

**NEW YORK  
CITY BAR**

**IN NORTHERN IRELAND, THE PAST IS STILL PRESENT:**

**A FOLLOW-UP REPORT ON CRIMINAL JUSTICE TO  
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
FROM A DELEGATION OF THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS**

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## I. INTRODUCTION

### A. OVERVIEW

The Association of the Bar of the City of New York (the “Association” or “City Bar”) has been monitoring developments in human rights and the administration of justice in Northern Ireland for over twenty-five years, principally through its International Human Rights Committee (“Committee”). As part of this work, the Committee sent delegations to Northern Ireland in 1987, 1998, and 2003 to examine adherence to international human rights standards, reforms in the criminal justice system, use of emergency laws, and implementation of laws reforming the administration of justice.<sup>1</sup> The Committee has paid particular attention to failures to investigate adequately individual deaths and injuries during the Northern Ireland conflict (or “the Troubles”),<sup>2</sup> in particular the murders of two lawyers, Patrick Finucane and Rosemary Nelson.<sup>3</sup> The Committee works on human rights issues across the globe and also considers human rights and civil rights concerns within the United States with the view that human rights and justice concerns should be examined wherever they exist. It is in this spirit that the Committee has embarked on its work in Northern Ireland.

In June and July 2014, the Committee undertook a fourth visit to Northern Ireland to meet with government officials, legislators, lawyers, judges, and members of non-governmental organizations (“NGOs”) regarding ongoing efforts to address the legacy of Northern Ireland’s past and reform the criminal justice system. The Committee sought to more fully understand

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<sup>1</sup> The reports produced by these earlier delegations are: William E. Hellerstein, Robert B. McKay & Peter R. Schlam, *Criminal Justice and Human Rights in Northern Ireland: A Report to the Association of the Bar of the City of New York*, 43 Rec. Ass’n B. City N.Y. 110 (1988) (hereinafter “1988 Report”); Peter G. Eikenberry, Gerald P. Conroy, Barbara S. Jones, Barbara Paul Robinson, & Sidney H. Stein, *Committee on International Human Rights, Northern Ireland: A Report to the Association of the Bar of the City of New York from a Mission of the Committee on International Human Rights* (1999) (hereinafter “1999 Report”), available at [http://www2.nycbar.org/Publications/reports/print\\_report.php?rid=31&searchterm=ireland](http://www2.nycbar.org/Publications/reports/print_report.php?rid=31&searchterm=ireland); Gerald P. Conroy, Fiona Doherty, Sam Scott Miller, Marny Requa, Barbara Paul Robinson & Sidney H. Stein, *Northern Ireland: A Report to the Association of the Bar of the City of New York from a Mission of the Committee on International Human Rights* (2003) (hereinafter “2003 Report”), available at <http://www2.nycbar.org/pdf/report/Nireport.FINAL.3.8.pdf>; see also Gerald P. Conroy, *International Human Rights Committee, Human Rights in Action: A Brief History of the New York City Bar’s Work to Promote Peace and Respect for Human Rights in Northern Ireland* (2009), available at <http://www2.nycbar.org/pdf/report/uploads/20071765-BriefHistoryofNYCBarWorkonNorthernIreland.pdf>. The authors of the report would like to offer their sincere and warm thanks to Martin Flaherty, Marny Requa, and Alexa Kolbi-Molinas, who have reviewed and commented on earlier versions of this report. Any errors in the report remain those of the authors alone.

<sup>2</sup> “The Troubles” refers to the most recent iteration of the political and violent conflict in Northern Ireland that has ethnic and religious undertones, beginning in the late 1960s and formally ending in 1998 with the “Good Friday” Agreement. See *infra* note 7 and accompanying text. The Troubles have their roots in the 1921 division of Ireland, and were centered in Northern Ireland but also spread into the Republic of Ireland and elsewhere in the United Kingdom. Additional violence has occurred periodically since 1998. Kristin Archick, *NORTHERN IRELAND: THE PEACE PROCESS*, Congressional Research Service, Jan. 8, 2014, available at <http://fas.org/sgp/crs/row/RS21333.pdf>.

<sup>3</sup> See *infra* Section III.C. The New York City Bar Association, through the work of the Committee, has sent numerous letters to the British government urging that action be taken on the Finucane and Nelson murders.

whether and how Northern Ireland was dealing with the substantial burdens it inherited from three decades of violence.

Since the Committee began to focus its attention on Northern Ireland in the late 1980s, significant, positive change has taken place in public and private life. At the time of the Committee's first visit in May 1987, parts of Belfast were "armed camps with homes and shopping areas bombed out or blackened by recurrent fires." Military checkpoints and army patrols were commonplace.<sup>4</sup> Just two weeks before that delegation arrived in Belfast a high-ranking judge, Lord Justice Gibson, and his wife were killed by a car bomb.<sup>5</sup> Less than two years after the Committee's first visit, human rights lawyer Patrick Finucane was murdered in his home in front of his family by members of a loyalist paramilitary organization.<sup>6</sup>

Following its second visit in 1998 to examine the implementation and reception of the Good Friday Agreement,<sup>7</sup> however, the Committee noted the dramatic changes that had taken place and the growing sense of hope.<sup>8</sup> After its third visit in 2003, the Committee commented on the transformation of public life in Belfast coupled with political changes that signaled even greater prospects for lasting peace.<sup>9</sup> The Committee's 2014 delegation was pleased to note that most individuals with whom it met believe that this positive trend continues. Belfast is a modern city with significant economic activity, and incidents of open violence have become less and less frequent. Perhaps most significantly, substantial reform of the police and criminal justice apparatus has been implemented following the transfer of executive authority over the police and prosecution services from the UK government in London to authorities in Belfast.

Despite these positive developments, however, substantial challenges remain. Observers, victims and their families, and other stakeholders remain deeply concerned about evidence withheld in individual cases that arose during the Troubles, the government's refusal to provide full investigative authority to inquiries into legacy cases, and ongoing problems with the prison service. The so-called "marching season"<sup>10</sup> in July still brings tension to Northern Ireland, and disputes over the display and use of historic but politically charged flags and emblems remain

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<sup>4</sup> See 1988 REPORT, *supra* note 1, at 115.

<sup>5</sup> New York Times, *Judge and Wife Slain by I.R.A. in Car Bombing*, Apr. 26, 1987, available at <http://www.nytimes.com/1987/04/26/world/judge-and-wife-slain-by-ira-in-car-bombing.html>.

<sup>6</sup> BBC News, *Pat Finucane: A controversial killing*, Sept. 13, 2004, available at [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/1677046.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/1677046.stm).

<sup>7</sup> Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland ("Good Friday Agreement," also known as the "Belfast Agreement"), Apr. 10, 1998, available at <http://cain.ulst.ac.uk/events/peace/docs/agreement.pdf>.

<sup>8</sup> 1999 REPORT, *supra* note 1, at 1.

<sup>9</sup> 2003 REPORT, *supra* note 1, at 2.

<sup>10</sup> Although violence in the streets is on the decline, it has not dissipated entirely. Tensions generally emerge during parades and marches. The Parades Commission for Northern Ireland documented 5,074 parades and parade-related protests in 2014, with 619 parades that year deemed "sensitive." Parades Commission for Northern Ireland, ANNUAL REPORT AND FINANCIAL STATEMENTS FOR THE YEAR ENDED 31 MARCH 2015, July 2, 2015, at 10–11. The majority of these parades occurs during the "marching season" in the spring and summer, and the majority of marches, including 91% of those deemed sensitive, are organized by unionists. *Id.* Violence during marches and parades persists because of the contentious nature of their historical roots. See *infra* Section III.D.

largely unresolved. Independent international organizations and observers have suggested a range of options to move forward, but none of these has been accepted by all the political parties.<sup>11</sup>

## **B. THE DELEGATION**

The New York City Bar Association is an independent, non-governmental organization with more than 24,000 members in over fifty countries. Founded in 1870 in response to growing public concern over corruption in the justice system in New York City, it has a long history of involvement in access to justice initiatives, civil rights, and pro bono representation in many areas, including immigration, AIDS, homelessness, and criminal justice. The New York City Bar also works actively on international human rights issues, notably through the International Human Rights Committee, which investigates and reports on human rights conditions around the world and in the United States.

The 2014 delegation of the Committee was chaired by Judge Sidney H. Stein of the United States District Court for the Southern District of New York. The members of the delegation included Gerald P. Conroy, Deputy Commissioner of the Office of the Special Commissioner of Investigation for the New York City School District and former Assistant District Attorney of the New York County District Attorney's Office; Lauren Melkus, head of funding analysis and long-term strategic planning for a private family foundation; Sam Scott Miller, Senior Counsel at Orrick, Herrington & Sutcliff LLP; Matthew F. Putorti, associate at Pillsbury Winthrop Shaw Pittman LLP; and Elisabeth Wickeri, Chair of the Committee (2012–2015) and Executive Director of the Leitner Center for International Law and Justice at Fordham University School of Law where she is also Adjunct Professor of Law.

Judge Stein and Sam Scott Miller conducted meetings in London on June 27, 2014 prior to the full delegation conducting its interviews in Belfast from June 30 through July 4, 2014. The Committee is grateful to the many people in Great Britain and Northern Ireland who met with the Committee delegation and shared their insights into the ongoing issues of justice and human rights in Northern Ireland.

Following previous Committee reports—which examined the impact of the many assaults, murders, and other instances of violence in Northern Ireland since 1968 and considered the importance of legislative and judicial reform to address those deaths and solve the political divisions that exacerbated the violence<sup>12</sup>—the 2014 Committee delegation returned to these themes. First, it sought to assess the ongoing challenges to the administration of justice in light of the impact of the 2010 Hillsborough Agreement,<sup>13</sup> which began the most recent phase of devolution (that is, transfer) of power over policing and justice powers to Northern Ireland. Second, the Committee returned to unresolved individual cases of death and injury during the

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<sup>11</sup> See *infra* Section III.D.

<sup>12</sup> 1999 REPORT, *supra* note 1, at 3–9.

<sup>13</sup> Agreement at Hillsborough Castle (“Hillsborough Agreement”), Feb. 5, 2010, *available at* <https://www.gov.uk/government/publications/hillsborough-castle-agreement>.

Troubles and examined their status. Finally, the delegation sought to understand the extent to which procedures instituted to deal with the past have been successful.

## II. BACKGROUND

### A. POLITICAL SPECTRUM

The differences between communities in Northern Ireland generally run along socio-religious lines that influence politics. Unionists, who favor continued union with the UK, generally have Protestant backgrounds; nationalists, who favor reunification with the Republic of Ireland, generally have Catholic backgrounds.<sup>14</sup> The divide between political parties has reflected a more serious social and public divide between official and unofficial armed groups, with violent activities sometimes directed at uninvolved civilian populations.<sup>15</sup> Militant unionists who have resorted to or advocated the use of force are referred to as “loyalists” and militant nationalists are referred to as “republicans.”<sup>16</sup>

Today, the dominant political parties are aligned with each side of the socio-religious divide, while others are more centrist in nature (including the Alliance Party and the Green Party). The mainstream unionist party, the Ulster Unionist Party (“UUP”) has as its nationalist counterpart the Social Democratic and Labour Party (“SDLP”). The more conservative, hard line Democratic Unionist Party (“DUP”), holds the most seats in the Northern Ireland Assembly (“the Assembly”); and under rules to ensure that unionists and nationalists both participate in governance,<sup>17</sup> the DUP shares powers with nationalist parties, among which Sinn Féin, the political party that has been associated with the Irish Republican Army (“IRA”), has the most seats.

### B. HISTORIC BACKGROUND

The tensions in and around Northern Ireland stem from national, cultural, and religious differences and can be traced back at least four centuries,<sup>18</sup> when the northernmost of Ireland’s four ancient provinces was the most fiercely militant Catholic and Celtic region.<sup>19</sup> In 1603, the forces of Queen Elizabeth I defeated certain Irish earls, and her successor, James I, encouraged Scottish Presbyterians to settle in the region, where eventually they suppressed the Catholic population. On July 12, 1690, the Protestant Prince, William of Orange, defeated deposed Catholic monarch James II, cementing Protestant English rule over the Catholic population for

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<sup>14</sup> According to the 2012 Census, Protestants outnumbered Catholics in Northern Ireland by a small percentage. RTE News, *Census shows gap between Protestants and Catholics narrows to 3% in Northern Ireland*, Dec. 11, 2012, available at <http://www.rte.ie/news/2012/1211/357831-northern-ireland-census-catholic-protestant/>.

<sup>15</sup> 1988 REPORT, *supra* note 1, at 115.

<sup>16</sup> Archick, *supra* note 2, at 1.

<sup>17</sup> These rules are set by the Good Friday Agreement. Good Friday Agreement, *supra* note 7, at 8 ¶ 8 (establishing that the election of ministers will use the principle of power-sharing under the d’Hondt system).

<sup>18</sup> For a closer examination at the history of tensions in Northern Ireland, see 1988 REPORT, *supra* note 1, at 114.

<sup>19</sup> 1999 REPORT, *supra* note 1, at 2.

centuries to come.<sup>20</sup> Today, unionists march on July 12, often provocatively in Catholic areas, to celebrate this event. The Acts of Union of 1800 united the Kingdom of Great Britain and the Kingdom of Ireland to create the United Kingdom of Great Britain and Ireland.<sup>21</sup>

The roots of the latest tensions in Northern Ireland date to the 1921 division of Ireland, following nationalist uprisings. The twenty-six southern counties were given “free state” status in 1922 and, in 1949, became completely independent as the Republic of Ireland.<sup>22</sup> The remaining six counties—Antrim, Armagh, Down, Derry/Londonderry, Fermanagh, and Tyrone—became Northern Ireland. A Protestant majority dominated the early government of the six counties of Northern Ireland, as a result of demographics and political factors. Religious discrimination in employment, housing, and education was commonplace and led to heightened Catholic frustration.<sup>23</sup>

The Troubles are considered to have begun in 1968 when, after peaceful civil rights demonstrations by the Catholic minority, the British army was called to intervene and violence erupted.<sup>24</sup> In response to the army’s presence and military activity, and a perceived failure to protect the Catholic nationalist community, Catholic nationalists increasingly supported their own more violent factions. Paramilitary groups grew in strength in both the Protestant and Catholic communities. After four years of violence, the government of the United Kingdom suspended the Northern Ireland Parliament and imposed direct rule.<sup>25</sup>

Over the next three decades, almost 3,500 people died, and thousands more were injured, as a result of political violence in Northern Ireland.<sup>26</sup> Negotiations to end the conflict were encouraged and supported by the governments and political actors in the United States, the United Kingdom, and Ireland. The conflict formally ended with the historic Good Friday Agreement of April 1998,<sup>27</sup> which voters in Northern Ireland and the Republic of Ireland approved the following month. Seventy-one percent of Northern Ireland voters ratified the Agreement, which led to the formation and election of a new local legislature, the Assembly.<sup>28</sup> The Agreement included provisions on the devolution of power from Westminster to Belfast, disarmament of paramilitary groups, police reform, and strengthened respect for human rights,

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<sup>20</sup> *Id.*

<sup>21</sup> The Union was enacted by twin Acts of the two Parliaments of Ireland and Great Britain: The Act of Union (1800) (Ir.), and The Union with Ireland Act (1800) (Eng.).

<sup>22</sup> The Government of Ireland Act (1920) entered into force on May 3, 1921 provided that Northern Ireland would consist of the six northeastern counties and the southern twenty-six counties would form Southern Ireland. On December 6, 1922, the Irish Free State seceded from the United Kingdom as a dominion of the British Empire in accordance with the Anglo-Irish Treaty of December 6, 1921. Gradually, all ties were severed in accordance with the Republic of Ireland Act, and the state was declared a republic in 1949.

<sup>23</sup> 1999 REPORT, *supra* note 1, at 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Archick, *supra* note 2, at 1.

<sup>27</sup> *See supra* note 7.

<sup>28</sup> 1999 REPORT, *supra* note 1, at 3.

among other matters.<sup>29</sup> That same year, the Committee analyzed the impact of the Good Friday Agreement on its second visit to Northern Ireland.<sup>30</sup>

### C. DEVOLUTION

The Good Friday Agreement has provided much-improved political stability and security for Northern Ireland, but its implementation has not been easy or trouble free. Tensions persist over the decommissioning of weapons of paramilitary organizations<sup>31</sup> and are inherent in efforts to establish joint governance by parties who hold fundamentally different political views<sup>32</sup> and whose members may have been linked to paramilitary organizations who had taken violent action against each other in the past.<sup>33</sup> Authority over local affairs devolved to the Assembly and Executive in December 1999.<sup>34</sup> By February 2000, however, in light of continuing tensions that threatened to erupt into a political crisis, Westminster suspended the devolved government and reasserted British control over Northern Ireland; power was reinstated to the devolved government in June of that year.<sup>35</sup> Political negotiations remained tense, and between 1998 and 2007, the Assembly was suspended four times, while negotiations between the political parties concerning power sharing and decommissioning weapons continued.

After a five-year suspension of devolved powers, the Assembly was restored in 2007 amid a power-sharing agreement between the DUP and Sinn Féin,<sup>36</sup> the two largest political parties since the Good Friday Agreement.<sup>37</sup> In May 2007, the DUP's Ian Paisley and Sinn Féin's Martin McGuinness were sworn in as First Minister and deputy First Minister, respectively.<sup>38</sup> A new legislative program for Northern Ireland was announced later that year.

Political tensions continued, however, over the transfer of authority on policing and justice powers, which had been scheduled for May 2008.<sup>39</sup> In February 2010, the DUP and Sinn

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<sup>29</sup> The Committee examined the Agreement's implementation and reception by legal practitioners in particular in its 1998 visit to Belfast. *Id.* at 10–17.

<sup>30</sup> *Id.*

<sup>31</sup> Good Friday Agreement, *supra* note 7, at 25 ¶ 3.

<sup>32</sup> *Id.* at 7 ¶ 5 (“There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected . . .”).

<sup>33</sup> Archick, *supra* note 2, at 4.

<sup>34</sup> BBC News, *Northern Ireland Prepares for Power*, Nov. 28, 1999, available at [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/539763.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/539763.stm).

<sup>35</sup> BBC News, *Devolution Returns to Northern Ireland*, May 30, 2000, available at [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/768954.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/768954.stm).

<sup>36</sup> Archick, *supra* note 2, at 7; BBC News, *Historic NI devolution day comes*, May 8, 2007, available at [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/6633493.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/6633493.stm).

<sup>37</sup> Archick, *supra* note 2, at 7.

<sup>38</sup> BBC News, *supra* note 36.

<sup>39</sup> The St. Andrews Agreement created a timetable leading toward the restoration of devolution and power-sharing in Northern Ireland, and set policing and justice matters to be devolved by May 2008. Northern Ireland (St. Andrews Agreement) Act 2006 (hereinafter “St. Andrews Agreement”), at c.53, pt. 2, § 18(3), available at <http://www.legislation.gov.uk/ukpga/2006/53/contents>.



Féin endorsed the Hillsborough Agreement,<sup>40</sup> which set April 2010 as the date for the transfer of policing and justice powers from Westminster to Belfast under a new Policing Board and Department of Justice.<sup>41</sup> The agreement also set a timeline for establishing a new framework for dealing with the controversial issue of parades.<sup>42</sup>

The newly-formed policing and justice authorities sought to address the challenges of administering daily justice functions while also handling a backlog of cases of deaths and other violent acts that took place during the Troubles. It is in the context of evaluating the progress of these initiatives that the Committee returned to Northern Ireland in 2014. First, the Committee considered the impact that dealing with the past more generally has on justice and peace matters in Northern Ireland, and specifically sought to better understand the several transitional justice mechanisms that have been proposed. Second, the Committee returned to unresolved individual cases that arose during the conflict and examined their status. Finally, the Committee wanted to understand how the police, prosecutors, and courts were handling the challenges of contemporary crime and security as well as legacy matters as described in the 2003 Report. The Committee also met for the first time with authorities in the Prison Service, an agency of the Northern Ireland Department of Justice, where matters relating to the accommodation of prisoners in segregated (or separated, by political affiliation) conditions are reserved to Westminster.

### III. TRANSITIONAL JUSTICE AND DEALING WITH THE PAST

#### A. OVERVIEW

The British Army withdrew from Northern Ireland in July 2007,<sup>43</sup> ending almost four decades of military operations there. Although a regular garrison of British troops remains, the army no longer has any role in policing, which is now the responsibility of the Police Service of Northern Ireland (“PSNI”). The PSNI succeeded the Royal Ulster Constabulary (“RUC”) in November 2001. This change, as well as the many reforms and steps toward progress cited above, has decidedly moved the peace process in Northern Ireland forward. The Northern Ireland Assembly is still dominated by the two parties representing the unionist-nationalist divide (the DUP and Sinn Féin), but the legislative agenda is now in large part defined by everyday political concerns.

Political stalemate around sensitive issues, including flags and parades, however, still prevents Northern Ireland from dealing effectively with “the past,” and the prevailing view is that “the past” remains insufficiently addressed.<sup>44</sup> Many of the private individuals, politicians,

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<sup>40</sup> See *supra* note 13.

<sup>41</sup> *Id.* at § 1(1).

<sup>42</sup> *Id.*; see also *infra* Section III.D.

<sup>43</sup> BBC News, *Army ending its operation in NI*, July 31, 2007, available at [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/6923342.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/6923342.stm).

<sup>44</sup> Northern Ireland Human Rights Commission, *DEALING WITH NORTHERN IRELAND’S PAST: TOWARDS A TRANSITIONAL JUSTICE APPROACH*, July 31, 2013 (hereinafter “*Dealing with Northern Ireland’s Past*”), at 12–13, available at <http://www.nihrc.org/documents/research-and-investigations/Transitional%20Justice/NIHRC%20Transitional%20Justice%20Report.pdf>.

and government and non-governmental officials with whom the Committee met spoke of the heavy weight of “the past” and hoped that the matter could be handled through a comprehensive plan. Some interviewees and members of the public urge that the past needs to be dealt with or put aside so that Northern Ireland can move on. Many interviewees supported a comprehensive, non-judicial, truth-seeking procedure. Several mechanisms have been attempted to individually address different aspects of the past conflict, including flags and parades and individual cases, but no comprehensive mechanism has been attempted and many matters remain unresolved.<sup>45</sup> Without implementing a holistic transitional justice mechanism, segregation along communal lines will persist and may well be exacerbated, especially in the most economically disadvantaged areas of Northern Ireland.<sup>46</sup>

Any country emerging from conflict and trauma has a need to heal. The need may be served in part by pursuing individual cases through the judicial process, but a comprehensive set of tools, including mechanisms for addressing past injustices holistically and expeditiously, may be needed to enable members of a society to obtain redress and move on. This multi-tiered approach to the systemic needs of a society is referred to as “transitional justice,” a process that incorporates both judicial and non-judicial measures in order to address wide-ranging historic human rights abuses and provide accountability, redress, justice, and a measure of truth.<sup>47</sup> Transitional justice is particularly valuable when traditional procedures, such as criminal trials and inquiries, are practically or politically infeasible. Transitional justice systems, while not strictly judicial, are nonetheless rooted in international law and require nations to take steps to prevent human rights abuses, investigate any abuses that do occur, impose sanctions on those responsible, and provide reparations to the victims.<sup>48</sup>

A number of transitional justice mechanisms have been enacted in Northern Ireland,<sup>49</sup> but their effectiveness has been blunted by, among other things: a failure to investigate the cases of

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<sup>45</sup> *Id.* at 14.

