Amnesties, Prosecution & the Public Interest

Investigations, Prosecutions, and the 'Public Interest'

March 2015

Queen's University Belfast
Healing through Remembering
Ulster University
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Contents

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This report was prepared by Gordon Anthony, Luke Moffett, Kieran McEvoy and Louise Mallinder as part of the Amnesties, Prosecutions and Public Interest in the Northern Ireland Transition project.

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About the Project

This report is produced as part of a project on *Amnesties, Prosecutions, and the Public Interest in the Northern Ireland Transition* (AHRC AH/J013897 1). The project, funded by the Arts and Humanities Research Council is a partnership between Queen's University Belfast School of Law (Kieran McEvoy, Gordon Anthony, and Luke Moffett), the Transitional Justice Institute at Ulster University (Louise Mallinder), and Healing Through Remembering (HTR). HTR is an independent non-governmental organisation made up of a diverse membership with different political perspectives working on the common goal of how to deal with the legacy of the past in Northern Ireland.

The rationale for the project is to explore the inter-relationship between amnesties, amnesty like measures, historical prosecutions, and truth recovery in dealing with the past in Northern Ireland. The project has entailed an extensive programme of meetings and seminars, and the organisation of a number of conferences involving victims, former prisoners, former security force personnel, civil society activists, and policy makers, as well as all of the political parties involved in the negotiations on dealing with the past. In addition we have produced a range of blogs, briefings, and submissions on issues and themes requested by our interlocutors. The team has also been involved in an extensive programme of media engagement in both print and broadcast outlets, providing accurate information and well-founded ideas in an accessible fashion.

Readers will inevitably make up their own minds about what they consider to be the best way to 'deal with the past'. The purpose of this report and all of the other outputs produced from this project is to provide information on the international, historical and legal context on these issues in order to ensure that the public debate is as well informed as possible.

Executive Summary

This report is produced as part of a project on *Amnesties, Prosecutions, and the Public Interest in the Northern Ireland Transition* (AHRC AH/J013897 1). It examines the role that investigations and prosecutions play in the context of the Northern Ireland transition by considering:

- Article 2 of the European Convention on Human Rights (ECHR) and the need for the State to investigate the use of force by state actors such as the police or the army.
- The fact that the state will in many cases be investigating acts of violence that were committed by state and non-state actors many years ago.

Article 2 ECHR and the Obligation to Investigate the Past

- The position in law in Northern Ireland is that the State must still investigate the use of force by its actors (acting either on their own or in collusion with non-state actors). This obligation has led the European Court of Human Rights (ECtHR) to criticise the UK government. The report asks whether the Stormont House Agreement will prove consistent with Article 2 ECHR.
- While truth and accountability are necessary, investigations face formidable difficulties as a result of the historical nature of offences. Even if evidence exists, the Public Prosecution Service for Northern Ireland (PPSNI) must still consider whether or not prosecution is in the 'public interest'.
- Cases which have come before the Court have revealed systemic failings in both the investigative and prosecutorial processes in Northern Ireland. These relate to the Coroners' Courts, the Royal Ulster Constabulary ((RUC) since replaced by the Police Service of Northern Ireland (PSNI)), and the office of the Director of Public Prosecutions (now PPSNI).
- In 2002 the UK government proposed a 'package of measures' intended to remedy its failings. In 2005, the Committee of Ministers responded, accepting that progress had been made in some areas – notably in that the Police Ombudsman for Northern Ireland, and the Historical Enquiries Team had been set up and legislation to set up inquiries was in train.
- However, the government's response to the murder of Belfast solicitor Pat Finucane was criticised by the ECtHR in an application to it under Article 2 ECHR, and a subsequent review, instead of a promised inquiry, has given rise to an ongoing legal challenge.
- The Council of Europe's Commissioner for Human Rights recently noted that the UK was in breach of its obligations by reason of its failure to conduct prompt, independent and effective investigations in accordance with Article 2 ECHR, and that the Government could not use limited resources as an excuse for failing to carry out investigations.
- The Historical Enquiries Team, set up in 2005 by the chief constable of the PSNI to review all deaths which arose from the conflict with a view to recommending further criminal investigation where appropriate, was

suspended in 2013 following a report by Her Majesty's Inspectorate of Constabulary (HMIC) which found it lacked independence and treated security force members differently than paramilitary suspects. The HET incentivised soldiers to divulge the truth through a *de facto* amnesty by not using cautions, knowing that what was being said would not be used against them in criminal proceedings. This undermined the effectiveness of the HET's investigatory capacity in light of Article 2 ECHR, and diminished prospects for prosecutions.

