forces.²²⁰

Lastly, and perhaps to a greater degree than in other post-conflict societies,²²¹ *the primary goal of a Northern Ireland truth commission should be achieving reconciliation.* Reconciliation is likely to be a slow, arduous process in Northern Ireland, yet it is necessary given the nature of the conflict. The Troubles were not a conflict between a repressive, authoritarian regime and its citizens, as was often the case in Latin America and Eastern Europe. Nor were they a conflict between an obviously unjust minority government and an oppressed majority, as was the case in apartheid South Africa. Rather, the Northern Ireland conflict is between two deeply polarized communities, divided by national identity, whose political, cultural, and economic aspirations are equally valid.²²² Until the gaps between these two communities are bridged, Northern Ireland will never experience lasting peace.

The Good Friday Agreement is at risk because Northern Ireland's Unionist and Nationalist communities largely refuse to work together.²²³ This political impasse can only be overcome by breaking down the politics of antagonism through greater cross-community cooperation and understanding, and by forging a communal narrative of the Troubles that addresses the reasons for the conflict, as well as its individual and societal costs. The establishment of an official truth-seeking mechanism would

217. See *supra* notes 59-61 and accompanying text.

218. See *supra* Part III.B.

219. See *supra* note 136 and accompanying text.

220. See Bell, *supra* note 74, at 1108-11, 1118-19.

221. See *supra* notes 62-67 and accompanying text.

222. For a useful description of the extent to which the two communities in Northern Ireland are divided by residential segregation, education, employment, and political affiliation, see KEVIN BOYLE & TOM HADDEN, NORTHERN IRELAND: THE CHOICE 21-66 (1994).

223. See *supra* Part II.A.

assist in this process. A truth commission will not solve all of Northern Ireland's problems overnight, any more so than similar bodies in other post-conflict societies have served as a panacea for the lingering effects of past violence.²²⁴ Nonetheless, a Northern Ireland truth commission can provide a foundation for future peace by creating an atmosphere in which political initiatives such as those contained in the Good Friday Agreement are more likely to succeed.

Conclusion

Sadly, "it's to hell with the future and live on the past" sums up much of Northern Ireland's history, and also sheds light on its current predicament. Here, the idea of "living on the past" has two meanings. At the societal level, the past lives on—in fact, it is never really the "past" because it is never really set aside. The past dictates the course of Northern Ireland's present and future. At the individual level, many people in Northern Ireland "live on the past" because the past plays a significant role in shaping their daily lives and their worldviews. As a result, the past perpetuates the deep societal divisions that are the cause of Northern Ireland's violence.

A truth commission in Northern Ireland offers the hope of changing the meaning of "living on the past." It ensures that the past is acknowledged and understood—in Northern Ireland, the past is far too important to be completely forgotten. Yet instead of allowing the past to remain the dominant force in Northern Ireland's present and future, a truth commission would enable Northern Ireland to live on the past by building on it—that is, by using the lessons of the past as the foundation for a more peaceful future. In this conception of "living on the past," the emphasis is less on the past, and more on the living.

224. See *supra* note 66 and accompanying text.