<sup>46</sup> Economic inequalities in Northern Ireland persist along socio-religious lines, with 22 percent of Catholic households living in poverty compared to 17 percent of Protestants according to a 2013 report. Paul Nolan, Community Relations Council, THE NORTHERN IRELAND PEACE MONITORING REPORT, NUMBER TWO (2013), at 85. In a follow-up report by the same author in 2014, poverty in Northern Ireland was documented to have increased by all measures in the country, and that in all ten deprivation indicators considered, Catholics make up a greater proportion than their Protestant counterparts. Paul Nolan, Community Relations Council, THE NORTHERN IRELAND PEACE MONITORING REPORT, NUMBER THREE (Mar. 2014), at 81.

<sup>47</sup> For an introduction to the concept of transitional justice, *see, e.g.*, United Nations Rule of Law, GUIDANCE NOTE OF THE SECRETARY-GENERAL: UNITED NATIONS APPROACH TO TRANSITIONAL JUSTICE (Mar. 2010), available at [http://www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf).

<sup>48</sup> The obligation to ensure fundamental human rights and provide for remedies to victims of human rights violations are enshrined in international human rights documents. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, at art. 2(3). International courts have also affirmed the responsibility of States for preventing human rights violations and providing for remedies where they occur. *See, e.g.*, Velásquez-Rodríguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988). The Velásquez-Rodríguez Case also confirmed that when judicial remedies were unavailable or unavailing, other remedies could be brought into play.

<sup>49</sup> An overview of initiatives attempted in Northern Ireland already can be found in Dealing with Northern Ireland’s Past, *supra* note 44, at 5–12.

those injured but not killed; the absence of centralized oversight or coordination of these efforts; inadequate compensation and reparations for individuals, groups, and communities; the absence of a long-term strategy; lack of transparency by the UK government in investigations to date, in particular where the UK has argued that matters of national security are at stake; oaths of silence taken by former paramilitary members and a lack of accurate records of their actions, which impede families of victims from knowing what occurred; perceived bias by investigators; and the lack of a systemic, community-wide opportunity for reviewing the past.<sup>50</sup>

## **B. EXISTING EFFORTS AND MECHANISMS**

People across the political spectrum have called for a need to address Northern Ireland's legacy of decades of violence. Both sides have called for a comprehensive effort at national reconciliation.

### **1. The Haass-O'Sullivan Proposed Agreement**

Former US diplomat and Special Envoy for Northern Ireland Richard Haass and former Deputy National Security advisor Meghan O'Sullivan proposed a comprehensive agenda both for dealing with Northern Ireland's fraught past and to set a course for moving forward. The Haass and O'Sullivan Proposed Agreement, released on the last day of 2013, sought to tackle the divisive issues of parades, flags and emblems, and dealing with the past.<sup>51</sup> It was designed to function as a proposal for further negotiations.

The most significant feature of the Haass-O'Sullivan Proposed Agreement was its comprehensive plan to "contend[] with the past," including the establishment of a Legacy Commission.<sup>52</sup> It also proposed that the commissioner of the Victims & Survivors Service ("VSS") establish a comprehensive Mental Trauma Service to attend to the unmet needs of victims.<sup>53</sup> It also called for the governments of the United Kingdom and Ireland to issue statements of acknowledgement of past acts that injured Northern Ireland society to advance reconciliation.<sup>54</sup> And it proposed the formation of a Historical Investigations Unit ("HIU") to replace earlier efforts by the Historical Enquiries Team ("HET") of the PSNI and the Historical Unit of the Police Ombudsman's office, as discussed below.<sup>55</sup> The proposal also demanded that the Executive, the Assembly, and other governmental bodies of Northern Ireland promptly put in place the legislative and regulatory steps necessary to implement these recommendations.<sup>56</sup> Finally, the Agreement proposed that the Northern Ireland government work with non-

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<sup>50</sup> Dealing with Northern Ireland's Past, *supra* note 44, at 13.

<sup>51</sup> AN AGREEMENT (PROPOSED) AMONG THE PARTIES OF THE NORTHERN IRELAND EXECUTIVE ON PARADES, SELECT COMMEMORATIONS, AND RELATED PROTESTS; FLAGS AND EMBLEMS; AND CONTENDING WITH THE PAST, Dec. 31, 2013 (hereinafter "HAASS-O'SULLIVAN PROPOSED AGREEMENT 2013"), *available at* <http://www.northernireland.gov.uk/haass.pdf>.

<sup>52</sup> *Id.* at 19.

<sup>53</sup> *Id.* at 21.

<sup>54</sup> *Id.* at 22–24.

<sup>55</sup> *Id.* at 24–29.

<sup>56</sup> *Id.* at 22.

governmental organizations in Northern Ireland as well as the governments of the United Kingdom and the Republic of Ireland to further these goals.<sup>57</sup>

While nationalist and republican groups were prepared to accept the proposal in its entirety, the unionist parties were not.<sup>58</sup> Negotiations aimed at implementing the proposal collapsed over the issues of parades and historical flags and symbols.

And new disputes arose in 2014 that led to additional political stalemates over advancing the Haass-O’Sullivan proposals. First, in early 2014, controversy arose over so-called “on the runs” (individuals suspected of paramilitary offenses or escaped prisoners not covered by the release and amnesty provisions of the 1998 Good Friday Agreement<sup>59</sup>). Sinn Féin pressed for a legal solution that would allow the “on the runs” to return to Northern Ireland, to which unionist groups were staunchly opposed.<sup>60</sup> Second, in May 2014, Sinn Féin President Gerry Adams was detained and questioned by the PSNI over the 1972 murder of Jean McConville.<sup>61</sup> Sinn Féin

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<sup>57</sup> *Id.*

<sup>58</sup> International Center on Transitional Justice, QUESTIONS OF TRUTH AND ACCOUNTABILITY AWAKEN IN NORTHERN IRELAND, May 27, 2014, available at <http://ictj.org/my/node/19002>.

<sup>59</sup> Good Friday Agreement, *supra* note 7, at 30 ¶ 1. For an overview of the “on the runs,” see BBC News, *On the Runs - key questions and inquiry findings*, Mar. 24, 2015, available at <http://www.bbc.com/news/uk-northern-ireland-26359906>.

<sup>60</sup> As early as 2000, Westminster had reached an initial agreement with Sinn Féin that would provide some legal assurances to some of the “on the runs” that they would not face arrest or prosecution for their offenses. This scheme was not made public but came to light when the case against former IRA member John Downey for his role in the 1982 London Hyde Park bombing was dismissed. An independent review conducted by Lady Justice Heather Hallett was released immediately following the Committee’s visit in July 2014 and found that the scheme was lawful. The Right Honourable Dame Heather Hallett DBE, THE REPORT OF THE HALLETT REVIEW: AN INDEPENDENT REVIEW INTO THE ON THE RUNS ADMINISTRATIVE SCHEME, July 17, 2014, ¶ 2.67, available at <http://www.hallettreview.org/filestore/uploads/2014/07/HallettReviewPrintReady.pdf>.

<sup>61</sup> Jean McConville was a Belfast woman who was kidnapped and killed by the IRA after being accused of being an informant for British forces. She was buried in Ireland in 1972 but her body was recovered only in August 2003. BBC News, *Jean McConville: Ivor Bell to be prosecuted for aiding murder*, June 4, 2015, available at <http://www.bbc.com/news/uk-northern-ireland-33005771>. The claim that McConville was an informer was dismissed after an investigation by the Northern Ireland Police Ombudsman in 2004.

Her case resurfaced after interviews with paramilitaries were recorded for an oral history project at Boston College. Interviews about McConville’s death were handed over to authorities in Belfast in September 2013. Patrick Radden Keefe, *The New Yorker*, *Letter from Belfast: Where the Bodies Are Buried*, Mar. 16, 2015, available at <http://www.newyorker.com/magazine/2015/03/16/where-the-bodies-are-buried>. Two republican interviewees, Brendan Hughes and Dolours Price, both now deceased, admitted in a taped interview that they were involved in McConville’s kidnapping; others involved in the investigation around the death stated that Gerry Adams was the only person who could have ordered her killing and he was arrested for questioning in April 2014. *Id.* Adams was released, and Ivor Bell, another interviewee, is the only person to have been charged to date. BBC News, *supra* note 61. In September 2015, the Public Prosecution Service of Northern Ireland (“PPS”) announced that Adams and six other individuals (some of whom were implicated in hearsay evidence obtained from the Boston College oral history project) would not be prosecuted in connection with the McConville murder. The Deputy Director of the PPS stated that the evidence currently available was “insufficient to provide a reasonable prospect of obtaining a conviction against any of them for a criminal offence.” Public Prosecution Service, News Release: PPS Confirms No Further Prosecutions in Relation to the Abduction and Murder of Jean McConville (Sept. 29, 2015), available at <http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/PPS%20Press%20Office/Press%20release%20Tuesday%2029%20September%202015.pdf>.

supporters argued that the detention was politically motivated.<sup>62</sup> Third, in the summer of 2014, political disputes with Westminster arose over Northern Ireland budgetary matters.<sup>63</sup>

The UK government convened the major Northern Ireland political parties to address those disputes, as well as the Haass-O'Sullivan Proposed Agreement. On December 23, 2014, the parties, together with the UK and Irish governments, announced that a comprehensive new agreement had been reached.<sup>64</sup> This new Stormont House Agreement committed to support country-wide welfare reform; a balanced budget; and issues relating to the past, including an individual and independent case investigations unit, as discussed below.<sup>65</sup> The Stormont House Agreement was a welcome step forward and was heralded by both London and Dublin. However, some advocates were dissatisfied that demands for a public inquiry into the 1989 murder of the human rights lawyer Patrick Finucane were not addressed. Progress under the agreement stalled in March 2015, when Sinn Féin announced it would block the welfare reform bill as a result of budget cuts introduced in London;<sup>66</sup> and negotiations remained tense<sup>67</sup> until a new Stormont Agreement was reached on November 17, 2015.<sup>68</sup>

Against this backdrop, a new political crisis emerged in September 2015, when Peter Robinson, First Minister of the Assembly, resigned along with all but one of the DUP cabinet members, leaving the possibility of a government collapse without the support of the majority party.<sup>69</sup> The resignations were in reaction to an August statement by PSNI Chief Constable George Hamilton concerning two recent murders of former IRA members. Hamilton said that some current and former IRA members “continue to engage in a range of criminal activity and occasional violence in the interest of personal gain or personal agendas.”<sup>70</sup> Robinson and other

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<sup>62</sup> Keefe, *supra* note 61.

<sup>63</sup> Douglas Dalby, New York Times, *Agreement in Northern Ireland Averts Collapse of Power-Sharing Government*, Dec. 23, 2014, available at <http://www.nytimes.com/2014/12/24/world/europe/agreement-in-northern-ireland-averts-collapse-of-power-sharing-government.html>. These developments are discussed *infra*.

<sup>64</sup> *Id.*

<sup>65</sup> Agreement Between the Parties at Stormont, Dec. 23, 2014 (hereinafter “Stormont House Agreement”), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/390672/Stormont\\_House\\_Agreement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf).

<sup>66</sup> RTE News, *Stormont welfare reform bill fails*, May 27, 2015, available at <http://www.rte.ie/news/2015/0526/703809-north-welfare/>.

<sup>67</sup> See, e.g., Belfast Telegraph, *Theresa Villiers believes deal ‘possible’ on Stormont House Agreement*, Sept. 8, 2015, available at <http://www.belfasttelegraph.co.uk/news/northern-ireland/theresa-villiers-believes-deal-possible-on-stormont-house-agreement-31510956.html>; Henry McDonald, The Guardian, *Stormont Northern Ireland Crisis Talks Explained*, Sept. 14, 2015, available at [www.theguardian.com/uk-news/2015/sep/14/stormont-northern-ireland-crisis-talks-explained](http://www.theguardian.com/uk-news/2015/sep/14/stormont-northern-ireland-crisis-talks-explained).

<sup>68</sup> BBC News, *Northern Ireland political crisis: Governments and two largest parties agree deal*, Nov. 18, 2015, available at <http://www.bbc.com/news/uk-northern-ireland-34850196>.

<sup>69</sup> Henry McDonald, The Guardian, *Stormont in crisis as Northern Ireland's first minister Peter Robinson resigns*, Sept. 10, 2015, available at <http://www.theguardian.com/uk-news/2015/sep/10/northern-ireland-government-on-brink-of-collapse>.

<sup>70</sup> Douglas Dalby, New York Times, *Northern Ireland Faces Crisis as Unionist First Minister Resigns*, Sept. 10, 2015, available at <http://www.nytimes.com/2015/09/11/world/europe/northern-ireland-peter-robinson-resigns-from-parliament.html>.

unionists declared that, under these circumstances, participating in the Assembly with members of Sinn Féin, many of whom are former IRA members, was unacceptable.

In response to Robinson's resignation, the Secretary of State for Northern Ireland convened a panel to examine and report on intelligence concerning the current structure and role of paramilitary groups, including the IRA, and focused on those that declared ceasefires in support of the political process.<sup>71</sup> The panel reported in October 2015 that the structures of the IRA "remain in existence in a much reduced form," but concluded that the IRA's "leadership remains committed to the peace process and its aim of achieving a united Ireland by political means. The group is not involved in targeting or conducting terrorist attacks against the state or its representatives."<sup>72</sup> In response to the panel's report, the DUP announced that Robinson and his cabinet would return to their leadership posts in the Assembly.<sup>73</sup>

Most recently, a November 2015 Agreement, "A Fresh Start: the Stormont Agreement and Implementation Plan,"<sup>74</sup> was reached after ten weeks of talks at Stormont among the Northern Ireland Executive, the UK government, and the Irish government. The agreement calls for full implementation of the 2014 Stormont House Agreement, including its financial provisions, as well as a commitment to dealing with the impact of continued paramilitary activity, and recommitting to the rule of law.<sup>75</sup> Despite progress in some areas, however, an agreement to establish new mechanisms to address past atrocities that continue to fuel anger and unrest in Northern Ireland was not included.<sup>76</sup>

## 2. Ongoing Efforts to Address Past Cases

As part of an effort to address the past and its heavy burden on Northern Ireland, several mechanisms have been introduced to handle individual cases, which can be invoked for both current and legacy investigations.

- First, the Police Ombudsman's Office ("PONI"), considered in more detail below,<sup>77</sup> is a statutory body established by the Police (Northern Ireland) Act 1998 that is

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<sup>71</sup> UK Government Northern Ireland Office, *Press Release: Villiers Announces Names of Independent Reviewers*, Sept. 22, 2015, available at <https://www.gov.uk/government/news/villiers-announces-names-of-independent-reviewers>.

<sup>72</sup> UK Government Northern Ireland Office, *Independent Report: Assessment on paramilitary groups in Northern Ireland*, Oct. 20, 2015, ¶¶12, 14 available at <https://www.gov.uk/government/publications/assessment-on-paramilitary-groups-in-northern-ireland>.

<sup>73</sup> Democratic Unionist Party, *Statement from the Democratic Unionist Party*, Oct. 20, 2015, available at <http://www.mydup.com/news/article/statement-from-the-democratic-unionist-party>.

<sup>74</sup> Agreement Between the Northern Ireland Executive, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of Ireland, *A Fresh Start: the Stormont Agreement and Implementation Plan* ("Stormont Agreement: A Fresh Start"), Nov. 17, 2015, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/479116/A\\_Fresh\\_Start\\_-\\_The\\_Stormont\\_Agreement\\_and\\_Implementation\\_Plan\\_-\\_Final\\_Version\\_20\\_Nov\\_2015\\_for\\_PDF.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479116/A_Fresh_Start_-_The_Stormont_Agreement_and_Implementation_Plan_-_Final_Version_20_Nov_2015_for_PDF.pdf).

<sup>75</sup> *Id.* at § A, F.

<sup>76</sup> BBC News, *Northern Ireland political crisis: Governments and two largest parties agree deal*, Nov. 18, 2015, available at <http://www.bbc.com/news/uk-northern-ireland-34850196>.

<sup>77</sup> *See infra* Section IV.B.2.ii.

intended to provide independent and impartial examinations of complaints made against the police. PONI is empowered to investigate “grave or exceptional” incidents that occurred more than one year ago and that involve allegations of police misconduct.<sup>78</sup>

- A second mechanism is coroner’s inquests, which are governed by the Coroner’s (NI) Act of 1959 and the Coroner’s (Practice and Procedure) Rules (NI) 1963. A Coroner is an independent judicial officer who inquires into suspicious deaths that appear to have been unexpected, unexplained, accidental, or occurred as a result of violence, negligence, or a cause other than natural illness or disease.<sup>79</sup> Coroner’s inquests have been found to be a key component in discharging the state’s obligations under Article 2 of the European Convention on Human Rights (“ECHR”) to effectively investigate suspicious deaths.<sup>80</sup>
- A third mechanism, public inquiries, are discretionary tools that are under the purview of the governments of the United Kingdom and the Republic of Ireland to address historical events,<sup>81</sup> but have rarely been used.
- Finally, the PSNI can investigate cases, and old cases are occasionally reopened.

Other mechanisms address only legacy cases—most of which deal only with cases that resulted in death, leaving many people who survived violence but with injuries, without an effective or current avenue for redress. The HET was established in 2005 within the PSNI to review the files of over 3,000 unsolved killings that occurred between 1968 and 1998.<sup>82</sup> The HET was not a statutory body, and its mandate was subject to control by the PSNI; it reported to the Chief Constable, leading to strong criticisms over its lack of independence.<sup>83</sup> Moreover, the HET’s scope included only incidents that resulted in death.<sup>84</sup> The HET was disbanded in 2013, and in December 2014 the PSNI’s new Legacy Investigations Branch (“LIB”) was established to take on those cases;<sup>85</sup> it is to be staffed by seventy officers and other staff.<sup>86</sup> The LIB was

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<sup>78</sup> REPORT OF THE CONSULTATIVE GROUP ON THE PAST, Jan. 23, 2009, at 109–10, available at [http://cain.ulst.ac.uk/victims/docs/consultative\\_group/cgp\\_230109\\_report.pdf](http://cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf).

<sup>79</sup> *Id.* at 116.

<sup>80</sup> R (on the application of Middleton) v West Somerset Coroner [2004] UKHL 10 (considering the domestic implications of European Court of Human Rights Article 2 caselaw). The European Court of Human Rights has criticized the use of inquests, but has not challenged the findings of the inquests but the role that inquests play as part of overall investigations, and procedural matters. Marny Requa, *Coroners, Controversial Deaths, and Northern Ireland’s Past Conflict*, Autumn PUB. LAW 443, 446–47 (2008).

<sup>81</sup> HAASS-O’SULLIVAN PROPOSED AGREEMENT 2013, *supra* note 51, at 25.

<sup>82</sup> *Id.* at 24.

<sup>83</sup> *Id.*

<sup>84</sup> REPORT OF THE CONSULTATIVE GROUP ON THE PAST, Jan. 23, 2009, at 109, available at [http://cain.ulst.ac.uk/victims/docs/consultative\\_group/cgp\\_230109\\_report.pdf](http://cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf).

<sup>85</sup> Police Service of Northern Ireland, *Media Release: Police announce new unit to investigate the past - Legacy Investigation Branch*, Dec. 4, 2014, available at [www.psnipolice.uk/police\\_announce\\_new\\_unit\\_to\\_investigate\\_the\\_past\\_-\\_legacy\\_investigation\\_branch](http://www.psnipolice.uk/police_announce_new_unit_to_investigate_the_past_-_legacy_investigation_branch).

immediately criticized by human rights groups as a rebranding of the HET and an ineffective response to investigating past crimes due to its lack of independence.<sup>87</sup>

A new and independent Historical Inquiries Unit (“HIU”) was considered by the Haass-O’Sullivan Proposed Agreement and endorsed in the 2014 Stormont House Agreement.<sup>88</sup> No timeframe to set up the HIU was set forth in the Agreement, and some observers—both within and outside the government—expected it to take up to two years before legislation was adopted to establish the body.<sup>89</sup> Moreover, an ongoing political stalemate and the fact that a mechanism dealing with the past was not included in the most recent political agreement of October 2015<sup>90</sup> suggests that the HIU may be much further away.<sup>91</sup>

The Haass-O’Sullivan Proposed Agreement stated that cases would be transferred from the LIB and the PSNI’s Police Ombudsman office only after the HIU was established.<sup>92</sup> The HIU, if implemented, will have significant power: in the Haass-O’Sullivan Proposed Agreement, the HIU is accorded the same powers as the PSNI,<sup>93</sup> and in the Stormont House Agreement, the HIU is given full police powers in all “criminal investigations” and, in cases transferred from the Police Ombudsman’s office, equivalent powers to that body.<sup>94</sup> Some NGOs and experts have warned, however, that the successful implementation of the HIU will depend on whether it remains independent.<sup>95</sup> The Stormont House Agreement states that the HIU is to be operationally independent, but does not set forth how it will be constituted, noting that the Policing Board will oversee it.<sup>96</sup>

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<sup>86</sup> Belfast Telegraph, *PSNI Deputy Chief Constable Drew Harris: Crime is changing from theft towards violence and racism*, May 18, 2015, available at <http://www.belfasttelegraph.co.uk/opinion/debateni/psni-deputy-chief-constable-drew-harris-crime-is-changing-from-theft-towards-violence-and-racism-31226055.html>.

<sup>87</sup> Amnesty International UK, *Northern Ireland: Re-branded HET is not the solution to investigating past abuses*, Dec. 4, 2014, available at <http://www.amnesty.org.uk/press-releases/northern-ireland-re-branded-het-not-solution-investigating-past-abuses>.

<sup>88</sup> Stormont House Agreement, *supra* note 65, ¶¶ 30–40.

<sup>89</sup> BBC News, *George Hamilton: Historical Investigations Unit ‘two years away’*, Feb. 1, 2015, available at [www.bbc.com/news/uk-northern-ireland-31082500](http://www.bbc.com/news/uk-northern-ireland-31082500); see also Committee on the Administration of Justice, *THE APPARATUS OF IMPUNITY? HUMAN RIGHTS VIOLATIONS AND THE NORTHERN IRELAND CONFLICT: A NARRATIVE OF OFFICIAL LIMITATIONS ON POST-AGREEMENT INVESTIGATIVE MECHANISMS* (Jan. 2015), at 3.

<sup>90</sup> BBC News, *Northern Ireland political crisis: Governments and two largest parties agree deal*, Nov. 18, 2015, available at <http://www.bbc.com/news/uk-northern-ireland-34850196>.

<sup>91</sup> Belfast Telegraph, *Stormont House Agreement “Offers Most Comprehensive Proposals Yet for Victims,”* Oct. 27, 2015, available at [www.belfasttelegraph.co.uk/news/northern-ireland/stormont-house-agreement-offers-most-comprehensive-proposals-yet-for-victims-34145429.html](http://www.belfasttelegraph.co.uk/news/northern-ireland/stormont-house-agreement-offers-most-comprehensive-proposals-yet-for-victims-34145429.html).

<sup>92</sup> HAASS-O’SULLIVAN PROPOSED AGREEMENT 2013, *supra* note 51, at 24–29.

<sup>93</sup> *Id.*

<sup>94</sup> Stormont House Agreement, *supra* note 65, ¶ 36.

<sup>95</sup> Daniel Holder, RightsNI: Human Rights from Northern Ireland, *The Historical Investigation Unit (HIU): Why the Devil Will Still Be in the Detail*, Jan. 6, 2015, available at <http://rightsni.org/2015/01/the-historical-investigations-unit-hiu-why-the-devil-will-still-be-in-the-detail/>.

<sup>96</sup> *Id.*



The Stormont House Agreement also commits the Northern Ireland Executive to establish an Oral History Archive by 2016,<sup>97</sup> and endorsed the Haass-O’Sullivan Proposed Agreement proposal to establish a Commission on Identity, Culture, and Tradition, and hold public discussions about the use of flags and emblems.

### **C. ALLEGATIONS OF GOVERNMENT COLLUSION IN THE MURDERS OF TWO HUMAN RIGHTS LAWYERS**

As an organization of lawyers, the Committee has focused particular attention on criminal defense lawyers in Northern Ireland who were subjected to significant intimidation during the Troubles. In two highly publicized cases, attorneys Pat Finucane and Rosemary Nelson were murdered by extremist groups. Although security forces and other government officials have since acknowledged some limited responsibility for their deaths, no comprehensive investigation of either case has been undertaken. Human rights advocates and lawyers remain deeply disturbed by the ongoing failure of any entity in Northern Ireland to deal with the most sensitive offenses, like these deaths, dating from the time of the Troubles.<sup>98</sup>

#### **1. Patrick Finucane**

The Committee has long been disturbed by the case of Patrick Finucane,<sup>99</sup> a human rights lawyer who was murdered in February 1989 in his home in front of his family. Finucane represented numerous prominent individuals charged by the UK authorities during the Troubles, including IRA hunger striker Bobby Sands and other hunger strikers who died during the 1981 Maze Prison protests.

Finucane was killed by members of the loyalist paramilitary organization, the Ulster Freedom Fighters (“UFF”),<sup>100</sup> and there have long been allegations that UK state security forces were involved and colluded with the UFF in Finucane’s death.<sup>101</sup> After Finucane’s death, Ken Barrett pled guilty to the murder, and William Stobie, an Ulster Defence Association (“UDA”)

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<sup>97</sup> Center for the Administration of Justice, *THE APPARATUS OF IMPUNITY? HUMAN RIGHTS VIOLATIONS AND THE NORTHERN IRELAND CONFLICT: A NARRATIVE OF OFFICIAL LIMITATIONS ON POST-AGREEMENT INVESTIGATIVE MECHANISMS* (January 2015), at 2.

<sup>98</sup> *Id.*

<sup>99</sup> The Association has repeatedly expressed its concern that there has not been a comprehensive investigation of the murder. *See, e.g.*, Association of the Bar of the City of New York, Letter to the Right Honorable David Cameron, Apr. 23, 2013, available at <http://www2.nycbar.org/pdf/report/uploads/20072467-RequesttoReopenPatrickFinucanesMurder.pdf>; Association of the Bar of the City of New York, Letter to the Right Honorable David Cameron, May 21, 2012, available at <http://www2.nycbar.org/pdf/report/uploads/20072285-LettertoPMCameronurginginganquiryonPatrickFinucanesmurder.pdf>; Association of the Bar of the City of New York, Letter to the Right Honorable David Cameron, July 14, 2005, available at [http://www.nycbar.org/pdf/report/Prime\\_Minister07142005.pdf](http://www.nycbar.org/pdf/report/Prime_Minister07142005.pdf); Association of the Bar of the City of New York, Letter to the Right Honorable Tony Blair, Oct. 28, 2004, available at <http://www.nycbar.org/pdf/report/letter%20to%20Tony%20Blair.pdf>.

<sup>100</sup> *See, e.g.*, Rosie Cowan and Nick Hopkins, *The Guardian*, *Collusion 'at heart' of Finucane killing*, June 13, 2002, available at <http://www.theguardian.com/uk/2002/jun/14/northernireland.military>.

<sup>101</sup> Mark McGovern, *Inquiring into Collusion? Collusion, The State and The Management of Truth Recovery in Northern Ireland*, 2 *STATE CRIME J.* 1 (2013), at 4.

quartermaster who was enlisted as a police informer by the RUC Special Branch, was charged. Stobie admitted to having supplied the weapons for the murder, but denied knowing anything about the identity of the target. The prosecution's case fell apart in November 2001, but Stobie was shot dead by loyalist gunmen.<sup>102</sup>

Two formal inquiries concerning Finucane's death were conducted after the Committee's last visit to Northern Ireland.<sup>103</sup> The first was led by the former Commissioner of the Metropolitan Police Service in London, Sir John Stevens, in 2003. The second was led by former Canadian Supreme Court Justice Peter Cory in 2004. The Cory Collusion Inquiry recommended that a full public inquiry into Finucane's death be held, to which the UK and Irish governments had already committed themselves under the Weston Park Agreement (2001). Both Stevens and Cory found clear and irrefutable evidence of collusion between loyalists and members of the Special Branch of the RUC and British Military Intelligence. Despite these findings, no public inquiry has been held on Finucane's murder.

In 2005, the UK Parliament passed the Public Inquiries Act, which substantially reduced the independence and potential effectiveness of inquiries.<sup>104</sup> The Committee was and remains gravely concerned about the Act because it introduced a far greater degree of ministerial and political influence over the shape and conduct of public inquiries, thus calling the integrity of the inquiry process into serious question.<sup>105</sup> The Finucane family has refused to endorse any inquiry held under the terms of the 2005 Act.

In October 2011, Patrick Finucane's widow, Geraldine Finucane, met with Prime Minister David Cameron and was informed that a full public inquiry would not be commenced. She has called attention to the fact that this refusal is contrary to previous commitments by the government.<sup>106</sup> Instead, an "independent review" was held, with which the family did not cooperate. Sir Desmond de Silva, QC, chaired the review,<sup>107</sup> which was released in December 2012<sup>108</sup> and found widespread state collusion in Finucane's death, but no evidence that the government was informed in advance of the murder or was involved or aware of the subsequent cover up. The Finucane family criticized the report as a "whitewash" and a "sham."<sup>109</sup> The "independent review" process that produced the report failed as an effective public investigation by an independent official body. Among other problems, the review lacked the power to compel

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<sup>102</sup> BBC News, *supra* note 6.

<sup>103</sup> McGovern, *supra* note 101, at 4–5.

<sup>104</sup> See Association of the Bar of the City of New York, AN ANALYSIS OF THE U.K. INQUIRIES BILL AND U.S. PROVISIONS FOR INVESTIGATING MATTERS OF URGENT PUBLIC CONCERN, Jan. 25, 2005, available at [http://www.abcny.org/pdf/report/ABCNY\\_Inquiries\\_Bill1.pdf](http://www.abcny.org/pdf/report/ABCNY_Inquiries_Bill1.pdf).

<sup>105</sup> McGovern, *supra* note 101, at 12.

<sup>106</sup> *Id.* at 5. A commitment to thorough investigation into the death of Patrick Finucane had been included in an agreement following intensive talks at Weston Park in 2001. Implementation Plan issued by the British and Irish Governments (Weston Park Accord), ¶18, Aug. 1, 2001, available at <http://cain.ulst.ac.uk/events/peace/docs/bi010801.htm>.

<sup>107</sup> McGovern, *supra* note 101, at 5.

<sup>108</sup> Dealing with Northern Ireland's Past, *supra* note 44, at 6.

<sup>109</sup> Owen Bowcott, The Guardian, *Pat Finucane's widow calls de Silva report 'a whitewash,'* Dec. 12, 2012, available at <http://www.theguardian.com/uk/2012/dec/12/pat-finucane-de-silva-report>.

testimony and relied on evidence presented by only eleven people, without the opportunity for cross-examination. The Finucane family brought a judicial action in light of the “independent review” process’s finding of collusion, but the High Court in Belfast upheld the decision not to hold a public inquiry in June 2015.<sup>110</sup>

## 2. Rosemary Nelson

Rosemary Nelson was a prominent criminal defense solicitor and human rights defender in Northern Ireland. She was subjected to threats and harassment—some of which came from members of law enforcement agencies—in connection with her representation of clients in politically sensitive cases.<sup>111</sup> Threats by members of the RUC were transmitted to Nelson through her clients when they were questioned outside of her presence. The Committee’s 1998 delegation met with Nelson in Belfast, where she described these threats and ongoing harassment. Nelson was killed on March 15, 1999 by a car bomb near her home in County Armagh.<sup>112</sup> The Red Hand Defenders, a loyalist paramilitary group, claimed responsibility for her murder,<sup>113</sup> but no one has been charged.

Members of Nelson’s family began a campaign for a public inquiry almost immediately after her death. NGOs (including the Association) joined in the request.<sup>114</sup> In March 2000, Prime Minister Tony Blair received a petition with 100,000 signatures requesting a public inquiry.<sup>115</sup> The Weston Park Agreement negotiated between the UK and Republic of Ireland in 2001 provided for an investigation into the deaths of Nelson and others in which government collusion was alleged.<sup>116</sup> This resulted in the Cory Collusion Inquiry, described above, in 2004. In his recommendation to the UK government concerning Nelson, Judge Cory stated:

I am satisfied that there is evidence of collusion by Governmental Agencies in the murder of Rosemary Nelson that warrants holding a public inquiry.<sup>117</sup>

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<sup>110</sup> The Irish Times, *Belfast High Court Rejects Call for Finucane Inquiry*, June 26, 2015, available at [www.irishtimes.com/news/crime-and-law/belfast-high-court-rejects-call-for-finucane-inquiry-1.2263902](http://www.irishtimes.com/news/crime-and-law/belfast-high-court-rejects-call-for-finucane-inquiry-1.2263902).

<sup>111</sup> AMNESTY INTERNATIONAL, *INQUIRY INTO THE KILLING OF HUMAN RIGHTS DEFENDER AND LAWYER ROSEMARY NELSON FINDS SERIOUS OMISSIONS BY STATE AGENCIES*, May 24, 2011, available at <https://www.amnesty.org/en/documents/EUR45/006/2011/en/>.

<sup>112</sup> *Id.*

<sup>113</sup> THE ROSEMARY NELSON INQUIRY REPORT, H.C. 947, May 23, 2011, at 17, available at <http://webarchive.nationalarchives.gov.uk/20110612081947/http://www.official-documents.gov.uk/document/hc1012/hc09/0947/0947.pdf>.

<sup>114</sup> 1999 Report, *supra* note 1, at 15–16.

<sup>115</sup> Committee on the Administration of Justice, *INQUIRIES OBSERVATION PROJECT* (July 2014), at 53, available at <http://www.caj.org.uk/contents/1280>.

<sup>116</sup> These included Robert Hamill and Billy Wright, for whom public inquiries were subsequently undertaken, as well as Patrick Finucane whose murder, as discussed above, has not been the subject of an inquiry.

<sup>117</sup> CORY COLLUSION INQUIRY REPORT: ROSEMARY NELSON, H.C. 473 (2004), ¶ 4.197, available at <http://cain.ulst.ac.uk/issues/collusion/cory/cory03nelson.pdf>.

As a result, in April 2005, a public inquiry was commenced, chaired by Sir Michael Morland, a retired judge of the High Court of England and Wales.<sup>118</sup> Full hearings were conducted from April 2008 through June 2009, and a report of the Inquiry was published in May 2011.<sup>119</sup> It found no evidence that any act by a state agency had directly affected or facilitated Nelson's murder, but it did not rule out the possibility of a rogue agent.<sup>120</sup> Morland also found that RUC members had publicly abused and assaulted Nelson, thereby assisting in making her a target. Finally, the report concluded that intelligence leaks had endangered Nelson's life, and that she was made more vulnerable by state agencies' failures to protect her.<sup>121</sup>

Prior to the Inquiry report, a non-governmental organization, Rights Watch UK (then known as British Irish Rights Watch) petitioned the Inquiry to amend its terms of reference to include collusion; the request was denied.<sup>122</sup> In its analysis of the Inquiry report, the Committee on the Administration of Justice ("CAJ"), another non-governmental organization, also noted the Inquiry's omission of collusion from its terms of reference and thus, from its conclusion. CAJ noted, "Had it chosen to include this possibility within the Inquiry, it appears that the evidence would have met the burden of proof."<sup>123</sup>

#### **D. FLAGS AND PARADES**

Parades, commemorations, flags and emblems are central to Northern Ireland's heritage, but also are a major source of contention. The issues raised by such practices are complicated and personal because the activities and objects embody and symbolize entrenched notions of history, culture, identity, religion, and politics. Nearly two decades after the Good Friday Agreement, Northern Ireland continues to grapple with issues surrounding parades and flags which are "are symptoms of much deeper divisions" within its society, and for which solutions are needed in order for the country to move forward.<sup>124</sup>

Parades and flags also involve a host of international human rights concerns that should be considered as part of any balanced plan to address these issues. The Northern Ireland Human Rights Commission has published several papers outlining the international human rights concerns implicated by parades and flags, as well as the treaties and case law that ground these rights,<sup>125</sup> including the rights to: life, culture, freedom of expression, freedom of religion, freedom of association, freedom from inhuman and degrading treatment, freedom of movement,

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<sup>118</sup> Amnesty International, INQUIRY INTO THE KILLING OF HUMAN RIGHTS DEFENDER, *supra* note 111, at 1.

<sup>119</sup> THE ROSEMARY NELSON INQUIRY REPORT, *supra* note 113.

<sup>120</sup> Dealing with Northern Ireland's Past, *supra* note 44, at 6.

<sup>121</sup> *Id.*

<sup>122</sup> British Irish Watch, REPORT OF THE ROSEMARY NELSON INQUIRY (May 2011), available at <http://www.rwuk.org/wp-content/uploads/2013/12/RosemaryNelsonInquiryReport.pdf>.

<sup>123</sup> Committee on the Administration of Justice, *supra* note 115, at 50.

<sup>124</sup> HAASS-O'SULLIVAN PROPOSED AGREEMENT 2013, *supra* note 51, at 3.

<sup>125</sup> See, e.g., Northern Ireland Human Rights Commission, PARADES AND PROTESTS IN NORTHERN IRELAND (Nov. 2013), available at <http://www.nihrc.org/Publication/detail/parades-and-protests-in-northern-ireland>; Northern Ireland Human Rights Commission, THE DISPLAY OF FLAGS, SYMBOLS AND EMBLEMS IN NORTHERN IRELAND (Sept. 2013), available at <http://www.nihrc.org/Publication/detail/the-display-of-flags-symbols-and-emblems-in-northern-ireland2>.

equality and non-discrimination, peaceful enjoyment of one's property, and, particularly in the Northern Ireland context, the right to be free from sectarian harassment.<sup>126</sup>

Despite years of legislation and proposals, issues surrounding parades and flags continue to be cause for concern. The Committee encourages continued dialogue about parades and flags grounded in international human rights law and the community success stories in parts of Northern Ireland that have deescalated these issues.

## 1. Parades

Parades have a long history in Northern Ireland. "Marching season" takes place between April and August each year, during which various fraternities, religious groups, and charities parade throughout Northern Ireland. While many parades are peaceful, some are contentious and viewed as an attempt by the marchers to harass or threaten members of an opposing religion or political party. Given past problems with parades, including violent clashes, parades have been subjected to regulation for many years.<sup>127</sup>

Following a particularly contentious parade season in Drumcree in 1996, which sparked riots and resulted in several deaths,<sup>128</sup> the Secretary of State for Northern Ireland established an independent body to review parades and marches. This body published the Report of the Independent Review of Parades and Marches—The North Report—on January 29, 1997, which "concluded that there is a need for a new independent body: a 'Parades Commission,'" with jurisdiction over contentious parades.<sup>129</sup>

Based on this recommendation, the Parades Commission for Northern Ireland was established in 1998 with the duty "(a) to promote greater understanding by the general public of issues concerning public processions; (b) to promote and facilitate mediation as a means of resolving disputes concerning public processions; (c) to keep itself generally informed as to the conduct of public processions and protest meetings; (d) to keep under review, and make such recommendations as it thinks fit to the Secretary of State concerning the operation of [the Public Processions Act]." <sup>130</sup> The Parades Commission is tasked with certain responsibilities and powers; for example, notice of parades must be given to the PSNI at least twenty-eight days

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<sup>126</sup> Good Friday Agreement, *supra* note 7, at 20 ¶ 1.

<sup>127</sup> See, e.g., Northern Ireland Human Rights Commission, PARADES AND COUNTER-PROTESTS: BRIEFING PAPER ON HUMAN RIGHTS COMPLIANCE AND COMMISSION POLICY (June 2011), at 6, available at <http://www.nihrc.org/documents/advice-to-government/2011/parades-and-counter-protests-consolidation-august-2011.pdf>.

<sup>128</sup> Fionnuala McKenna & Martin Melaugh, Conflict Archive on the Internet (CAIN), *Developments at Drumcree, 1995-2000*, available at <http://cain.ulst.ac.uk/issues/parade/develop.htm>.

<sup>129</sup> REPORT OF THE INDEPENDENT REVIEW OF PARADES AND MARCHES - THE NORTH REPORT, EXECUTIVE SUMMARY, ¶¶ 53–57, available at <http://cain.ulst.ac.uk/issues/parade/docs/north97sum.pdf>.

<sup>130</sup> Public Processions (Northern Ireland) Act 1998, at c.2, §§ 1, 2(1).

before the procession is to be held,<sup>131</sup> and the Parades Commission has the power to impose such conditions as to the timing, size, and route of the parade.<sup>132</sup>

However, not all stakeholders in Northern Ireland have accepted the Parades Commission. The United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association noted that, during his 2013 visit to Northern Ireland, he “was informed by representatives of the nationalist community on the one hand, that the Parades Commission did not do enough to protect them from loyalist parade participants who engaged in violence during the parades”; “Loyalists on the other hand perceived the Parades Commission, by imposing conditions on their parades (in relation to routes, times and music), as unduly restricting what they considered to be their right to parade, their freedom to express their cultures and manifest their religious beliefs.”<sup>133</sup> One expert with whom the Committee met in July 2014 suggested that the problem was not with the Parades Commission itself, but with the bases on which it grounds its decisions, which are focused more on the threat to order rather than the freedom of assembly.<sup>134</sup>

Given this lack of universal support for the Parades Commission, as part of the Hillsborough Agreement, the First Minister and deputy First Minister set up a working group that drafted proposed legislation called, “The Public Assemblies, Parades and Protests Bill (Northern Ireland),” with the purpose of “establish[ing] a legal framework that will allow for the introduction of new procedures governing public assemblies in Northern Ireland.”<sup>135</sup> This bill never became law.

In addition to the Parades Commission, the Secretary of State for Northern Ireland and the police also regulate parades. For example, the Secretary of State “shall, on application by the Chief Constable, review a determination issued by the [Parades] Commission,”<sup>136</sup> and can “prohibit the holding of” a procession after having given regard to factors such as public disorder.<sup>137</sup> Senior police officers can, when they believe that a public meeting could result in “serious public disorder” or is intending to intimidate others, “impos[e] on the persons organising or taking part in the meeting such conditions as to the place at which the meeting may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it.”<sup>138</sup>

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<sup>131</sup> *Id.* at c.2, § 6(2).

<sup>132</sup> *Id.* at c.2, § 8(2).

<sup>133</sup> Maina Kiai, Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, REPORT, MISSION TO THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, U.N. Doc. A/HRC/23/39/Add.1, June 17, 2013, ¶ 65.

<sup>134</sup> Interview with Neil Jarman (July 2, 2014).

<sup>135</sup> Office of the First Minister & Deputy First Minister, PUBLIC ASSEMBLIES, PARADES AND PROTESTS IN NORTHERN IRELAND, Apr. 20, 2010, *available at* [http://cain.ulst.ac.uk/issues/parade/docs/ofmdfm\\_20100420\\_parades.pdf](http://cain.ulst.ac.uk/issues/parade/docs/ofmdfm_20100420_parades.pdf).

<sup>136</sup> Public Processions (Northern Ireland) Act 1998, at c.2, § 9(1).

<sup>137</sup> *Id.* at c.2, § 11(1).

<sup>138</sup> The Public Order (Northern Ireland) Order 1987, at art. 4(2).

To give perspective into how entrenched parade culture is in Northern Ireland, consider the statistics. From April 1, 2014 to March 31, 2015, the Parades Commission received notification of 5,074 parades and parade-related protests (up from 4,665 in 2013 to 2014), of which 583 required imposition of conditions.<sup>139</sup> Of the total, 58 percent were organized by “the loyal orders and broad Unionist tradition,” 3 percent by “Nationalist groups,” and the remainder by other categories including “charity, civic, rural and sporting events, as well as church parades.”<sup>140</sup>

One expert with whom the Committee met observed with concern that parades have become more contentious in the last four or five years.<sup>141</sup> Because the Committee’s visit to Belfast occurred during marching season, members of the Committee were able to observe a weeknight parade through central Belfast. While there was no disruption or violence, Committee members did witness some hostility when several members of the public were pushed and yelled at for crossing the parade line while crossing the street. The Committee was also informed of one parade that was prevented from finishing its route and so had marched daily for months, each time attempting to finish its route, and each time being prevented from doing so. The policing over the months for this one demonstration has cost millions of pounds.<sup>142</sup>

One important success story regarding parades occurred in Derry/Londonderry where the business community, recognizing how parades and associated tensions hurt business, became involved in mediating a way forward.<sup>143</sup> In other cities, where parade routes do not pass through the business district in the same way they do in Derry/Londonderry, local community groups in the marching locations may be able to follow suit and become engaged in identifying ways to mediate locally.

## 2. Flags

Flags in Northern Ireland divide communities as one might expect: unionists generally favor the display of the British Union flag and nationalists generally favor the display of the Irish tricolor flag. The flag issue concerns both flags displayed on government buildings and those on private property, as well as flags improperly displayed on public property in order to attempt to “claim territory.”

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<sup>139</sup> Parades Commission for Northern Ireland, *supra* note 10, at 10.

<sup>140</sup> *Id.*

<sup>141</sup> Interview with Neil Jarman (July 2, 2014).

<sup>142</sup> Gerry Moriarty, *The Irish Times*, *Tensions rise ahead of Orange Order parades*, July 10, 2015 (placing the policing at £17 million as of July 2015); Chris Kilpatrick, *BelfastLive*, *Money spent at Camp Twaddell would pay for 90 more PSNI officers, says police union chief*, June 30, 2015 (placing the cost of policing the camp around £330,000 a month), available at <http://www.belfastlive.co.uk/news/belfast-news/money-spent-camp-twaddell-would-9555916>; John Mugrew, *Belfast Telegraph*, *Cost of policing of loyalist Twaddell protest camp at Ardoyne interface ‘rises to £12 million,’* June 10, 2014 (placing the policing at £12 million as of June 2014).

<sup>143</sup> Interview with Neil Jarman (July 2, 2014); see also Kiai, *supra* note 133, ¶ 68 (“[T]he Special Rapporteur recalls the positive experience of Derry/Londonderry where engagement amongst all affected parties has resulted in peaceful parades in recent years.”).

Legislation concerning flags in Northern Ireland predates the Troubles. For example, the Flags and Emblems (Display) Act (Northern Ireland) of 1954 made it an offense to prevent or threaten “to interfere by force with the display of the Union flag” and gave the police the ability to require a person displaying a flag or emblem that could “occasion a breach of the peace” to discontinue such display.<sup>144</sup> The Flags and Emblems (Display) Act (Northern Ireland) was repealed in 1987.<sup>145</sup>

The Good Friday Agreement recognized the challenges that flags and other symbols present:

All participants acknowledge the sensitivity of the use of symbols and emblems for public purposes, and the need in particular in creating the new institutions to ensure that such symbols and emblems are used in a manner which promotes mutual respect rather than division. Arrangements will be made to monitor this issue and consider what action might be required.<sup>146</sup>

By 2000, “regulations regulating the flying of flags at government buildings” were delegated to the Secretary of State.<sup>147</sup> This legislation, however, “neglected to cover the 26 district councils which were allowed to set their own policies.”<sup>148</sup> On December 3, 2012, the Belfast City Council voted to change flying the Union flag from 365 days a year to eighteen designated days per year,<sup>149</sup> which led to four months of protests during which time the PSNI recorded 2,980 occurrences related to the flag dispute; 160 police officers sustained injuries; and the government spent £21.9 million in policing operations.<sup>150</sup> In June 2015, Stormont also passed a resolution to fly the Union flag on eighteen designated days, in line with practice in the rest of the UK.<sup>151</sup> Currently, there is “no legislation [that is] sufficiently clear and comprehensive” regarding flags.<sup>152</sup>

### 3. Recent Attempts to Address Parades and Flags

The Haass-O’Sullivan Proposed Agreement made recommendations on parades and flags. With regard to parades, the Haass-O’Sullivan Proposed Agreement proposed the creation of the Office for Parades, Select Commemorations, and Related Protests, an “administrative, non-partisan, and non-judicial body” “intended to efficiently facilitate the vast majority of

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<sup>144</sup> Flags and Emblems (Display) Act (Northern Ireland) 1954, at c.10, §§ 1–2.

<sup>145</sup> The Public Order (Northern Ireland) Order 1987, at pt. V, § 27.

<sup>146</sup> Good Friday Agreement, *supra* note 7, at 24 ¶ 5.

<sup>147</sup> The Flags (Northern Ireland) Order 2000, at art. 3.

<sup>148</sup> Paul Nolan et al., Queen’s University Belfast, Institute for the Study of Conflict Transformation and Social Justice, THE FLAG DISPUTE: ANATOMY OF A PROTEST (Dec. 2014), at 9, available at <http://www.qub.ac.uk/research-centres/iscts/News/Title,481122,en.html>.

<sup>149</sup> *Id.* at 14.

<sup>150</sup> *Id.* at 10, 14.

<sup>151</sup> UTV, *DUP Bid to Fly Union Flag at Stormont All Year Fails*, June 17, 2015, available at [www.u.tv/News/2015/06/17/DUP-bid-to-fly-Union-flag-at-Stormont-all-year-fails-39289](http://www.u.tv/News/2015/06/17/DUP-bid-to-fly-Union-flag-at-Stormont-all-year-fails-39289).

<sup>152</sup> Northern Ireland Foundation, *Flags*, available at <http://nifoundation.net/research/flags/>.



parades and other events that are non-contentious and to promote the resolution of any related disputes through community dialogue or mediation.”<sup>153</sup>

And with regard to flags, the Haass-O’Sullivan Proposed Agreement proposed the formation of a Commission on Identity, Culture, and Tradition “to launch and sustain a conversation about the role of identity, culture, and traditions of the citizens of Northern Ireland.”<sup>154</sup> Although some have suggested that issues surrounding parades are more likely to be resolved than issues surrounding flags, Northern Ireland needs to address both as part of its process of dealing with the past.

#### **IV. REVIEW OF INSTITUTIONAL REFORMS**

To follow up on work conducted during previous visits to Northern Ireland, the 2014 Committee delegation sought to examine the current state of the criminal justice system and review the extent to which devolution of power to Northern Ireland has been successful. The Committee met with members of the judiciary, as well as officials from the PSNI, the Prosecution Service, and the Prison Service.

##### **A. THE JUDICIARY AND THE COURTS**

After its 1998 visit, the Committee identified two major areas of concern relating to the judiciary and the courts. First, the Committee called for greater transparency in the process of selecting judges, and urged that a greater effort be made to achieve diversity among the judiciary from the various communities of Northern Ireland. Second, the Committee was concerned with the continued use of non-jury trials in relation to emergency powers provisions. The Committee revisited both of these matters.

##### **1. Diversity of the Judiciary**

The Committee has praised the judiciary for its courage, dedication, and determination in upholding the rule of law during and since the Troubles, but also encouraged greater transparency and efforts to diversify the bench with members from under-represented religious, political, gender, socioeconomic, and legal communities (for example, defense attorneys and solicitors, in addition to barristers).<sup>155</sup> During its visit in 2014, the Committee was pleased to hear comments that the court system is more transparent and effective<sup>156</sup> and to see a diversification among religious backgrounds on the bench. While recognizing this progress, the Committee continues to encourage the judiciary to address the relative lack of diversity in areas

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<sup>153</sup> HAASS-O’SULLIVAN PROPOSED AGREEMENT 2013, *supra* note 51, at 5–6.

<sup>154</sup> *Id.* at 17.

<sup>155</sup> See 2003 REPORT, *supra* note 1, at 27; 1999 REPORT, *supra* note 1, at 11–12.

<sup>156</sup> Interview with Raymond McCartney, Rosie McCorley, Sean Lynch, Gareth Keating & Sean McPeake, Sinn Féin Justice Committee (June 30, 2014); Interview with Alban Maginness MP, SDLP Justice Committee (July 2, 2014).

other than religious background—though the Committee was pleased to note that in October 2015, two women were appointed to the High Court.<sup>157</sup>

## **i. Judicial Appointments Commission**

When the Committee last visited Northern Ireland in 2003, the government had committed to establishing a Judicial Appointments Commission (“JAC”) to provide for transparency, credibility, and accountability in the judicial selection process, and to increase the number of judges from under-represented groups. The JAC, a welcome development, was established in June 2005.

### *a. Function and Composition*

The JAC’s role is to “conduct the appointments process and select and appoint, or select and make recommendations for appointment, in respect to all listed judicial appointments up to, and including, High Court Judge.”<sup>158</sup> The JAC is charged with making judicial nominations “solely on the basis of merit” that are “reflective of the community in Northern Ireland.”<sup>159</sup>

Thirteen members comprise the JAC. The Lord Chief Justice, as the President of the Courts of Northern Ireland and Head of the Judiciary in Northern Ireland, is the chair of the JAC and nominates five other judicial members, one of whom is a lay magistrate, to the JAC. The Bar Council (representing barristers) and the Law Society (representing solicitors) nominate one member each, and the First Minister and deputy First Minister of the Northern Ireland Assembly select five lay commissioners.

Information about the commissioners, including their career, period of appointment, remuneration, other public appointments, and political activity is available on the JAC’s website. At the time of this report, four of the thirteen commissioners are women.<sup>160</sup> The Committee welcomes this level of transparency about the commissioners and encourages further gender diversification of the JAC.

### *b. Appointment Process*

There are two types of judicial appointments: non-crown appointments and crown appointments.<sup>161</sup> Non-crown appointments, which are made directly by the JAC, are mainly fee-paid (non-salaried) posts in various courts and tribunals.<sup>162</sup> Crown appointments are mainly full-

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<sup>157</sup> BBC News, *First women appointed as NI High Court judges*, Oct. 23, 2015, available at [www.bbc.com/news/uk-northern-ireland-34613920](http://www.bbc.com/news/uk-northern-ireland-34613920).

<sup>158</sup> Northern Ireland Judicial Appointments Commission, *What We Do*, available at <http://www.nijac.gov.uk/index/what-we-do.htm>.

<sup>159</sup> Northern Ireland Act 2009, at c.3, sch. 3, § 13; *see also* Justice (Northern Ireland) Act (2004), at c.4, art. 3.

<sup>160</sup> *See* Northern Ireland Judicial Appointments Commission, *Commissioners*, available at <http://www.nijac.gov.uk/index/who-we-are/commissioners.htm>.

<sup>161</sup> For a list of non-crown and crown appointments, *see* Northern Ireland Judicial Appointments Commission, *Crown and Non Crown Appointments*, available at [http://www.nijac.gov.uk/index/crown\\_and\\_non\\_crown\\_appointments\\_table\\_nov11.pdf](http://www.nijac.gov.uk/index/crown_and_non_crown_appointments_table_nov11.pdf).

<sup>162</sup> *See* Northern Ireland Act 2009, at c.3, sch. 3, § 13.

time substantive posts that are appointed by the Queen on the recommendation of the Lord Chancellor (a senior cabinet member of the UK Parliament).<sup>163</sup> The JAC, however, is “responsible for the selection of persons for recommendation for appointment to listed judicial offices,”<sup>164</sup> so, effectively, it selects the candidates for recommendation by the Lord Chancellor. Once the JAC selects a person, it notifies the Lord Chancellor who must, “as soon as reasonably practicable,” recommend to the Queen the selected person for appointment.<sup>165</sup> The Queen also appoints the Northern Ireland Lord Chief Justice and Lord Justices of Appeal “on the Prime Minister’s recommendation.”<sup>166</sup> Before making the recommendation, the UK Prime Minister must consult with the Lord Chief Justice (or, if the office is vacant or the Lord Chief Justice is not available, the senior Lord Justice of Appeal who is available) and the JAC.<sup>167</sup>

*c. Application Process*

When there is a judicial vacancy, the JAC sets out the merit criteria and provides a job description that is “publicly advertised widely in the media.”<sup>168</sup> The JAC assesses candidates using interviews, assessment tests, case studies, or role-play.<sup>169</sup> For the High Court, the JAC interviews all those who apply, then calls back selected candidates for further assessment.<sup>170</sup>

When evaluating candidates, each JAC member scores the candidates individually and then the group collectively reaches an agreement on the candidate’s position through a process called “moderation,” which the current Lord Chief Justice Declan Morgan described as a “robust discussion to . . . examine the strengths, weaknesses and development areas of each candidate.”<sup>171</sup> Successful candidates are checked to ensure that “they are in good standing for judicial office.” Unsuccessful candidates are “offered feedback in a way that is intended to be constructive and perhaps of value in helping them prepare for future judicial appointments.”<sup>172</sup>

**ii. Impact and Results**

While progress in diversifying the bench has been made in some areas—particularly with regard to candidates’ religious and political backgrounds—the Committee remains concerned

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<sup>163</sup> See Ray McCaffrey & Fiona O’Connell, Northern Ireland Assembly, JUDICIAL APPOINTMENTS IN NORTHERN IRELAND (2012), at 9.

<sup>164</sup> Northern Ireland Act 2009, at c.3, sch. 3, § 13.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at c.3, sch. 2, § 12.

<sup>167</sup> *See id.*

<sup>168</sup> Northern Ireland Judicial Appointments Commission, *Steps in the Process*, available at <http://www.nijac.gov.uk/index/what-it-takes/steps.htm>; see also Northern Ireland Assembly, Committee for Justice, BRIEFING BY RT. HON. SIR DECLAN MORGAN (LORD CHIEF JUSTICE) AND NORTHERN IRELAND JUDICIAL APPOINTMENTS COMMISSION, June 4, 2014, at 2, available at [http://www.niassembly.gov.uk/globalassets/documents/official-reports/justice/2013-2014/140604\\_lordchiefjusticeandnijac.pdf](http://www.niassembly.gov.uk/globalassets/documents/official-reports/justice/2013-2014/140604_lordchiefjusticeandnijac.pdf).

<sup>169</sup> See Northern Ireland Assembly, *supra* note 168, at 2.

<sup>170</sup> *See id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

about the lack of gender, socioeconomic, and legal-background diversity on the bench. While the judiciary has been transparent in reporting some categories of diversity, reporting and transparency are not enough to promote long-term stability and the public’s faith in a fair and balanced court system.

The Committee heard positive comments about the balance within the judiciary of religious and political communities.<sup>173</sup> The most recent Equity Monitoring Report states that 55.6 percent of judicial offices in the courts are held by Protestants, 38.7 percent by Catholics, and 5.6 percent by “not determined.”<sup>174</sup> Within tribunals, which are lower level posts,<sup>175</sup> those numbers change to 38.9 percent Protestant, 58 percent Catholic, and 3.1 percent undetermined.<sup>176</sup> The latest census in Northern Ireland found that 48 percent of the population is Protestant (or brought up Protestant), and 45 percent is Catholic (or brought up Catholic).<sup>177</sup>

Compared with the first JAC annual reporting period in 2006 to 2007, the applicant pool in 2013 to 2014 has a smaller percentage of Protestants and a greater percentage of Catholics, but the percentage of appointments from each group has remained nearly the same.<sup>178</sup>

	Applicants			Appointments		
	Protestant	Catholic	Neither	Protestant	Catholic	Neither
2006/07	54%	39%	7%	58%	36%	6%
2013/14	44%	51%	5%	60%	38%	2%

Surveys by the School of Law at Queen’s University, Belfast, indicate that religion is perceived as irrelevant in applying for judicial posts.<sup>179</sup> Given Northern Ireland’s recent past, this is commendable progress.

<sup>173</sup> Interview with Alban Maginness MP, SDLP Justice Committee (July 2, 2014); Interview with Brian Gormally & Daniel Holder, Committee on the Administration of Justice (July 4, 2014).

<sup>174</sup> Northern Ireland Statistics & Research Agency, JUDICIARY IN NORTHERN IRELAND 2014 EQUITY MONITORING REPORT (2014) (hereinafter “2014 EQUITY MONITORING REPORT”), at 3.

<sup>175</sup> Tribunals are independent judicial or quasi-judicial bodies set up under legislation to hear and determine appeals and other legal matters to do with specific areas of law or decisions from government departments.

<sup>176</sup> 2014 EQUITY MONITORING REPORT, *supra* note 174, at 3.

<sup>177</sup> RTE News, *Census shows gap between Protestants and Catholics narrows to 3% in Northern Ireland*, Dec. 11, 2012, available at [www.rte.ie/news/2012/1211/357831-northern-ireland-census-catholic-protestant/](http://www.rte.ie/news/2012/1211/357831-northern-ireland-census-catholic-protestant/).

<sup>178</sup> Northern Ireland Judicial Appointment Commission, ANNUAL REPORT AND ACCOUNTS 2013-2014 (2014) (hereinafter “JAC REPORT 2013-2014”), at 28; Northern Ireland Judicial Appointment Commission, ANNUAL REPORT AND ACCOUNTS 2006-2007 (2008) (hereinafter “JAC REPORT 2006-2007”), at 31.

<sup>179</sup> Prof. Philip Leith et al., Queen’s University Belfast School of Law, PROPENSITY TO APPLY FOR JUDICIAL OFFICE UNDER THE NEW NORTHERN IRELAND JUDICIAL APPOINTMENTS SCHEME: A QUALITATIVE STUDY FOR THE NORTHERN IRELAND JUDICIAL APPOINTMENTS COMMISSION (2008) (hereinafter “PROPENSITY TO APPLY”), at 4;

Concerns remain, however, about the lack of socioeconomic and gender diversity on the bench, particularly among the higher courts.<sup>180</sup> In fact, the Queen’s University survey (published before the recent appointment of two women to the High Court) concluded that the failure to appoint a woman to the High Court is seen as a key factor affecting the legitimacy of the new appointment process.<sup>181</sup>

Currently, with regard to gender, 77.5 percent of court judicial offices are held by men, compared to 22.5 percent by women, which is lower than in the legal profession generally (39.3 percent women).<sup>182</sup> Within tribunals, 58 percent of offices are held by men and 42 percent are held by women.<sup>183</sup> Discrepancy in gender representation is particularly pronounced among higher courts and, while some progress has been made, the gender composition has not changed substantially since the Committee’s comments on the matter nearly fifteen years ago:

	1999	2003	2014
	Female/Male	Female/Male	Female/Male
High Court	0 (0%)	0/8 (0%)	0/10 (0%)
County Court	1/15 (7%)	2/17 (12%)	4/17 (24%)
District	N/A	2/4 (50%)	2/4 (50%)
Magistrate	3/17 (18%)	3/19 (16%)	5/21 (24%)

As far as applicants and recommendations are concerned, from the time of the first JAC annual report covering 2006 to 2007 to the most recent report covering 2013 to 2014, the number of female applicants has risen from 99 to 138, but these numbers are still lower than those of male applicants, which have gone from 146 to 213.<sup>184</sup> In the 2006 to 2007 period, the JAC made 151 recommendations for appointment to courts and tribunals, of which 63 (or 42 percent) were women; in 2013 to 2014, the JAC made 60 recommendations, of which 26 (or 39 percent) were

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Prof. Philip Leith et al., Queen’s University Belfast School of Law, REWARDING MERIT IN JUDICIAL APPOINTMENTS?: A RESEARCH PROJECT UNDERTAKEN BY THE SCHOOL OF LAW, QUEEN’S UNIVERSITY BELFAST FOR THE NORTHERN IRELAND JUDICIAL APPOINTMENTS COMMISSION (2013) (hereinafter “REWARDING MERIT”), at 4.

<sup>180</sup> See PROPENSITY TO APPLY, *supra* note 179, at 5; Interview with Raymond McCartney, Rosie McCorley, Sean Lynch, Gareth Keating & Sean McPeake, Sinn Féin Justice Committee (June 30, 2014); Interview with Alban Maginness MP, SDLP Justice Committee (July 2, 2014); Interview with Brian Gormally & Daniel Holder, Committee on the Administration of Justice (July 4, 2014).

<sup>181</sup> See REWARDING MERIT, *supra* note 179, at 3.

<sup>182</sup> 2014 EQUITY MONITORING REPORT, *supra* note 174, at 2.

<sup>183</sup> *Id.*

<sup>184</sup> JAC REPORT 2013-2014, *supra* note 178, at 27; JAC REPORT 2006-2007, *supra* note 178, at 31.

women.<sup>185</sup> Thus, in 2006 to 2007, women were 40 percent of the applicants and 42 percent of the recommendations, and in 2013 to 2014, women were 39 percent of the applicants and 39 percent of the recommendations.

Various reasons have been advanced for this lack of diversity by stakeholders interviewed by the Committee: (1) the culture and ethos of the judiciary leads qualified women to self-select out of the process of becoming a judge<sup>186</sup>; (2) less diversity among older attorneys (that is, the composition of the judiciary is dependent on candidates with the desired degree of seniority);<sup>187</sup> (3) lack of fellowship shown by females to other females within the judiciary and bar;<sup>188</sup> and (4) the likelihood that more women than men take time out for their families,<sup>189</sup> and those women who return to the profession after raising a family find that they must work their way back up.<sup>190</sup>

Additionally, the lack of diversity can be partly attributed to differing understandings of “merit.” This is critical because the JAC is tasked with nominating candidates based “solely on merit,” even though the legislation does not define the term. For some, merit may correspond to court experience, age, legal scholarship, gender (male), and employment as a private barrister.<sup>191</sup> If, indeed, factors such as gender, age, and type of practice (including solicitors) affect a candidate’s merit, it is no wonder that gender and socioeconomic diversity within the judiciary is progressing at such a slow rate. The Committee urges the JAC to be more transparent about what factors it considers when evaluating a candidate’s merit, and also to conduct internal training to establish a broader and more egalitarian understanding of the term.

The Committee is pleased that the first two women were appointed to the High Court in 2015, and is hopeful that more women will fill the bench in the near future. The Committee also encourages the JAC and the judiciary to provide better support to further diversify the bench, including giving due regard to sexual orientation and socioeconomic diversity. And while there is greater statistical transparency about ethnicity and disability within the judiciary, there is a dearth of commentary on ways to improve that diversity.

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<sup>185</sup> JAC REPORT 2013-2014, *supra* note 178, at 27; JAC REPORT 2006-2007, *supra* note 178, at 27.

<sup>186</sup> *See* Interview with Raymond McCartney, Rosie McCorley, Sean Lynch, Gareth Keating & Sean McPeake, Sinn Féin Justice Committee (June 30, 2014).

<sup>187</sup> *See* 2014 EQUITY MONITORING REPORT, *supra* note 174, at 1; PROPENSITY TO APPLY, *supra* note 179, at 39.

<sup>188</sup> *See* PROPENSITY TO APPLY, *supra* note 179, at 24.

<sup>189</sup> The Committee is informed that at the entry level to the profession, there is an equal split between men and women. That fifty percent-fifty percent split continues at seven years of practice, but, by fourteen years, the profession is seventy-five percent male to twenty-five percent female. *See* Interview with Rt. Hon. Sir. Declan Morgan (July 1, 2014).

<sup>190</sup> *See id.*

<sup>191</sup> *See generally* REWARDING MERIT, *supra* note 179.

## 2. Non-Jury Trials

### i. Diplock Courts

Codified in the Northern Ireland (Emergency Provisions) Act 1973, so-called “Diplock courts” were non-jury, single-judge trials for certain scheduled criminal offenses related to “terrorist activities,”<sup>192</sup> and were established to address perceived perverse verdicts, and jury intimidation during the Troubles.<sup>193</sup> Despite concluding in 1988 that Diplock courts “conform to the requirements of the international standards on fair trial,”<sup>194</sup> the Committee advocated for the elimination of Diplock courts and an immediate return to jury trials.<sup>195</sup> The UK government, as early as 1975, similarly recognized the need to return to jury trials.<sup>196</sup>

Diplock courts were technically abolished in Northern Ireland starting in 2007—which the Committee applauds—but since then, a new form of Diplock-style, non-jury trial has been used in Northern Ireland. The Committee continues to urge the return to jury trials, a right enjoyed in the United Kingdom, as a prerequisite to maintenance of public confidence in the justice system and as a safeguard to fair verdicts in a common law system.

### ii. Diplock-Style Courts: The New Non-Jury Trial Scheme

The Justice and Security (Northern Ireland) Act 2007 provides for a new system of non-jury trials.<sup>197</sup> Originally enacted for two years (i.e., until 2009), Parliament has extended the non-jury trial provisions of the legislation on four separate occasions (including subsequent to the Committee’s 2014 visit), each time for two years, such that the non-jury trial provisions are scheduled to remain in effect until July 31, 2017<sup>198</sup>—with the option to continually renew in two-year increments.<sup>199</sup>

Under the new scheme enacted in 2007 and renewed at least through July 2017, the Director of Public Prosecutions (“DPP”) in Northern Ireland may issue a certificate that any trial

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<sup>192</sup> See REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORISTS ACTIVITIES IN NORTHERN IRELAND (1972) (hereinafter “DIPLOCK REPORT”), at 1.

<sup>193</sup> The Committee’s 1988 report provides an extensive analysis of the history and evolution of Diplock courts. See 1988 REPORT, *supra* note 1, at 142–55.

<sup>194</sup> *Id.* at 189–90.

<sup>195</sup> See 2003 REPORT, *supra* note 1, at 12; 1999 REPORT, *supra* note 1, at 8.

<sup>196</sup> See REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND (1975), at c.7, ¶ 7 (“Trial by jury is the best form of trial for serious cases, and it should be restored in Northern Ireland as soon as this becomes possible.”); LEGISLATION AGAINST TERRORISM: A CONSULTATION PAPER (1998), ¶ 13.5 (“The Government is committed to move as quickly as circumstances allow to jury trial for all offences.”).

<sup>197</sup> See The Justice and Security (Northern Ireland) Act 2007, at c.6.

<sup>198</sup> The Justice and Security (Northern Ireland) Act 2007 (Extension of Duration of Non-Jury Trial Provisions) Order 2009, SI 2009/2090; The Justice and Security (Northern Ireland) Act 2007 (Extension of Duration of Non-Jury Trial Provisions) Order 2011, SI 2011/1720; The Justice and Security (Northern Ireland) Act 2007 (Extension of Duration of Non-Jury Trial Provisions) Order 2013, SI 2013/1619; The Justice and Security (Northern Ireland) Act 2007 (Extension of Duration of Non-Jury Trial Provisions) Order 2015, SI 2015/1572.

<sup>199</sup> The Justice and Security (Northern Ireland) Act 2007, at c.6, §§ 9(2, 3(b)).

is to be conducted without a jury if the Director “suspects” that any of four conditions is met and is “satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.”<sup>200</sup> The four conditions are: (1) the defendant is, or is an “associate”<sup>201</sup> of, a person who is or has been a member of a “proscribed organisation;” (2) the offense was committed on behalf of a “proscribed organisation,” or a “proscribed organisation” was otherwise involved with carrying out the offense; (3) a “proscribed organisation” attempted or was involved in an attempt to prejudice the investigation or prosecution of the offense; or (4) the offense was committed to any extent as a result of, or in connection with, or in response to “religious or political hostility.”<sup>202</sup> A “proscribed organization” is an organization delineated in the Terrorism Act 2000 whose activities “are (or were) connected with the affairs of Northern Ireland.”<sup>203</sup>

Other provisions are worth noting. First, the court may not draw any inference from the fact that the certificate has been issued by the DPP in relation to the trial.<sup>204</sup> This is an important safeguard. Second, a certificate may be challenged only on the grounds of dishonesty, bad faith, or “other exceptional circumstances.”<sup>205</sup>

The legislation’s Explanatory Notes attempt to justify this new scheme: “[I]t is not yet possible for Northern Ireland to operate entirely without the fall-back of some special arrangements for a small number of exceptional cases.”<sup>206</sup> The Secretary of State for Northern Ireland provided a similar justification: “Non-jury trial provisions remain necessary to address paramilitary and community-based pressures on jurors that create a risk to the administration of justice. These risks are more significant in Northern Ireland than elsewhere in the UK.”<sup>207</sup> The Committee was not made aware of any specific evidence that speaks to continued jury intimidation and tampering that would necessitate the continuation of this type of derogation from the critical right to be tried by a jury.<sup>208</sup>

The Secretary of State for Northern Ireland noted in 2012 that the number of non-jury trials under the 2007 Act has been “significantly lower” than the number of Diplock trials: “there was an average of 62 cases per year over the last 5 years of the Diplock system, compared with

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<sup>200</sup> *Id.* at c.6, § 1(2).

<sup>201</sup> An “associate” is broadly defined to include a spouse or former spouse, a civil partner or former civil partner, someone who has lived as a partner “in an enduring family relationship,” a friend, or a relative. *Id.* at § 9.

<sup>202</sup> *Id.* at §§ 1(3)–(6).

<sup>203</sup> *Id.* at § 1(10); *see also* Terrorism Act 2000, at sch. 2. Proscribed organizations include, but are not limited to, Irish Republic Army, Cumann na mBan, Fianna na hEireann, Red Hand Commando, Saor Eire, Ulster Freedom Fighters, Ulster Volunteer Force, Irish National Liberation Army, Irish People’s Liberation Organisation, Ulster Defence Association, Loyalist Volunteer Force, Continuity Army Council, Orange Volunteers, Red Hand Defenders. *Id.*

<sup>204</sup> The Justice and Security (Northern Ireland) Act 2007, at § 5(4).

<sup>205</sup> *Id.* at § 7(1).

<sup>206</sup> *Id.* at Explanatory Notes ¶ 7.

<sup>207</sup> St. Andrews Agreement, *supra* note 39, at 10.

<sup>208</sup> *See* 1988 REPORT, *supra* note 1, at 155 (“Nonetheless it is still a system which is in derogation of the common law traditions of the country.”).



an average of 19 non-jury trials per year since the 2007 Act took effect.”<sup>209</sup> Statistics provided to the Committee show that there were 14 non-jury trials in 2011 (involving 23 defendants), 21 in 2012 (involving 55 defendants), 36 in 2013 (involving 65 defendants), and 16 from January through May 2014 (involving 36 defendants). These non-jury cases represent fewer than 2 percent of the total of disposed cases, but the percentage of cases and the percentage of affected defendants have increased from 2011 to 2014.<sup>210</sup>

While Diplock courts have disappeared in name, the non-jury trials that continue in Northern Ireland as permitted by the 2007 Act suffer from the same defect: whether the prosecution has proven the defendant’s guilt is not being decided by a jury. Furthermore, the legislation that established the new scheme of non-jury trials is very broad (e.g., the DPP can issue a non-jury certificate if the DPP merely “suspects” one of the four conditions has been met), and provides only a limited set of circumstances under which a non-jury trial can be challenged. For the reasons that this Committee called for the abolition of Diplock-style courts, it continues to urge Northern Ireland and the UK Parliament to return to the use of jury trials for those scheduled offenses that at present are tried in non-jury trials.

## **B. THE POLICE SERVICE**

### **1. Overview**

At the time of the Committee’s 2003 visit to Northern Ireland, the PSNI, the successor organization to the RUC, had existed for less than two years.<sup>211</sup> The framework for the new PSNI was based on the recommendations of the Independent Commission on Policing for Northern Ireland, known as the Patten Commission.<sup>212</sup> The Patten Commission Report stated that the new PSNI would be premised on the consent of the entire population of Northern Ireland rather than being a security force whose goal was to secure British rule. In order to ensure that this new police service had the support and confidence of the whole of Northern Ireland, increased transparency and accountability were required, as well as the creation of a code of ethics based on the European Convention on Human Rights.<sup>213</sup> Additionally, the Patten Commission

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<sup>209</sup> St. Andrews Agreement, *supra* note 39, at 10.

<sup>210</sup> Figures provided to the Committee by the Lord Chief Justice’s Office.

<sup>211</sup> On November 4, 2001, the RUC became the Police Service of Northern Ireland. The first PSNI-trained officers took up duty in April 2002. PSNI, *A History of Policing in Ireland* (2008), available at [http://www.psni.police.uk/history\\_of\\_policing](http://www.psni.police.uk/history_of_policing).

<sup>212</sup> Independent Commission on Policing for Northern Ireland, *A NEW BEGINNING: POLICING IN NORTHERN IRELAND* (September 1999) (hereinafter “Patten Commission Report”), available at <http://cain.ulst.ac.uk/issues/police/patten/patten99.pdf>.

<sup>213</sup> *Id.* at 6–8, 20; *id.* at 2 (“Both in the past, when the police were subject to political control by the Unionist government at Stormont, and more recently in the period of direct rule from Westminster, they have been identified by one section of the population not primarily as upholders of the law but as defenders of the state...”); Northern Ireland Policing Board, *Police Service of Northern Ireland Code of Ethics 2008*, available at [http://www.nipolicingboard.org.uk/es/final\\_code\\_of\\_ethics-2.pdf](http://www.nipolicingboard.org.uk/es/final_code_of_ethics-2.pdf); Interview with Chief Inspector Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

recommended a reduction in the overall size and a more representative demographic composition of the police force.<sup>214</sup>

The Committee's 2003 report noted that several important Patten Commission recommendations had already been implemented, including the publication of a code of ethics compliant with the European Convention on Human Rights, and establishment of a practice of audiotaping interrogations, a commendable procedure often lacking in US jurisdictions. Since 2004, the reform process within the PSNI has continued through the strengthening of accountability mechanisms, representative recruitment, and demilitarization.<sup>215</sup> A broad cross-section of the people with whom the Committee spoke were generally positive and complimentary about the PSNI's handling of day-to-day law enforcement and community policing functions, though concerns were raised in reference to the investigations of both past and present cases.<sup>216</sup>

The organization has distinguished itself from the legacy of the RUC, but the Committee nonetheless heard from some interviewees that the significant presence of former RUC officers within the PSNI, often serving as civilian contractors, threatens the real or perceived independence of the organization, especially in the investigation of past crimes. Currently, about half of PSNI officers served in the RUC and, given their years of experience, tend to be the higher-ranking officers; such representation raises concerns about ingrained attitudes toward policing and the influence of those attitudes on younger recruits. Many former RUC officers who were incentivized to retire, in accordance with the recommendations of the Patten Commission, have been rehired as civilian contractors, and thus fall outside of some of the accountability mechanisms applicable to PSNI officers.

Other concerns relate to the reach of the accountability mechanisms. The Patten Commission Report provided a framework of accountability for the new PSNI and included strong recommendations for increasing transparency in all aspects of police work, noting "the presumption should be that everything should be available for public scrutiny unless it is in the public interest—not the police interest—to hold it back."<sup>217</sup> However, concerns remain that some of the most sensitive areas of policing—for example, covert, or secret, policing—remain outside of the Patten transparency mechanisms. In an annex appended by the UK Government to the 2006 St. Andrews Agreement, the role of the UK Security Service (also known as "Military Intelligence, Section 5," or "MI5") in Northern Ireland was formalized and aspects of covert policing were taken away from ordinary PSNI policing.<sup>218</sup> Concerns remain, therefore, about

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<sup>214</sup> Patten Commission Report, *supra* note 212, at 9, 75.

<sup>215</sup> See Interview with Raymond McCartney, Rosie McCorley, Sean Lynch, Gareth Keating & Sean McPeake, Sinn Féin Justice Committee (June 30, 2014).

<sup>216</sup> See generally Section IV.

<sup>217</sup> Patten Commission Report, *supra* note 212, at 36.

<sup>218</sup> St. Andrews Agreement, *supra* note 39, at 10, at Annex E, "Future National Security Arrangements in Northern Ireland: Paper by the British Government."

covert or security-related matters that fall under the jurisdiction of MI5, which is exempt from the accountability framework established to scrutinize the PSNI.<sup>219</sup>

Moreover, concerns have been raised over processing and timing of disclosure of material critical to the defense by the Public Prosecution Service (“PPS”), particularly in terrorism cases. In political cases, problems with the process of disclosing material have not been materially improved according to some interviewees, and the Criminal Justice Inspector does not involve himself in these issues. Some lawyers charge that the PPS often abandons trials in an effort to stop the disclosure process. (Additional concerns relating to the PPS declining to prosecute will be discussed below.) Defense costs, which are paid for by the Ministry of Justice, are published and can be used to vilify defense lawyers; but the PPS’s costs for abandoned prosecutions are never made public. Some further allege that the UK government is withholding national security information from politicians and from judicial organs in Northern Ireland. It is difficult for the Committee to evaluate these concerns.

## **2. Accountability**

### **i. The Policing Board**

One of the primary means by which the PSNI is held accountable is through the Northern Ireland Policing Board (“Policing Board”), whose function is to ensure that the police service is effective, impartial, representative, accountable, and compliant with all relevant human rights instruments.<sup>220</sup>

The Policing Board itself is designed to be representative of the broader community, and is composed of nine independent members and ten political members from the Northern Ireland Assembly.<sup>221</sup> Independent members apply for open board positions, which are advertised to the public, and are selected by the Minister of Justice rather than the Secretary of State (which was the practice prior to the devolution of policing powers). For the political members, each party in the Assembly selects members for the board in proportion to the party’s seats in the legislature.<sup>222</sup>

In 2003, Sinn Féin, the largest nationalist party, chose not to participate on the Policing Board, which undermined the agency’s legitimacy and representation for many in Northern Ireland. In 2007, however, Sinn Féin voted to take its allotted seats (now three), reflecting an increased confidence in, and broader cross-community support for, both the PSNI and the

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<sup>219</sup> *Id.* See also Committee on the Administration of Justice, THE POLICING YOU DON’T SEE—COVERT POLICING AND THE ACCOUNTABILITY GAP: FIVE YEARS ON FROM THE TRANSFER OF ‘NATIONAL SECURITY’ PRIMACY TO MI5 (2012), at 9.

<sup>220</sup> The Policing Board is an independent public body made up of nineteen Political and Independent Members established to ensure for all people of Northern Ireland an effective, efficient, impartial, representative and accountable police service, with the goal of securing the confidence of the whole community by reducing crime and the fear of crime. Northern Ireland Policing Board, *The Board* (2014), available at [www.nipolicingboard.org.uk/index/theboard.htm](http://www.nipolicingboard.org.uk/index/theboard.htm).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

Policing Board. This decision effectively ended Sinn Féin's eighty-six-year boycott of involvement in the policing of Northern Ireland and is certainly a significant step forward.<sup>223</sup>

The Policing Board as a whole and each of its four committees meet regularly with the Chief Constable, who is appointed by and accountable to the Board, and other senior officials of the PSNI, both privately and publicly, in order for the police service to present reports and answer questions.<sup>224</sup> The Policing Board has the power to enact regulations and to compel the PSNI to produce information.<sup>225</sup>

There is, however, a significant limitation on the requirement for the provision of information, which potentially inhibits transparency and thus accountability. Under Section 33A(2) of the Police (NI) Act 2000, the Chief Constable is not obliged to supply the Policing Board with information if the Constable is of the opinion that it might be related to national security, is sensitive personnel information, would prejudice law procedures, or puts anyone in danger; however, the Chief Constable must inform the Secretary of State for Northern Ireland and the Policing Board that he or she is withholding information pursuant to one of these grounds.<sup>226</sup> Information that is withheld from the Policing Board under the terms of Section 33A(2) must still be disclosed to the Policing Board's Human Rights Advisor, who is tasked to ensure that the PSNI carries out its duties in a manner that complies with the Human Rights Act 1998.<sup>227</sup> Such review adds a layer of scrutiny to ensure that information withheld from the Policing Board does in fact fall within one of the areas delineated in the Police (NI) Act 2000/2003.

The current Chair of the Northern Ireland Policing Board, Anne Connolly, expressed confidence in the position of the Human Rights Advisor to ensure that any withholding of information is proper. The Chair also noted that the Human Rights Advisor undergoes additional levels of security vetting beyond that required of the members of the Policing Board, which helps to ensure that information properly withheld is not subsequently disclosed.<sup>228</sup>

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<sup>223</sup> Financial Times, *Sinn Féin Votes to End Police Boycott*, Jan. 28, 2007, available at [www.ft.com/cms/s/0/0d3bbb3c-af06-11db-a446-0000779e2340.html#axzz3149166eo](http://www.ft.com/cms/s/0/0d3bbb3c-af06-11db-a446-0000779e2340.html#axzz3149166eo).

<sup>224</sup> Northern Ireland Policing Board, *Our Work* (2014), available at [www.nipolicingboard.org.uk/index/our-work.htm](http://www.nipolicingboard.org.uk/index/our-work.htm); Northern Ireland Policing Board, *Human Rights: Complaints and Discipline* (2014), available at [www.nipolicingboard.org.uk/index/our-work/content-humanrights/content-lesslethal.htm](http://www.nipolicingboard.org.uk/index/our-work/content-humanrights/content-lesslethal.htm).

<sup>225</sup> Northern Ireland Policing Board, *Our Work: Oversight of the PSNI* (2014), available at [www.nipolicingboard.org.uk/index/our-work/oversight-of-the-psni.htm](http://www.nipolicingboard.org.uk/index/our-work/oversight-of-the-psni.htm).

<sup>226</sup> Police (NI) Act 2000 §§ 33A(2), 76A.

<sup>227</sup> In the event of a dispute about whether the information is properly withheld there is a statutory mechanism and an agreed upon protocol to resolve that dispute. In December 2012, the Policing Board agreed to a formal protocol for requiring the Chief Constable to submit a report under section 59 of the 2000 Act. Northern Ireland Policing Board, HUMAN RIGHTS 2014 ANNUAL REPORT 70, available at [http://www.nipolicingboard.org.uk/human\\_rights\\_main\\_report.pdf](http://www.nipolicingboard.org.uk/human_rights_main_report.pdf).

<sup>228</sup> Remarks of Anne Connolly, Chair, Northern Ireland Policing Board, Citizens Crime Commission Event, New York City, NY (March 20, 2015).

## ii. Police Ombudsman's Office

The Police Ombudsman for Northern Ireland was established to address concerns about police misconduct. Since 1998, this office has been charged with investigating all complaints against Northern Ireland's police officers, whether or not the police officers were acting in the course of their duty.<sup>229</sup> The PONI was intended to provide an independent, impartial police complaint system for the public regarding the PSNI. The work of the office was praised under the first ombudsman, Dame Nuala O'Loan, but was then plagued by questions of its independence under Al Hutchinson,<sup>230</sup> who stepped down in January 2012. Dr. Michael Maguire, then Criminal Justice Inspector, suggested that the office lacked independence at that time,<sup>231</sup> and he took over the position in 2012.<sup>232</sup>

## 3. Recruiting

The police force that the PSNI inherited from the RUC was, the Committee concluded in its 2003 Report, overstuffed and "characterized in part by an overrepresentation of Protestant and unionist members."<sup>233</sup> To address this concern, the PSNI instituted a broad ranging retirement package for former RUC police officers. It then sought to increase the representation of Catholics on the police force to more closely match Northern Ireland's Catholic population of approximately 45 percent, by recruiting 50 percent of new hires from the Catholic/nationalist backgrounds and 50 percent from the Protestant/unionist backgrounds.<sup>234</sup> This "fifty/fifty" recruiting policy, however, has since been discontinued<sup>235</sup> and was replaced by a program that the current Justice Minister believes better addresses the need to increase the number of women and minorities.<sup>236</sup>

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<sup>229</sup> Police (Northern Ireland) Acts of 1998 & 2000.

<sup>230</sup> Belfast Telegraph, *Police Ombudsman Al Hutchinson: I may step down from post*, Sept. 5, 2011, available at [www.belfasttelegraph.co.uk/news/northern-ireland/police-ombudsman-al-hutchinson-i-may-step-down-from-post-28653918.html](http://www.belfasttelegraph.co.uk/news/northern-ireland/police-ombudsman-al-hutchinson-i-may-step-down-from-post-28653918.html).

<sup>231</sup> Breaking News.ie, *New police ombudsman appointed for North*, Apr. 4, 2012, available at <http://www.breakingnews.ie/ireland/new-police-ombudsman-appointed-for-north-546248.html>.

<sup>232</sup> *Id.*

<sup>233</sup> 2003 REPORT, *supra* note 1, at 31.

<sup>234</sup> Northern Ireland Policing Board, *Recruitment* (2014), available at <http://www.nipolicingboard.org.uk/index/faqs/recruitment.htm>.

<sup>235</sup> See Interview with Chief Inspector Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

<sup>236</sup> See Interview with Justice Minister David Ford (July 1, 2014). Under the 50:50 recruiting scheme and related recommendations, female representation within the PSNI has increased from 12% to 27% as a result of the increased levels of recruitment in the period 2001 to 2011. There have also been increased levels of female representation at all ranks. Police Service of Northern Ireland, THE WORKFORCE PLAN: EQUALITY IMPACT ASSESSMENT (Feb. 2015), at 19, available at [http://www.psni.police.uk/eqia\\_workforce\\_plan\\_-\\_february\\_2015.pdf](http://www.psni.police.uk/eqia_workforce_plan_-_february_2015.pdf). Despite this improvement, discrimination against women in the police service remains. See, e.g., Belfast Telegraph, *After top cop says women aren't fit for police force, will Chief Constable George Hamilton put himself to test?*, Mar. 7, 2015, available at [www.belfasttelegraph.co.uk/news/northern-ireland/after-top-cop-says-women-arent-fit-for-police-force-will-chief-constable-george-hamilton-put-himself-to-test-31047587.html](http://www.belfasttelegraph.co.uk/news/northern-ireland/after-top-cop-says-women-arent-fit-for-police-force-will-chief-constable-george-hamilton-put-himself-to-test-31047587.html).

Additionally, there are concerns that while the prior policy was successful in increasing the number of officers from Catholic backgrounds, it was premised on the incorrect assumption that Catholic and Protestant groups are homogenous<sup>237</sup> and thus did not adequately increase the representation of those from more staunchly nationalist and unionist backgrounds (including residents of West Belfast (largely nationalist) and East Belfast (largely unionist)). The PSNI has acknowledged the need to increase efforts to recruit from these underrepresented groups.<sup>238</sup>

Currently, those from Catholic backgrounds represent 31 percent of the police force—a dramatic increase since 2003—and training center recruits are at approximately the same level, with 70 percent Protestant and 30 percent Catholic.<sup>239</sup> Questions have been raised about whether there is greater attrition among the Catholic recruits. However, according to information provided by the PSNI, there is only a slight disparity in attrition between the two groups, and that disparity may be attributable to factors other than community background.<sup>240</sup>

The PSNI continues to struggle to introduce socioeconomic diversity among its officers. It has few officers from working class backgrounds, in part due to education requirements and to pressures within certain communities (especially nationalist communities) against joining the PSNI.<sup>241</sup> Instances of intimidation of potential recruits persist. For example, the bombing of the Everglades Hotel in Derry/Londonderry in 2014 was attributed to the hotel hosting a PSNI recruiting event.<sup>242</sup> Additionally, due to safety concerns over reprisals in some communities,

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<sup>237</sup> See *id.* The current recruitment campaign does not use the 50/50 requirement but does use an affirmative action framework to better address diversity.

<sup>238</sup> Interview with Chief Inspector Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

<sup>239</sup> There has been an increase of 1496 (252%) in Roman Catholic officers since the inception of the PSNI in 2001 (1 November 2001 to 1 August 2014). The Patten Report recommendations have increased the number of regular police officers from a Roman Catholic background; however, the same level of increase has not been realized for staff (only an 8% increase in the same period), as the 50:50 recruitment policy applied only to recruitment competitions where there were six or more vacancies of a similar nature to be filled at or about the same time or for Police Officers Part Time (POPT) due to limited community based recruitment in 2003 and 2006. Additionally, as a result of the Patten Severance Scheme, Catholic officer representation at the ranks of Chief Superintendent and Superintendent has been reduced. The Catholic application rate has been consistently higher since 2001 and stands at an average of 36.98%. In the most recent campaign—Campaign 16—37.39% of the applications were from those from a Catholic community background. Police Service of Northern Ireland, *supra* note 235, at 15, 18, 52, 56; see also Secretary of State for Northern Ireland, CONSULTATION PAPER: POLICE (NORTHERN IRELAND) ACT 2000—REVIEW OF TEMPORARY RECRUITMENT PROVISIONS (November 2010), at 11–12, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/136382/50\\_50\\_consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136382/50_50_consultation.pdf); Interview with Chief Inspector Tim Mairs and Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

<sup>240</sup> E-mail from Tim Mairs, Chief Inspector, Police Service of Northern Ireland, to Lauren Melkus, (Oct. 19, 2015, 6:53 EST) (on file with author).

<sup>241</sup> See Interview with Chief Inspector Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

<sup>242</sup> Belfast Telegraph, *Derry hotel bomb: Everglades Hotel left badly damaged in explosion 'had hosted PSNI recruitment event,'* May 30, 2014, available at <http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/derry-hotel-bomb-everglades-hotel-left-badly-damaged-in-explosion-had-hosted-psni-recruitment-event-30316678.html>.

police officers are sometimes unable to patrol the same neighborhoods in which they live, or might relocate to avoid intimidation or retribution for joining the PSNI.<sup>243</sup>

With over a decade since the creation of the PSNI and the implementation of the above methods of accountability and recruiting policies, the general consensus in Northern Ireland is that the PSNI represents a clear break with the legacy of the RUC. Police interactions with the community, respect for human rights, the composition of police force, and a reduction in bias have greatly improved.<sup>244</sup> This is commendable progress and is an example of how Northern Ireland can successfully move on from the Troubles. Concern over how the police force handles legacy cases, however, persists.

#### 4. Investigations

Despite significant improvements in policing, the Committee spoke with some who expressed concerns about the thoroughness and timeliness of criminal investigations conducted by the PSNI, and their view that the PSNI's investigative tactics sometimes contribute to delay, increased costs, and ineffective prosecutions. These issues may be attributed in part to the police force's earlier emphasis, during the Troubles, on maintaining order rather than cultivating investigators, improving investigative procedures, or creating procedures for coordination with other criminal justice agencies. Of particular concern is the quality and timeliness of investigative files referred by the PSNI to the Public Prosecution Service—many of which are returned to the PSNI by prosecutors for further investigation.<sup>245</sup> According to a recent report by Criminal Justice Inspection Northern Ireland, 33% of the files they sampled were categorized as unsatisfactory or poor quality and, depending on the type of case, between 26% and 58% of case files were not completed within timeliness targets.<sup>246</sup> According to the PSNI, the inordinate length of time it takes to develop some kinds of evidence is also problematic.<sup>247</sup>

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<sup>243</sup> E-mail from Tim Mairs, Chief Inspector, Police Service of Northern Ireland, to Lauren Melkus, (Oct. 19, 2015, 6:53 EST) (on file with author); Interview with Chief Inspector Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

<sup>244</sup> Several of the people with whom the Committee met expressed this view. *See, e.g.*, Interview with Brian Gormally & Daniel Holder, Committee on the Administration of Justice (July 4, 2014); Interview with Brendan McGuigan, Chief Inspector of Criminal Justice in Northern Ireland & James Corrigan, Deputy Chief Inspector (July 4, 2014); Interview with Prof. Brice Dickson (July 2, 2014); Interview with Raymond McCartney, Rosie McCorley, Sean Lynch, Gareth Keating & Sean McPeake, Sinn Féin Justice Committee (June 30, 2014); Interview with Neil Jarman, Director, Institute for Conflict Research (July 1, 2014).

<sup>245</sup> Criminal Justice Inspection, Northern Ireland, A CORPORATE GOVERNANCE INSPECTION OF THE PUBLIC PROSECUTION SERVICE FOR NORTHERN IRELAND (Apr. 2013), ¶¶ 3.37 – 3.43, available at <http://www.cjini.org/CJNI/files/1b/1b8e142e-9f17-41b5-8674-fec5c0521706.pdf>.

<sup>246</sup> Criminal Justice Inspection, Northern Ireland, AN INSPECTION OF THE QUALITY AND TIMELINESS OF POLICE FILES (INCORPORATING DISCLOSURE) SUBMITTED TO THE PUBLIC PROSECUTION SERVICE FOR NORTHERN IRELAND, Nov. 2015, Executive Summary and ¶ 3.28, available at <http://www.cjini.org/CJNI/files/9f/9faaa7ad-b1a9-4d66-bd35-79ff20848c7c.pdf>.

<sup>247</sup> For example, analysis of evidence such as the contents of a mobile phone can take up to eighteen months to complete, hindering investigatory leads and collection of evidence for prosecution. Interview with Chief Inspector Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

The PSNI has acknowledged the need for improvement and has noted factors that contribute to quality and timeliness issues. The lack of early engagement with the PPS contributes to delay. Investigations are not coordinated with a prosecutor at the outset, potentially resulting in incorrect charges or failure to pursue the types of evidence needed to sustain a charge. There are not clear parameters specifying what should be contained in a file that would meet the needs of the PPS.<sup>248</sup> On the other hand, PSNI officials also expressed concern that the amount of documentation they are required to generate for cases that the PPS ultimately declines to prosecute or that result in guilty pleas is a significant drain on police resources.<sup>249</sup>

At the time of the Committee's visit, there was also evidence to suggest that the police have been transmitting fewer files for prosecution.<sup>250</sup> While this may be a result of proper use of police discretion, the concern is that the police may be improperly using their discretion to issue spot fines or decide against a prosecution referral for low-level crimes.<sup>251</sup> The Criminal Justice Inspectorate issued a report in January 2015 that found that "the vast majority of these cases were appropriate but Inspectors identified a small number of occasions where the use of a discretionary disposal was beyond the scope that was intended."<sup>252</sup> Brendan McGuigan, Chief Inspector of Criminal Justice in Northern Ireland, recommended improved supervision and clearer guidance to be developed in conjunction with the PPS for the use of discretionary disposals or penalty notices.<sup>253</sup> The Committee agrees that enhanced monitoring is important to ensure that police discretion is applied fairly and consistently while providing alternatives to criminalization, especially for juveniles.<sup>254</sup>

## 5. Community-Level Policing

According to the PSNI, many of the improvements they have realized have come from prioritizing a community policing strategy.<sup>255</sup> The strategy is implemented through the use of neighborhood patrol teams, which allows community members to know their neighborhood police officers by name. Policing partnerships are also being developed on a local level,<sup>256</sup>

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<sup>248</sup> Criminal Justice Inspection, *supra* note 246, at Executive Summary and ¶ 3.33; Interview with Chief Inspector Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

<sup>249</sup> Criminal Justice Inspection, *supra* note 246, ¶¶ 3.36, 3.55, 3.59-3.60; Interview with Chief Inspector Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

<sup>250</sup> Criminal Justice Inspection, *supra* note 246, ¶ 1.5.

<sup>251</sup> Police can dispose of certain offenses where the victim does not want to prosecute but wants restitution. Interview with Chief Inspector Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

<sup>252</sup> Criminal Justice Inspection Northern Ireland, *Press Release: Police Use of Discretion Incorporating Penalty Notices*, Jan. 28, 2015, available at [www.cjini.org/TheInspections/Inspection-Reports/Latest-Publications.aspx?did=1451](http://www.cjini.org/TheInspections/Inspection-Reports/Latest-Publications.aspx?did=1451).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> Interview with Chief Inspector Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

<sup>256</sup> Interview with Raymond McCartney, Rosie McCorley, Sean Lynch, Gareth Keating & Sean McPeake, Sinn Féin Justice Committee (June 30, 2014).



including engagement with community and restorative justice organizations, in part with the goal of ending the use of “informal justice” methods employed by paramilitaries.<sup>257</sup> The community strategy remains a work in progress<sup>258</sup> requiring increased efforts at engagement in certain districts.<sup>259</sup>

In past reports, the Committee addressed the experiences of criminal suspects during arrest and in post-arrest detention. The PSNI has made substantial improvement in these areas. Interviews that take place at a police station are audio or videotaped.<sup>260</sup> Additionally, there is video surveillance in the vast majority of designated custody suites in Northern Ireland in all areas where suspects might be detained (with the exception of the legal consultation rooms where clients meet with their attorneys).<sup>261</sup> Police may not bring weapons into the custody suites and are required to follow a detailed code of practice.<sup>262</sup>

## 6. Public Order Policing

Public order and crowd control is handled by the PSNI’s Tactical Support Groups (“TSG”). In the past, policing of parades and protests has generated significant criticism. Several with whom the Committee spoke indicated that the police are now using force more judiciously.<sup>263</sup> Although the TSGs continue in some instances to deploy “less-lethal” projectiles and water cannons in protest and riot situations, officers are now issued redesigned impact rounds that are arguably safer than previously used plastic baton rounds.<sup>264</sup> Additionally, the

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<sup>257</sup> Interview with Justice Minister David Ford (July 1, 2014).

<sup>258</sup> Interview with Chief Inspector or Superintendent Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

<sup>259</sup> *Id.*

<sup>260</sup> Interviews with non-terrorism suspects conducted under the Police and Criminal Evidence Act (NI) Order 1989 (“PACE (NI)”) are audio recorded in accordance with PACE (NI) Code of Practice E at <https://www.dojni.gov.uk/sites/default/files/publications/doj/pace-code-e-2015.pdf>. Where such interviews are video recorded, they are conducted in accordance with PACE(NI) Code of Practice F at <https://www.dojni.gov.uk/sites/default/files/publications/doj/pace-code-f-2015-.pdf>. Interviews in terrorism cases are audio and video recorded under Terrorism Act 2000.

<sup>261</sup> E-mail from Tim Mairs, Chief Inspector, Police Service of Northern Ireland, to Lauren Melkus, (Oct. 19, 2015, 6:53 EST) (on file with author); Interview with Chief Inspector Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

<sup>262</sup> Interview with Chief Inspector Tim Mairs & Sr. Legal Advisor for Human Rights Ralph Roche, Police Service of Northern Ireland (July 3, 2014).

<sup>263</sup> Interview with Neil Jarman, Director, Institute for Conflict Research (July 1, 2014); Interview with Brian Gormally & Daniel Holder, Committee on the Administration of Justice (July 4, 2014) (noting that police use of force is less “heavy handed”).

<sup>264</sup> Since 2005, the PSNI has changed the less lethal projectile technology it employs to the Attenuating Energy Projectile (AEP) rounds. Police Service of Northern Ireland, Freedom of Information Request Response No. F-2012-02259 (2012), available at [www.psni.police.uk/baton\\_rounds.pdf](http://www.psni.police.uk/baton_rounds.pdf). While these have been identified as less lethal, organizations like Rights Watch (UK) have raised concerns about their use, especially in riot situations. British Irish Watch, *Memorandum Submitted: Children's Rights - Human Rights Joint Committee to Parliament* (Feb. 2009), available at [www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/157we07.htm](http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/157we07.htm).

PSNI has significantly reduced the number of instances where these measures are employed.<sup>265</sup> Some remained concerned that TSG still struggles to find the balance between negotiation and the use of force. In addition, unionists and nationalists have complained that the police treat the “other” community more leniently, especially concerning public order offenses.

## C. THE PUBLIC PROSECUTION SERVICE

### 1. Overview

The Public Prosecution Service for Northern Ireland, unlike other major criminal justice agencies, falls outside the purview of the Ministry of Justice of the Northern Ireland Assembly.<sup>266</sup> Although the Attorney General of Northern Ireland appoints the Director of the PPS and can initiate the process for his or her removal, the PPS is independent of the Office of the Attorney General and not under any form of direct political control.<sup>267</sup>

Following recommendations of the Criminal Justice Review in 2000, the PPS was created under the Justice (Northern Ireland) Act 2002<sup>268</sup> and established in June 2005<sup>269</sup> to succeed the Department of the Director of Public Prosecutions. The transition to the current PPS included several functional and structural changes which, according to many individuals with whom the

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<sup>265</sup> In 2004–2006, the number of times these measures were used started dropping dramatically; in recent years this has increased, but in a controlled manner. Interview with Neil Jarman, Director, Institute for Conflict Research (July 1, 2014).

<sup>266</sup> Since the devolution of policing and justice to the Northern Ireland Assembly in April 2010, the Service has been designated as a non-ministerial government department. In accordance with the Justice (Northern Ireland) Act 2002, the functions of the Director shall be exercised by him independently of any other person. Public Prosecution Service Northern Ireland, *About the PPS* (2014), available at <http://www.ppsni.gov.uk/About-the-PPS-5014.html>. PPS works closely with the Ministry of Justice but is not part of it. See Interview with Justice Minister David Ford (July 1, 2014).

<sup>267</sup> The Justice (Northern Ireland) Act 2002, which came into effect in April 2010, established the new post of Attorney General for Northern Ireland (“AGNI”) and devolved policing and justice matters to the Northern Ireland Assembly. The AGNI is appointed by the First Minister and deputy First Minister of the Northern Ireland Legislative Assembly but is not an elected Member of the Legislative Assembly. The AGNI is “statutorily independent” of the First Minister and deputy First Minister, the Northern Ireland Executive and the Northern Ireland Departments. The AGNI is responsible for the appointment of the Director and Deputy Director of the Public Prosecution Service for Northern Ireland, but does not oversee the Public Prosecution Service. The Justice (Northern Ireland) Act 2002. The relationship between AGNI and the PPS continues to be reviewed to ensure that it is “correctly pitched.” Department of Justice (Northern Ireland), *A CONSULTATION PAPER: GOVERNANCE AND ACCOUNTABILITY OF THE PUBLIC PROSECUTION SERVICE* (Feb. 2012), at 4 (“[Concerns] are, in essence, that the balance between independence and accountability struck in the 2002 Act may not be the right arrangement for 2012.”).

<sup>268</sup> Established under the Justice (Northern Ireland) Act 2002, the PPS was originally conceived as part of the Review of the Criminal Justice System in Northern Ireland (2000). The key services the PPS provide are: The decision to prosecute in all criminal cases in Northern Ireland investigated by the Police Service of NI and Prosecutorial/Pre-charge advice to police.

<sup>269</sup> The Public Prosecution Service, *About the PPS* (2014), available at [www.ppsni.gov.uk/About-the-PPS-5014.html](http://www.ppsni.gov.uk/About-the-PPS-5014.html).

Committee met, have resulted in improved transparency and represents a fresh start.<sup>270</sup> Additionally, many of the specific recommendations made during the last report by the Committee in 2003 have been implemented, including the development and publication of a code of ethics, issuance of annual reports, development of an independent complaints process, and publication of demographic information and statistics about PPS staff.<sup>271</sup>

The PPS now prosecutes all crimes investigated by the PSNI, including offenses that were previously prosecuted by the police.<sup>272</sup> Some prosecutorial matters are reserved to the UK Parliament at Westminster, however, and are carried out by the Advocate General for Northern Ireland, The Rt. Hon. Jeremy Wright QC MP, who is also the Attorney General for England and Wales.<sup>273</sup> In order to accommodate the larger caseload and help diversify the staff, the number of PPS attorneys has increased dramatically; this increase will require additional training for the new group to deploy the functions of the office. The PPS has also expanded to several additional offices outside of Belfast, increasing the benefits of localization of services.<sup>274</sup> Recruitment of prosecutors for assignment to the outer offices, however, is more challenging.

Despite the various organizational changes that have made the PPS a more community-based, transparent, and transformed organization, several issues remain to be addressed with regard to accountability, oversight, efficiency, and effectiveness.

## **2. Relationship with the Police Service**

The PPS was designed to provide an independent review of the investigation and arrest of criminal suspects by the PSNI and to “remove [the] potential for conflict of interest by placing responsibility for arrest and prosecution decisions within separate entities.”<sup>275</sup> To that end, two key changes were introduced in 2005: first, the PPS now prosecutes all crimes (including low-level offenses previously prosecuted by the police), and second, it provides prosecutorial and pre-charge advice to the police and a review of charges prior to submission to the court.<sup>276</sup> As

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<sup>270</sup> Interview with Paul O’Connor, Pat Finucane Centre (July 3, 2014); Interview with Brian Gormally and Daniel Holder, Committee on the Administration of Justice (July 4, 2014); Interview with Prof. Brice Dickson (July 2, 2014); Interview with Justice Minister, David Ford (July 1, 2014).

<sup>271</sup> See 2003 REPORT, *supra* note 1, at 10, 25.

<sup>272</sup> The Public Prosecution Service, *Public Prosecution Service at the Heart of Criminal Justice System*, June 13, 2005, available at [http://www.ppsni.gov.uk/SiteDocuments/Publications/Lauch\\_of\\_the\\_PPS\\_June\\_2005.pdf](http://www.ppsni.gov.uk/SiteDocuments/Publications/Lauch_of_the_PPS_June_2005.pdf).

<sup>273</sup> Public Prosecution Service for Northern Ireland, ANNUAL REPORT AND RESOURCE ACCOUNTS: 2014-2015, July 2, 2015, at 10, available at [www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Publications/Annual%20Reports/PPS%20Annual%20Report%20and%20Resource%20Accounts%202014-15.pdf](http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Publications/Annual%20Reports/PPS%20Annual%20Report%20and%20Resource%20Accounts%202014-15.pdf).

<sup>274</sup> Regional offices are located in Belfast, Derry/Londonderry, Omagh, Lisburn, Ballymena and Newry. The Public Prosecution Service, *Public Prosecution Service at the Heart of Criminal Justice System*, June 13, 2005, available at [www.ppsni.gov.uk/SiteDocuments/Publications/Lauch\\_of\\_the\\_PPS\\_June\\_2005.pdf](http://www.ppsni.gov.uk/SiteDocuments/Publications/Lauch_of_the_PPS_June_2005.pdf).

<sup>275</sup> See 2003 REPORT, *supra* note 1, at 22.

<sup>276</sup> Public Prosecution Service, *About the PPS: Services* (2014), available at <http://www.ppsni.gov.uk/Services-5033.html>; see 2003 REPORT, *supra* note 1, at 22; see also The Role of the Public Prosecution Service (Current Online Pamphlet), available at [www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/The%20Role%20of%20The%20PPS%20\(Oct%202014\).pdf](http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/The%20Role%20of%20The%20PPS%20(Oct%202014).pdf).

described above, the first of these changes has been implemented.<sup>277</sup> Progress on the second important change has been less straightforward. Previous Committee reports in 1999 and 2003 noted the important function the PPS provides with respect to pre-charge and investigatory advice, both in terms of the efficiency of the process and the proper administration of justice. The Committee thus recommended early engagement of the PPS with the PSNI.<sup>278</sup>

In the 1999 Report, the Committee noted that in Northern Ireland the role of the prosecutor did not include involvement in investigations, the decision to arrest, the assessment of evidence, or review of charges before an arrestee is presented to a magistrate.<sup>279</sup> Elsewhere in the United Kingdom (as in much of the United States), police officers consult with prosecutors who assist in drafting complaints that are sworn to by police officers.<sup>280</sup> Prior to the arraignment, the charges are reviewed by a prosecutor who has interviewed the arresting officer (and sometimes witnesses). The prosecutor considers probable cause and prosecutorial merit, and often reduces or disapproves the officer's initial charges.<sup>281</sup>

The 2003 Committee Report noted that the police expressed interest in a closer relationship with prosecutors including "assigning officers to PPS offices ...[to] assist in speedier disposition of cases."<sup>282</sup> At that time, however, the Office of the Director of Public Prosecutions—the predecessor to the PPS—raised concerns that connections between the police and prosecutors might undermine public confidence in the prosecution service due to historic distrust of the police in many communities.<sup>283</sup>

While independence between the PPS and PSNI may have helped build confidence in both organizations and in criminal justice as a whole, it has now become apparent that the lack of a coordinated process is inefficient, has consumed unnecessary financial resources, created avoidable delay, and may hinder the administration of justice.<sup>284</sup> As mentioned before, without coordination such as pre-charge advice, officers are more likely to incorrectly charge suspects and collect evidence for charges or cases that the prosecution is not interested in pursuing.

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<sup>277</sup> The PPS is the principal prosecuting authority in Northern Ireland and is responsible for all criminal cases previously prosecuted by the former Department of the Director of Public Prosecutions for Northern Ireland (DPPNI) and the Police Service of Northern Ireland (PSNI). Public Prosecution Service for Northern Ireland, ANNUAL REPORT (2008-09), at 13, *available at* [www.ppsni.gov.uk/SiteDocuments/Publications/PPSNI%20Annual%20Report%200809v1.pdf](http://www.ppsni.gov.uk/SiteDocuments/Publications/PPSNI%20Annual%20Report%200809v1.pdf).

<sup>278</sup> 1999 Report, *supra* note 1, at 13–14. "The ABCNY's 1999 Report recommended that in cases involving serious crimes, prosecutors should be involved to assist the police at the investigation stage." 2003 REPORT, *supra* note 1, at 22.

<sup>279</sup> 1999 REPORT, *supra* note 1, at 13.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 14.

<sup>282</sup> "The police favor assigning officers to PPS offices and also believe that this would assist in speedier disposition of cases." 2003 REPORT, *supra* note 1, at 22.

<sup>283</sup> "The Office of the DPP voiced caution concerning association with the police, and opposes 'co-location' of prosecutors in police stations, which it believes could compromise public support for the prosecution service because of historic distrust of the police in many communities." *Id.*

<sup>284</sup> Criminal Justice Inspection Northern Ireland, AVOIDABLE DELAY (June 2010), *available at* <http://www.cjini.org/CJNI/files/c0/c0243f51-1e73-47e8-a6fa-344d5f0063c5.PDF>.

Conversely, the PPS receives a high percentage of incomplete police files, which must be returned to the PSNI for additional information necessary for the decision to prosecute.

It is the Committee's understanding that both the PSNI and PPS have attempted to address some of these issues internally<sup>285</sup> and through the over-arching structures of the Criminal Justice Delivery Group and the Criminal Justice Board, but with limited success.<sup>286</sup> According to the Criminal Justice Inspector, however, both the leaderships of the PSNI and PPS have agreed to the Criminal Justice Inspector's recommendation to form a Prosecution Team to address these issues.<sup>287</sup> The Prosecution Team will work to improve file quality through agreed-upon standards, create a system for the provision of investigative and pre-charge advice (rather than relying on ad hoc relationships), introduce proportionate case-file building to reduce the amount of documentation required for cases that are unlikely to proceed to trial, and streamline the Information Communications Technology portals relating to case preparation and presentation.<sup>288</sup> The Committee continues to recommend early engagement, improved systems of communication, and joint training between these essential criminal justice agencies and is encouraged to hear that both agencies will be working to specifically implement the recommendations of the Criminal Justice Inspector.

### 3. Use of "Supergrass" Evidence

The Committee's 1988 Report noted with approval that after several, well-publicized reversals by the Court of Appeals of convictions based on so-called "supergrass" testimony (referring to uncorroborated testimony provided by "assisting offenders," i.e., people accused of crimes who agree to testify against alleged former accomplices<sup>289</sup>), that type of evidence was no longer in use by prosecutors in Northern Ireland.<sup>290</sup> The danger associated with the use of uncorroborated testimony is sometimes increased in non-jury courts (mentioned earlier) where a single judge must determine the credibility of the supergrass witness.<sup>291</sup>

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<sup>285</sup> Criminal Justice Inspection, *supra* note 246, ¶¶ 2.13–2.15 and 3.24–3.25.

<sup>286</sup> *Id.* ¶¶ 2.3–2.8.

<sup>287</sup> *Id.* Chief Inspector's Foreword.

<sup>288</sup> *Id.* Strategic Recommendations

<sup>289</sup> Use in Ireland and Great Britain was common until the 1980s, and the witnesses were technically considered "assisting offenders." The practice fell into disuse after concerns arose related to the credibility of that testimony. See discussion in Mervyn Jess, BBC News, *History of the supergrass system in Ireland*, Feb. 22, 2012, available at <http://www.bbc.com/news/uk-northern-ireland-17074001>.

<sup>290</sup> "By the time of our visit to Northern Ireland, primarily as a result of significant reversals by the Court of Appeals of convictions based on 'Supergrass' evidence, the general consensus was that the 'Supergrass' phenomenon has all but passed on." 1988 REPORT, *supra* note 1, at 173.

<sup>291</sup> "The approach in this case has been assisted by the detailed consideration given by Mr. Justice Gillen in his judgment in the case of *R v Haddock and others* to the dangers of convicting on the uncorroborated evidence of an accomplice." Public Prosecution Service, *News Release: Decision Not to Prosecute in Martin O'Hagan Murder Case: PPS*, Jan. 25, 2013, available at [www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/PPS%20Press%20Office/Press%20Release%20Martin%20O'Hagan%2025%20January%202013.pdf](http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/PPS%20Press%20Office/Press%20Release%20Martin%20O'Hagan%2025%20January%202013.pdf).

The use of supergrass testimony has reemerged in several prominent cases under the Serious Organised Crime and Police Act (SOCPA) 2005,<sup>292</sup> but the scheme enabling its use has changed. On the one hand, the statute contains certain provisions that may reduce some of the previous concerns about reliability of testimony, fair trial and due process for the accused. Under the earlier statute, “assisting offenders” were eligible to receive immunity and did not face the reinstatement of their original sentence if they retracted their testimony.<sup>293</sup> There were also reports that supergrass witnesses received up to “hundreds of thousands of pounds in exchange for giving evidence.”<sup>294</sup> Under the current scheme, supergrasses are eligible for greatly reduced sentences but cannot receive immunity or financial remuneration.<sup>295</sup> Additionally, one judge has cautioned two supergrass witnesses that, should they renege on their agreement to testify, they would face re-sentencing at the original level.<sup>296</sup> On the other hand, another crucial change in the laws affecting those now facing supergrass trials, and which applies in any criminal trial, is the modification of the right to silence. In the 1980s, many suspects chose to remain silent during questioning, but the applicable law now states that a judge or jury can draw an adverse inference from a defendant’s decision to remain silent during police interrogation or at trial.<sup>297</sup>

In one highly publicized case in 2011, the first supergrass trial in Northern Ireland for over twenty-five years, the testimony of two supergrass witnesses, brothers Ian and Robert Stewart, was used in a case against thirteen defendants in connection with the murder of Thomas English. English was killed during a feud between two loyalist paramilitaries, the Ulster Defense Association and the Ulster Volunteer Force (“UVF”), in 2000.<sup>298</sup> The Stewart brothers each received twenty-two-year sentences for their part in a series of UVF attacks; those sentences were ultimately reduced to five-and-a-half years in return for their testimony. The Thomas English trial ended in the acquittal of twelve of the thirteen defendants, including all nine of the defendants charged with murder. The acquittal was a result of the judge’s finding that the testimony of the supergrass witnesses was unreliable.<sup>299</sup>

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<sup>292</sup> Serious Organised Crime and Police Act (2005). Section 179 extends or designates sections applying to Northern Ireland. Barry McCaffrey, *The Detail*, *Supergrass System Back in the Dock After 25 Years in Limbo*, Sept. 4, 2011, available at <http://www.thedetail.tv/articles/supergrass-system-back-in-the-dock-after-25-years-in-limbo>.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> The Court of Appeal for England and Wales has noted that such a reduction in sentence is the only incentive that can be offered to encourage the provision of information about serious crimes. BBC News, *Northern Ireland Supergrass Terrorist Trials*, Feb. 26, 2010, available at [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/8538895.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/8538895.stm).

<sup>296</sup> McCaffrey, *supra* note 292. SOCPA 2005 allows for a sentence to be referred to the court where promised co-operation was not forthcoming. Serious Organised Crime and Police Act (2005), at § 74. See Northern Ireland Assembly, Committee for Justice, OFFICIAL REPORT (HANSARD), TOMMY ENGLISH MURDER TRIAL: MINISTERIAL BRIEFING, Mar. 1, 2012, available at [www.niassembly.gov.uk/globalassets/documents/official-reports/justice/2011-2012/tommy-english-murder-trial.pdf](http://www.niassembly.gov.uk/globalassets/documents/official-reports/justice/2011-2012/tommy-english-murder-trial.pdf).

<sup>297</sup> Criminal Evidence (NI) Order (1988).

<sup>298</sup> Mark Simpson, *UVF Supergrass Trial Brothers Not to be Returned to Jail*, June 11, 2013, available at <http://www.bbc.com/news/uk-northern-ireland-22860451>.

<sup>299</sup> McCaffrey, *supra* note 292; David Young, *Belfast Telegraph*, *Nine Cleared of Loyalist Feud Murder*, Feb. 22, 2012, available at <http://www.belfasttelegraph.co.uk/news/northern-ireland/nine-cleared-of-loyalist-feud-murder-28717591.html>.

Against this backdrop, the PPS is attempting to use the testimony of another highly publicized supergrass witness. Gary Haggarty is a former UVF commander who potentially faces 212 felony counts including five counts of murder.<sup>300</sup> Despite having become a cooperating witness over five years ago, Haggarty has not yet testified in any case. Additionally, charges related to the killings of Gary Convie and Eamon Fox, which had been brought against two defendants allegedly based on evidence provided by Gary Haggarty, were recently dismissed (without prejudice) just months after being brought.<sup>301</sup> As part of his agreement to cooperate with the authorities, Haggarty reportedly may serve as little as three years in prison.<sup>302</sup> In addition to concerns about the inadequacy of his possible sentence, the victims' families have expressed frustration that Haggarty has not yet been tried for his alleged crimes. According to a prosecutor, "It's unclear whether there will be a Haggarty trial . . . until we know the assisting offender's status as a witness we can't take a decision."<sup>303</sup>

Despite some improvements in the law, its application in the two instances above continues to demonstrate reasons for concern about the reliability of supergrass testimony. The criminal justice system must take into account the potential impact not only on defendants, but also on the victims of the supergrass witness and their survivors and their rights to adequate redress.

#### 4. Other High Profile Cases

Since the establishment of the PPS, several high profile legacy and other politically charged cases, in addition to the Thomas English murder case described above, have failed due to the prosecution's withdrawal of evidence, acquittal, or reversal upon appeal. These failed prosecutions include those of the Omagh bombing, the Northern Bank robbery, the Robert McCartney murder, and the Massereene Barracks murders. These cases were very costly and their collapses have eroded some public confidence in the PPS to secure justice for victims.<sup>304</sup>

Taken together, these cases, described below, represent a pattern of failed prosecutions in many high profile cases handled by the PPS since its inception. In many instances, the prosecution's case appears to have been greatly hampered by the poor quality of the police investigation and by ongoing witness intimidation and fear in cases linked to paramilitaries. The

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<sup>300</sup> Alan Erwin, Belfast Telegraph, '10,000 Pages of Evidence Against UVF Supergrass Gary Haggarty,' *Court Hears*, Oct. 13, 2014, available at <http://www.belfasttelegraph.co.uk/news/northern-ireland/10000-pages-of-evidence-against-uvf-supergrass-gary-haggarty-court-hears-30659488.html>.

<sup>301</sup> Alan Erwin, Belfast Telegraph, *All Charges Withdrawn Against Two Men Accused of the Double Murder of Catholic Workmen 21 Years Ago*, May 7, 2015, available at <http://www.belfasttelegraph.co.uk/news/northern-ireland/all-charges-withdrawn-against-two-men-accused-of-the-double-murder-of-catholic-workmen-21-years-ago-31203396.html>; BBC News, *Gary Convie and Eamon Fox Murder Charges Withdrawn*, May 7, 2015, available at <http://www.bbc.com/news/uk-northern-ireland-32626645>.

<sup>302</sup> Alan Erwin & Chris Kilpatrick, Belfast Telegraph, *Five murder charges against alleged UVF supergrass - but if found guilty he could get just three years*, Oct. 14, 2014, available at <http://www.belfasttelegraph.co.uk/news/northern-ireland/five-murder-charges-against-alleged-uvf-supergrass-but-if-found-guilty-he-could-get-just-three-years-30661724.html>.

<sup>303</sup> BBC News, *UVF Supergrass Gary Haggarty May Seek to Have Charges Dropped*, Mar. 11, 2015, available at <http://www.bbc.com/news/uk-northern-ireland-31839776>.

<sup>304</sup> Criminal Justice Inspection, *supra* note 245, ¶ 1.12

decision of the PPS to prosecute these cases despite these problems and the manner in which the underlying investigations were conducted raise concerns about how evidence and witnesses are vetted by the PPS for reliability, consistency, and sufficiency.

### **i. Omagh Bombing**

In August 1998, a car bomb parked in downtown Omagh, County Tyrone, exploded, claiming the lives of twenty-nine people and injuring hundreds more. Members of the Real IRA, a paramilitary group, committed the bombing, likely in retaliation for the approval of the Good Friday Agreement. This atrocity caused the greatest loss of life from a single bombing incident in the conflict. Sean Hoey, the only person yet brought to trial in Northern Ireland in connection with the Omagh bombing, was charged with fifty-six offenses.<sup>305</sup>

The case against Hoey rested on three lines of evidence, all of which the judge rejected after a ten-month trial for a range of reasons, including the lack of expertise of a testifying forensic officer, improper storing and handling of evidence that tainted the DNA,<sup>306</sup> concerns over the reliability of the forensic evidence used, and concerns about the presentation of false testimony by PSNI officers and others involved in the investigation and preparation of the case with possible “deliberate and calculated deception.”<sup>307</sup> Transcripts of the officers’ testimony were referred by the trial judge to the Chief Constable of the PSNI who, in turn, referred the file to the Police Ombudsman for investigation. Upon conclusion of the Police Ombudsman’s investigation, the PPS made the decision not to proceed against the officers, citing insufficient evidence to provide a reasonable prospect of conviction.<sup>308</sup>

### **ii. Northern Bank Robbery**

In December 2004, the headquarters of the Northern Bank, located in the center of Belfast, was robbed of £26.5 million—the biggest bank robbery in the history of Northern Ireland. After a PSNI investigation, Chris Ward, a bank employee, was charged as a co-conspirator in the crime, which included holding other employees and their families hostage. The

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<sup>305</sup> Seamus Daly was charged in April 2014 with twenty-nine counts of murder and other charges related to the Omagh bombing but no trial date has been scheduled. BBC News, *Michael McKevitt: TDs back Real IRA chief release bid*, July 2, 2015, available at <http://www.bbc.com/news/uk-northern-ireland-33361674>.

<sup>306</sup> Steve James, World Socialist Web Site, *Omagh bombing trial: Hoey cleared, but little else clarified*, Jan. 19, 2008, available at <http://www.wsws.org/en/articles/2008/01/omag-j19.html>.

<sup>307</sup> *The Queen v. Sean Hoey* (Crown Court Sitting in Northern Ireland), Bill No. 341/05, Dec. 20, 2007, available at [www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2007/2007%20NICC%2049/j\\_j\\_WEI7021FINAL.htm](http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2007/2007%20NICC%2049/j_j_WEI7021FINAL.htm); Frank Shouldice, Irish America, *Omagh Bombing Case Collapses*, Feb./Mar. 2008, available at <http://irishamerica.com/2008/02/omagh-bombing-case-collapses/>; see also Police Prosecution Service, *PPS Response to Criticisms Concerning Preparation of Police Witnesses Omagh*, Feb. 20, 2009, available at <http://www.ppsni.gov.uk/Press-Releases---5083/Page4.html>.

<sup>308</sup> Public Prosecution Service, *PPS Statement In Relation To Prosecution Decisions Arising From An Investigation Carried Out By The Police Ombudsman Into The Evidence Given At The Omagh Bomb Trial By A Number Of Police Officers*, Feb. 20, 2009.



PSNI Chief Constable at the time, Sir Hugh Orde, claimed that the Provisional IRA planned and executed the robbery, a charge denied by Sinn Féin.<sup>309</sup>

Ultimately, Ward was the only defendant brought to trial. The prosecution's case hinged on evidence that Ward manipulated the work roster in order to ensure he would be on the schedule the night of the robbery. At trial, testimony that conflicted with the prosecution's contention was introduced, which severely undermined its case. In October 2008, the case against Ward collapsed and was withdrawn, and he was subsequently cleared of all charges.<sup>310</sup> The magnitude of the crime, the alleged involvement of the Provisional IRA, an investigation that failed to identify the perpetrators, and the unsuccessful prosecution of Chris Ward had far reaching political consequences for the Northern Ireland peace process:<sup>311</sup> accusations about IRA involvement in the robbery initially caused them to withdraw their decommissioning pledge; however, over several months the accusations increased pressure on the IRA and by mid-2005 the IRA ordered an end to their armed campaign.

### iii. Robert McCartney

In 2005, Robert McCartney, a resident of Short Strand, a primarily nationalist Belfast neighborhood, was fatally beaten and stabbed following an altercation at a bar in the center of the city.<sup>312</sup> The investigation was hindered by several factors, including rioting outside the bar after the incident, apparent systematic destruction of evidence (the perpetrators' clothing and security camera footage), and intimidation of witnesses (approximately seventy bar patrons gave statements that they were in the bathroom at the time of the incident).<sup>313</sup>

Despite these obstacles, the PPS brought three defendants to trial. Terence Davison was charged with murder, and co-defendants James McCormick and Joseph Fitzpatrick were charged with related lesser offenses. During the trial, Mr. Justice Gillen raised doubts about the veracity and reliability of the testimony of two critical witnesses. The first witness, identified only as Witness C, claimed to have seen the attack from her car, and identified Davison as the attacker in a subsequent line up. Despite the judge's opinion that the witness was "transparently honest," he found that her testimony allowed for reasonable doubt, as it did not correspond to the forensic

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<sup>309</sup> Lee Glendinning, *The Guardian*, *Northern Bank Robbery: The Crime That Nearly Ended the Peace Process*, Oct. 9, 2008, available at <http://www.theguardian.com/uk/2008/oct/09/northernbankrobbery.background>; *The Irish Times*, *Northern Bank Robbery Case Collapses in Belfast*, Oct. 9, 2008, available at <http://www.irishtimes.com/news/northern-bank-robbery-case-collapses-in-belfast-1.829891>.

<sup>310</sup> Darwin Templeton, *Belfast Telegraph*, *The Provos Got So Much Cash from Northern Bank Heist They Could Not Handle It*, Dec. 15, 2014, available at <http://www.belfasttelegraph.co.uk/news/northern-ireland/the-provos-got-so-much-cash-from-northern-bank-heist-they-could-not-handle-it-30833641.html>; Henry McDonald, *The Guardian*, *Employee Cleared of £26.5m Northern Bank Robbery*, Oct. 9, 2008, available at <http://www.theguardian.com/uk/2008/oct/09/northern.bank.robbery1>.

<sup>311</sup> Glendinning, *supra* note 309; *The Irish Times*, *supra* note 309; *Belfast Telegraph*, *10 Facts About the IRA's £26.5m Raid of Northern Bank*, Dec. 19, 2014, available at <http://www.belfasttelegraph.co.uk/news/northern-ireland/10-facts-about-the-iras-265m-raid-on-northern-bank-30848746.html>.

<sup>312</sup> Colm Heatley, *The Irish Examiner*, *What's Now for the McCartney Family*, Aug. 9, 2006, available at [http://www.irishexaminerusa.com/mt/2006/08/09/what\\_now\\_for\\_the\\_mccartney\\_fam.html](http://www.irishexaminerusa.com/mt/2006/08/09/what_now_for_the_mccartney_fam.html).

<sup>313</sup> Mick Fealty, *The Guardian*, *Justice Undone*, July 9, 2009, available at <http://www.theguardian.com/commentisfree/2008/jul/09/northernireland.humanrights>.

evidence.<sup>314</sup> A friend of McCartney admitted in court that he was unable to recollect most of the night of the murder, as he had consumed thirty-two pints of beer over the course of that weekend.<sup>315</sup> At the end of the five-week trial, all three defendants were acquitted of all charges.<sup>316</sup> This case, too, represents the difficulty of handling politically-charged cases and highlighted continuing concerns regarding witness intimidation.

#### iv. Massereene Barracks Murders

In March 2009, four off-duty British soldiers and two civilians were attacked by two gunmen in a car outside the army barracks in Antrim. Two of the soldiers were killed and the other soldiers and civilians were wounded. The Real IRA later claimed responsibility.<sup>317</sup> Colin Duffy and Brian Shivers were tried for murder and attempted murder.<sup>318</sup>

In Duffy's case, the evidence centered on a match to his DNA profile, but the judge was not fully satisfied that the evidence was sufficient to support a conviction, and Duffy was acquitted.<sup>319</sup> Although Shivers was initially convicted of murder and sentenced to twenty-five years,<sup>320</sup> his conviction was overturned and a retrial ordered. The central issue of Shivers's appeal was whether he aided or participated in the planning or execution of the crimes prior to the destruction of evidence. The judgment, delivered by the Lord Chief Justice, stated that, "[w]e do not accept that a person who provides assistance after a murder with full knowledge of what has happened thereby becomes guilty of murder. There is no authority to support such a proposition. The learned trial judge made no findings as to when the appellant had the relevant knowledge."<sup>321</sup>

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<sup>314</sup> Michael Seamark, Daily Mail, *Man Cleared of "IRA" Killing as 71 Witnesses Saw Nothing*, June 27, 2008, available at <http://www.dailymail.co.uk/news/article-1029938/Man-cleared-IRA-killing-71-witnesses-saw-nothing.html>.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> The Guardian, *Man Cleared of Murdering Two Soldiers at Massereene Barracks*, May 3, 2013, available at <http://www.theguardian.com/uk/2013/may/03/massereene-shootings-man-cleared>.

<sup>318</sup> BBC News, *Man in Court Over Solider Murders*, July 23, 2009, available at [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/8164381.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/8164381.stm); BBC News, *Murder Gang "Taped Themselves,"* Aug. 11, 2009, available at [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/8195084.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/8195084.stm).

<sup>319</sup> Judge Anthony Hart said: "I consider that there is insufficient evidence to satisfy me beyond reasonable doubt that whatever Duffy may have done when he wore the latex glove, or touched the seatbelt buckle, meant that he was preparing the car in some way for this murderous attack. And I therefore find him not guilty." Duncan Gardham, The Telegraph, *Dissident Republican Brian Shivers Guilty in Real IRA Massereene Barracks Shooting*, Jan. 20, 2012, available at <http://www.telegraph.co.uk/news/uknews/northernireland/9027791/Dissident-Republican-Brian-Shivers-guilty-in-Real-IRA-Massereene-barracks-shooting.html>; Henry McDonald, The Guardian, *Massereene Murders: Colin Duffy Found Not Guilty*, Jan. 20, 2012, available at <http://www.theguardian.com/uk/2012/jan/20/massereene-colin-duffy-not-guilty>.

<sup>320</sup> The Journal, *Brian Shivers Found Not Guilty of Massereene Barracks Murders*, May 3, 2013, available at <http://www.thejournal.ie/brian-shivers-not-guilty-massereene-barracks-murders-895245-May2013/>.

<sup>321</sup> Henry McDonald, The Guardian, *Massereene Barracks Murder Conviction Quashed*, Jan. 15, 2013, available <http://www.theguardian.com/uk/2013/jan/15/massereene-barracks-murder-conviction-quashed>; Henry McDonald, The Guardian, *Court Orders Retrial in Massereene Barracks Murders Case*, Jan. 16, 2013, available at <http://www.theguardian.com/uk/2013/jan/16/massereene-barracks-killings-retrial-shivers>; *Court of Appeal Allows*

## 5. Declining to Prosecute

At the time of the Committee's 2003 report, the Attorney General had slightly modified the previous policy with respect to the giving of reasons for a decision not to prosecute, to allow for an exception where agents of the state caused a victim's death. This modification permitted the Director of Public Prosecutions to weigh the public interest considerations in each case.<sup>322</sup> In agreement with the Criminal Justice Review, the Committee called for a more substantial policy shift toward the presumption that reasons should be given for non-prosecution in controversial cases, taking into account the interests of justice and the public interest.<sup>323</sup> The PPS (successor to the DPP) has now instituted a process to ensure that victims whose cases are not prosecuted due to lack of evidence receive a letter explaining this decision. Victims who do not receive a letter or who want additional information are able to request information from the prosecutor.<sup>324</sup> The Committee commends this important step in increasing the accountability of the PPS and improving prosecutors' communication with victims.

While this process helps increase transparency within the PPS, the question remains as to whether crime victims should be able to submit the decision not to prosecute to an outside review body.<sup>325</sup> The ability to have such decisions reviewed by an external organization and the establishment of a procedure for evaluating the decision may be particularly important for victims of crimes that pre-date the PPS, when the process was less transparent and there were greater perceptions of political influence. Unlike in other parts of the United Kingdom,<sup>326</sup> there is no direct political control of the head of the prosecution service in Northern Ireland, thus limiting options for victims of crime to address concerns about decisions not to prosecute.

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*Appeal Against Conviction*, Jan. 15, 2013, available at [http://www.courtsni.gov.uk/en-gb/judicial%20decisions/summaryjudgments/documents/j\\_sj\\_150113/j\\_sj\\_r-v-shivers\\_150113.html](http://www.courtsni.gov.uk/en-gb/judicial%20decisions/summaryjudgments/documents/j_sj_150113/j_sj_r-v-shivers_150113.html).

<sup>322</sup> See 2003 REPORT, *supra* note 1, at 26.

<sup>323</sup> See *id.* at 25–26.

<sup>324</sup> PUBLIC PROSECUTION SERVICE FOR NORTHERN IRELAND, MAKING A COMPLAINT ABOUT THE PUBLIC PROSECUTION SERVICE FOR NORTHERN IRELAND (Jan. 2012), available at <http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Equality/Making%20A%20Complaint%20about%20the%20PPS%20%28Consultation%20Jan%202012%291.pdf>.

<sup>325</sup> Information concerning the process by which an internal review of a prosecutorial decision can be initiated is contained in the PPS Code for Prosecutors. During 2014-15 there were 128 requests for review, nine of which resulted in the original decision being changed. Public Prosecution Service for Northern Ireland, ANNUAL REPORT AND RESOURCE ACCOUNTS (2014-15), at 27, available at <http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Publications/Annual%20Reports/PPS%20Annual%20Report%20and%20Resource%20Accounts%202014-15.pdf>.

<sup>326</sup> The Attorney General for England and Wales is (and remains) an elected Member of the British Parliament appointed to the position by the ruling party. The Attorney General for England and Wales oversees the Crown Prosecution Service (for England and Wales). UK Attorney General's Office, *Our Governance*, available at <https://www.gov.uk/government/organisations/attorney-generals-office/about/our-governance>.

## D. THE PRISON SERVICE

### 1. Overview

The Northern Ireland prison system was not part of the devolution included in the Hillsborough Agreement in 2010,<sup>327</sup> but is now an administrative body of the Northern Ireland Executive. The administration of prisons in Northern Ireland remains a sensitive issue and a topic of political debate. In 2011, Dame Anne Owers led an investigation and published a report that included forty recommendations for the prison system, many of which were similar to the Patten Commission's changes to the police service.<sup>328</sup> The Owers report that was initially released gave high-level recommendations eight months before the final report was adopted.<sup>329</sup> These focused on reforming the system to better contribute to a safer society and "reflect international best practice and human rights standards;"<sup>330</sup> dedicating adequate resources to managing the system; ensuring and reinforcing governance and accountability; establishing a staff development package that would include a retirement scheme and recruitment and training program; and improving consistent security that would also allow for freer movement for lower risk prisoners.<sup>331</sup> The final report expressed concern that, in the intervening months between the interim and final report, little had changed.<sup>332</sup>

The prison system in Northern Ireland was deeply connected with its troubled past, with abusive and discriminatory practices commonplace during the Troubles in places such as the notorious HMP Maze ("Maze Prison").<sup>333</sup> The prison system therefore holds a unique political association that necessitated a comprehensive review, to ensure that it emerged as a system that was safe, effective, humane and followed international human rights norms. The Owers report concluded that fundamental change and transformation was required, and had not begun at the time it was issued in 2011.<sup>334</sup>

Although some of the recommendations made by the Owers report have now been implemented—including the construction of a women-only prison and the creation of a Prison Ombudsman's office—many have yet to be. The prison service initiated a four-year reform program, based on some of the recommendations in the Owers report, and annual reports reflect a work in progress, with key improvements made particularly in the areas of staffing, physical

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<sup>327</sup> Hillsborough Agreement, *supra* note 13, at Sec. 7.

<sup>328</sup> Prison Review Team, REVIEW OF THE NORTHERN IRELAND PRISON SERVICE: CONDITIONS, MANAGEMENT, AND OVERSIGHT OF ALL PRISONS, Oct. 24, 2011, available at [http://cain.ulst.ac.uk/issues/prison/docs/2011-10-24\\_Owers.pdf](http://cain.ulst.ac.uk/issues/prison/docs/2011-10-24_Owers.pdf).

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> Her Majesty's Prison Maze (HMP Maze or Maze Prison) had previously been called Long Kesh. For a description of concerns arising out of that period, see, e.g., William Borders, New York Times, *Amid Storm Over Hunger Strikers, All is Calm in Maze Prison Hospital*, Aug. 23, 1981, available at [www.nytimes.com/1981/08/23/world/amid-storm-over-hunger-strikers-all-is-calm-in-maze-prison-hospital.html](http://www.nytimes.com/1981/08/23/world/amid-storm-over-hunger-strikers-all-is-calm-in-maze-prison-hospital.html).

<sup>334</sup> Prison Review Team, *supra* note 328, at 9.

facilities reform, and prisoner management.<sup>335</sup> Despite some progress in these areas, prison management and the safeguarding of prisoners' rights remain key areas of staunch criticism in the management of justice in Northern Ireland.<sup>336</sup>

## 2. Administration

The Prison Service, including its facilities and staff, has been the subject of much criticism for its slow path to reform.<sup>337</sup> Many challenges remain in creating a safe environment for all prisoners, especially in the administration of services for segregated prisoners (i.e., prisoners who are separated from the general prison population because of their political affiliations, and most of whom were convicted on terrorism charges). The prisons that housed the majority of political prisoners during the Troubles have closed, including Maze Prison.

The Northern Ireland Prison Service now administers four prisons on three sites: Maghaberry (high security), Magilligan (medium security), and Hydebank Wood (medium to low security, which also has a separate facility for female prisoners). Maghaberry, the largest prison, was designed with political conflict in mind, and can be used to house segregated prisoners. During the last five years, the prison population has continued to rise by approximately twenty percent. According to the current Prison Director, Sue MacAllister, this is due in part to increasingly long sentences. Despite some new facilities, efforts at establishing social programs for prisoners, and strong healthcare recommendations in the Owers report and subsequent reports,<sup>338</sup> quality of life remains a concern in Northern Ireland prisons, in particular relating to substance abuse and mental health.<sup>339</sup>

As in the PSNI, early retirement incentives were used to effectuate comprehensive reform of the culture of the prison service. Approximately 500 people—one-third of the prison staff—took early retirement offers, but a substantial number of older prison guards remain, which has led to ongoing distrust. The last of these retirees left in May 2014, and 300 recruits were hired. Traditionally, the prison officers were male, white, Protestant unionists. The Prison Director stated that one aim in recruiting new hires has been toward hiring more women, Catholics, and educated officers, but critics maintain that there has been little success in achieving diversity.

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<sup>335</sup> See, e.g., Northern Ireland Prison Service, Prison Review Oversight Group, Third Annual Report April 2014-March 2015, March 1, 2015, available at <https://www.dojni.gov.uk/sites/default/files/publications/doj/proc-third-annual-report-april-2014-to-march-2015.pdf>.

<sup>336</sup> National Preventive Mechanism, Chief Inspector of Criminal Justice in Northern Ireland, Her Majesty's Chief Inspector of Prisons, the Regulation and Quality Improvement Authority, and the Education and Training Inspectorate, REPORT ON AN UNANNOUNCED INSPECTION OF MAGHABERRY PRISON: 11-22 MAY 2015 (hereinafter "National Preventative Mechanism Report"), Nov. 5, 2015, available at <https://www.dojni.gov.uk/sites/default/files/publications/doj/cjini-an-unannounced-inspection-of-maghaberry-prison-11-to-22-may-2015.pdf>.

<sup>337</sup> *Id.*; see also Prison Review Team, *supra* note 328, at 35.

<sup>338</sup> Prison Review Team, *supra* note 328, at 40–44.

<sup>339</sup> National Preventive Mechanism Report, *supra* note 336, ¶2.51–2.60.

The prison service remains predominantly Protestant while the prison population remains disproportionately Catholic.<sup>340</sup> Thus, the legacy of past tensions is reflected and perpetuated through the prison system, as disparate outcomes persist for Protestant and Catholic prisoners, with Catholic prisoners receiving consistently poorer outcomes over time.<sup>341</sup> The Committee heard concerns from some stakeholders that, despite efforts to introduce a complaints system and to train staff and management in non-discrimination and systems best practices, these problems persist. Further, despite the establishment of an Ombudsman's office, as discussed below, a lack of any follow-up mechanism for complaints limits the office's effectiveness. Without a robust complaint system for prisoners that includes a mechanism for follow-up and review, distrust among the prison population will persist, limiting the possibilities for reform.

### **3. Heavy Security**

Numerous recommendations in international reports address the fact that Northern Ireland's prison administration remains inordinately concerned with security even for prisoners convicted of minor offenses. This preoccupation with heavy security for even low-level offenders is, in part, due to the fact that several segregated prisoners remain in the system.<sup>342</sup>

At the time of the Committee's 2014 visit, among the segregated prisoners, there were almost an equal number of prisoners who were affiliated with nationalist and loyalist groups (48 loyalist to 50 republican) and five prisoners who could not be housed with either segregated population, and were therefore essentially in isolation. Some heavy-handed practices continue to be documented, including the use of overly restrictive physical restraints, especially with these populations,<sup>343</sup> and administration of social and medical services to those prison populations continues to be lacking. The Committee urges the Northern Ireland Executive to prioritize prison reform and adopt international human rights standards as a baseline for governance of all prison populations.

### **4. Prison Ombudsman**

The office of the Prison Ombudsman was established in 2005 to help reduce tensions within the prisons. The office has two mandates: to investigate complaints and to investigate deaths in custody. The office receives a wide range of complaints, from cancellations or restrictions of visits with family members to problems with inmates' property. All complaints are investigated and reported to the Prison Service, with anonymity guaranteed in sensitive cases. Complaint determinations are then provided to the Prison Service, which upholds approximately forty percent of the prisoner complaints. According to Thomas McGonagle, the current Prison Ombudsman, a high number of complaints are made by segregated prisoners.

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<sup>340</sup> Committee on the Administration of Justice, *PRISONS AND PRISONERS IN NORTHERN IRELAND: PUTTING HUMAN RIGHTS AT THE HEART OF PRISON REFORM* (Dec. 2010), at 21–25, available at [http://www.caj.org.uk/files/2011/01/17/prisons\\_report\\_web2.pdf](http://www.caj.org.uk/files/2011/01/17/prisons_report_web2.pdf).

<sup>341</sup> National Preventive Mechanism Report, *supra* note 336, ¶18.

<sup>342</sup> Prison Review Team, *supra* note 328, at 10–11.

<sup>343</sup> National Preventive Mechanism Report, *supra* note 336, ¶1.38.

The Prison Ombudsman function is an important one, yet there are no follow-up mechanisms or any means to monitor enforcement.<sup>344</sup> The Committee reemphasizes the need for strong follow-up procedures to ensure accountability where abuses and discrimination persist.

## V. CONCLUSION

Many affirmative and remarkable changes have occurred in Northern Ireland since the Committee began its work to understand the impact of the political troubles on the administration of justice. In the wake of the 2003 Committee visit to Northern Ireland, the Committee was sanguine about the prospects for a lasting peace and the improvement of the protection of human rights in Northern Ireland. Nonetheless, substantial work remains to be done in ensuring that the abuses of human rights and injustices of the past do not destabilize the peace that has already been secured. In the years since the Committee's 2003 visit, substantial political changes have advanced new political cooperation between parties on either side of the former conflict and implemented local systems of justice in Northern Ireland through devolution.

The Committee commends the progress made to date in the administration of justice in Northern Ireland, but urges continued dialogue in key areas. First, all parties must prioritize a comprehensive approach toward transitional justice in order to address the past effectively. This should include adopting an inclusive mechanism that can investigate all allegations of abuses in the past and ensure that they receive impartial and independent examination. The Committee urges all parties to revisit these issues since an accord could not be reached in the "Fresh Start" Agreement in November 2015.<sup>345</sup> The HIU may be able to meet this requirement if it is established swiftly and if it is implemented in a fully independent manner. The mechanism must be provided with committed and sustained budgetary and other resources to ensure it can operate through completion of its investigations.

The Committee also urges, once again, that the case of Patrick Finucane receive a full independent and public inquiry, and encourages the UK Government to promptly commit to such an inquiry. The Committee also urges that any adopted mechanisms consider cases of injury resulting from the trauma of the past, noting that people affected by violence in the past have not had an adequate means of redress. The Committee also encourages ongoing dialogue on flags and parades, an issue that continues to disrupt the peace every year. A solution must include dialogue and mediation on disputed matters. Finally, the Committee recommends consideration of the adoption of non-judicial and non-investigative public healing approaches, such as truth-telling mechanisms to supplement other measures. Without a political solution to address the impact of Northern Ireland's past, there are limits on the extent to which peace and social order can meaningfully be achieved.

The Committee welcomes efforts in the reform of the justice apparatus in the judiciary, police, public prosecution service, and prison system. In particular, the Committee lauds efforts toward greater transparency and accountability in each of these areas. The Committee continues to be concerned about diversity in the judiciary. Although there has been progress with respect to

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<sup>344</sup> Committee on the Administration of Justice, *supra* note 340, at 43.

<sup>345</sup> Stormont Agreement: A Fresh Start, *supra* note 74, § D.

religious and political diversity among the judiciary, there is still great need for more gender and socioeconomic diversity. Statistical information that is available is commendable as a major step toward greater transparency, but should be followed by government-led review of how to address the lack of diversity illuminated by those statistics. The Committee also encourages the elimination of Diplock-style trials and a return to jury trials in all criminal cases for scheduled offenses or, at minimum, assurance of procedural fairness in any non-jury trial.

Although the PSNI has undergone wide-ranging reforms and is a different system than the infrastructure during the Troubles, the Committee encourages greater attention to the presence of former RUC officers, even in contractor positions, which may undermine public trust in the new police force. This attention is especially crucial with respect to the investigation of past cases where the PSNI must continue to build public trust. Further, greater transparency and accountability systems are needed in the area of covert policing and surveillance. These powers should be brought under the control of the PSNI to ensure that the recommendations of the Patten Commission are fully implemented.

The Committee also recommends greater dialogue and coordination between the PSNI and the PPS. Again, with respect to legacy and political cases, that coordination should be prioritized to minimize concerns relating to prosecution failures and decisions not to prosecute. The PPS also needs greater case preparation and management in order to secure public trust, which will require better coordination with the PSNI to ensure improvement in investigation and prosecution. Finally, in the area of prisons, despite commendable progress, further reforms are needed and, in particular, the Northern Ireland Executive and UK government should prioritize comprehensive reform of the Northern Ireland prison system. Areas of particular concern include health and safety for prisoners, non-discriminatory treatment among prison populations, elimination of abuse and overly restrictive practices, and reformation of the complaints system to include follow-up and review.

The Committee readily acknowledges that there are many human rights and civil rights concerns within the United States. The Committee, and the Association more generally, has repeatedly urged the United States government to take steps to better protect human rights, and it has worked to promote similar recommendations grounded in promoting diversity and securing human rights and justice at home. It is in this spirit that the recommendations in this report are offered.<sup>346</sup>

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<sup>346</sup> See, e.g., Association of the Bar of the City of New York, Letter to Senators Mitch McConnell and Harry Reid regarding congressional proposals to halt or delay US resettlement of refugees from Iraq or Syria, Nov. 23, 2015, available at [www2.nycbar.org/pdf/report/uploads/20073002-NYCBarSyrianRefugeeAdmissionsLetterSenateIMNAT11.23.pdf](http://www2.nycbar.org/pdf/report/uploads/20073002-NYCBarSyrianRefugeeAdmissionsLetterSenateIMNAT11.23.pdf); Association of the Bar of the City of New York Letter to Governor Andrew Cuomo regarding Support of A.6430-A (AM Perry) / S.983-A (Sen. Montgomery), which would strengthen protections to prevent the shackling of incarcerated pregnant women, Oct. 9, 2015, available at [www2.nycbar.org/pdf/report/uploads/20072965Anti-shacklingPregnantPrisonersCorrectionsSexLawReportFINAL10915.pdf](http://www2.nycbar.org/pdf/report/uploads/20072965Anti-shacklingPregnantPrisonersCorrectionsSexLawReportFINAL10915.pdf); Association of the Bar of the City of New York, STATEMENT TO THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND HUMAN RIGHTS: CLOSING GUANTANAMO: THE NATIONAL SECURITY, FISCAL AND HUMAN RIGHTS IMPLICATIONS, July 24, 2013, available at [www2.nycbar.org/pdf/report/uploads/20072550-ClosingGuantanamo--TheNationalSecurityFiscalHumanRightsImplications.pdf](http://www2.nycbar.org/pdf/report/uploads/20072550-ClosingGuantanamo--TheNationalSecurityFiscalHumanRightsImplications.pdf); Association of the Bar of the City of New York, Press



## **VI. APPENDICES**

### **A. DELEGATION ITINERARY**

#### **FRIDAY, JUNE 27: LONDON**

Yasmine Amed, Director, Rights Watch (UK)

Brian Kerr, QC, Justice of the Supreme Court of the United Kingdom and former Lord Chief Justice of Northern Ireland

#### **MONDAY, JUNE 30: BELFAST**

Sinn Féin Justice Committee: Raymond McCartney, Deputy Chairperson, MLA for Foyle; Rosie McCorley, MLA for West Belfast; Sean Lynch; Gareth Keating, Councillor; Sean McPeake, Councillor Co-Coordinator.

Martin McGuinness, Deputy First Minister, Northern Ireland Assembly

Patrick Corrigan, Northern Ireland Programme Director, and Kartik Raj, EU Researcher/Campaigner, Amnesty International

Barra McGrory, Director of Public Prosecution Service

#### **TUESDAY, JULY 1: BELFAST**

Committee for the Administration Justice, Conference: Covert Policing and Ensuring Accountability: Ten Years on from the Cory Collusion Inquiry Reports, Where Now?

Panel 1: Paul O'Connor, Director, Pat Finucane Centre; Daniel Holder, Deputy Director, Committee for the Administration of Justice; Cheryl Lawther, Queen's University, Belfast

Panel 2: Suresh Grover, Director, Monitoring Group (UK); Fionnula Ni Aoláin, Associate Director and Professor, University of Ulster's Transitional Justice Institute; Carsten Illius, Lawyer

Panel 3: Dr. Michael Maguire, Police Ombudsman for Northern Ireland; Yasmine Ahmed, Director, Rights Watch UK; Ryan Feeney, Member, Northern Ireland Policing Board

Professor Phil Scranton, Queen's University Belfast School of Law

Neil Jarman, Director, Institute for Conflict Resolution

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Release: City Bar Statement Condemns Attack on Department of Justice Lawyers Who Represented Guantanamo Detainees, March 8, 2010, available at [www.nycbar.org/pdf/report/uploads/20071892-StatementonDOJLawyers.pdf](http://www.nycbar.org/pdf/report/uploads/20071892-StatementonDOJLawyers.pdf).

Declan Morgan, Lord Chief Justice of Northern Ireland

David Ford, Minister of Justice Minister, Alliance Party Leader, MLA for South Antrim

Avila Kilmurray, Director, Community Foundation for Northern Ireland

**WEDNESDAY, JULY 2: BELFAST**

Professor Brice Dickson, Queen's University Belfast School of Law

Sue McAllister, Director General, Northern Ireland Prison Service

Dr. Michael Maguire, Police Ombudsman; Paul Holmes, Director of Historical Investigations for Police Ombudsman; Seamus McIlroy, Director of Legal Services for Police Ombudsman

Kevin Winters, partner; Joe McVeigh, partner, KRW Law

Tom McGonigle, Prisoner Ombudsman for Northern Ireland; George Richardson, Director of Operations

Alan McBride and Mary McCallan, WAVE Trauma Centre

SDLP Justice Committee: Alban Maginness, MLA for North Belfast

UUP Justice Committee: Chairman Tom Elliott, MLA for Fermanagh and South Tyrone; Stephen and Sharon Gault, Justice for Innocent Victims of Terrorism<sup>347</sup>

**THURSDAY, JULY 3: BELFAST**

Dr. Michelle Butler, Queen's University Belfast

Paul O'Connor, Pat Finuance Centre

Superintendent Tim Mairs, Police Service Northern Ireland; Ralph Roche, Senior Legal Advisor for Human Rights, Police Service Northern Ireland

Patrick Yu, Executive Director, Northern Ireland Council for Ethnic Minorities

**FRIDAY, JULY 4: BELFAST**

John Larkin, Attorney General; Eamonn McConville

Brian Gormally, Director, and Daniel Holder, Deputy Director, Committee on the Administration of Justice

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<sup>347</sup> Stephen and Sharon Gault joined the meeting at the invitation of Tom Elliott.

Brendan McGuigan, Chief Inspector of Criminal Justice; James Corrigan, Deputy Chief Inspector of Criminal Justice

Joan Boyd, Former Member of Historical Enquires Team; David McKittrick, journalist and author of *Lost Lives*<sup>348</sup>

## **B. LIST OF ABBREVIATIONS**

CAJ	Committee on the Administration of Justice
DPP	Director of Public Prosecutions
DUP	Democratic Unionist Party
ECHR	European Convention on Human Rights
HET	Historical Enquiries Team
HIU	Historical Inquiries Unit
HMIC	Her Majesty's Inspectorate Constabulary
IHRC	International Human Rights Committee (of the Association)
IRA	Irish Republican Army
JAC	Judicial Appointments Commission
LIB	Legacy Investigations Branch
MLA	Members of the Legislative Assembly
NIPB	Northern Ireland Policing Board
NIPS	Northern Ireland Prison Service
PONI	Police Ombudsman's Office Northern Ireland
PPS	Public Prosecution Service for Northern Ireland
PSNI	Police Service Northern Ireland
RUC	Royal Ulster Constabulary
SDLP	Social Democratic and Labour Party

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<sup>348</sup> *David McKittrick joined the meeting at the invitation of Joan Boyd.*

TSG	Tactical Support Groups
UDA	Ulster Defense Association
UFF	Ulster Freedom Fighters
UUP	Ulster Unionist Party
VVS	Victims and Survivors Service