- The report considers proposals for dealing with the past in the Stormont House Agreement, noting that they are based on those contained in the Haass-O'Sullivan proposals, rejected a year earlier. Under Haass-O'Sullivan, a two-track approach was envisaged to investigations and 'information retrieval', alongside Coroners' Courts and inquiries. An Article 2 ECHR compliant Historical Investigations Unit (HIU) would replace the HET and also assume the conflict-related investigative responsibilities of the PSNI and Police Ombudsman. A 'principle of choice' would allow the families of victims to be more or less involved in its work.
- The related process of information retrieval was be undertaken by an Independent Commission for Information Retrieval (ICIR). Information given would not lead to the identity of the deponent being revealed, and it could not subsequently be used in either civil or criminal proceedings against them.
- Information would be combined to develop a narrative about individual cases and also organisational patterns and practices during the conflict. The Northern Ireland Executive would establish an archive for conflict-related oral histories, documents and other relevant materials. The Stormont House Agreement commits to establishing both the HIU and ICIR, and may lead to approach to the past that will be fully wedded to the demands of Article 2.

Prosecuting The Past

- The question whether there is sufficient evidence to offer a 'reasonable prospect of a conviction' is gauged with reference to the criminal standard of proof, i.e. 'beyond a reasonable doubt'. Faced with formidable problems arising from the passage of time, the broader question for society is whether to draw a line under the past, as controversially suggested by the Attorney General for NI in 2012, or, to incentivise a truth telling process through the use of amnesties and other measures.
- The Code for Prosecutors notes that there may be 'circumstances in which … prosecution is not required in the public interest' but defining this interest has proved controversial. There have been claims that many prosecutions have been politically motivated, while others have not been pursued for similar reasons. Membership of a 'proscribed' paramilitary organisation can still lead to prosecution. While the security forces killed 363 people during the conflict, only a small number of police and soldiers were convicted of murder or manslaughter.
- While release of prisoners jailed for conflict related offences prior to the Good Friday Agreement was a matter for the 'ordinary' workings of the criminal justice system, release since then has been governed by the

Northern Ireland (Sentences) Act 1998 which provides for early release under the terms of the agreement. Those prosecuted post-Agreement are covered.

- There are searching questions about the reach of Article 2 ECHR in a post-conflict setting, where doubts remain about how far the UK government is acting in accordance with its international obligations. Much now depends on what happens with the Stormont House Agreement which must give Article 2 ECHR the central and uncontested role that it should play in any process of transition.

Introduction

This report is part of a series of final publications of the *Amnesties, Prosecutions and the Public Interest in the Northern Ireland Transition* project. The focus and content of each report is designed to address some of issues and questions that were raised by the people we spoke to during the project.[1] In this report, we examine the specific role that investigations and prosecutions play in the context of the Northern Ireland transition. As will become apparent below, we do so by considering two main themes related to the past. The first concerns Article 2 of the European Convention on Human Rights (ECHR) and the need for the State to investigate the use of force by state actors such as the police or the army.

Although our report on Articles 2 & 3 ECHR has considered the question of whether amnesties are possible under the ECHR, the current position in law in Northern Ireland is that the State must still investigate the use of force by its actors (acting either on their own or in collusion with non-state actors). This obligation has since given rise to very significant difficulties during the Northern Ireland transition, and we outline the nature of some of those difficulties as well as criticisms that the European Court of Human Rights (ECtHR) has made of the UK government. We also make mention of some recent proposals for dealing with the past, notably in the 2013 Haass-O'Sullivan proposals (which were ultimately rejected) and the subsequent 2014 Stormont House Agreement (reportedly accepted but at time of writing not yet enacted), and ask whether those would be consistent with Article 2 ECHR.

The second theme concerns the (self-evident) fact that the state will in many cases be investigating acts of violence that were committed by state and non-state actors many years ago. The point that we hope to develop here is that, while there is a very real need for truth and accountability in respect of such acts of violence, particularly for the victims and their families, the historical nature of the offences in question often means that investigations will face formidable difficulties. This may be most obviously true at the level of gathering evidence for a prosecution, as key eye-witnesses may since have died or there may be a lack of documentary evidence. However, even where there may be sufficient evidence to implicate a state or non-state actor of involvement in a crime, the Public Prosecution Service for Northern Ireland (PPSNI) would still have to ask itself whether it would be in the 'public interest' to bring a prosecution in a particular case. This may be a difficult question to answer, notably where there has been a significant lapse of time between the act in question and the proposed prosecution and/or where the 'defendant' is very elderly and/or of ill health.

We begin this report with a few short comments on the nature of the investigative obligation under Article 2 ECHR and the ECtHR's related criticisms of investigative practices in Northern Ireland. We next trace how the UK government has sought to respond to those criticisms while also noting areas in which the UK government arguably remains in breach of Article 2 ECHR. The report then considers the nature of prosecutorial decision-making and gives some examples of conflict-related prosecutions (and the question of what

[1] All project reports are available on the project website.

happens to those individuals who are convicted of offences and imprisoned). The conclusion offers some more general comments about the evolving nature of the law and practice in this area.

I. Article 2 ECHR – The Obligation to Investigate the Past

Article 2 ECHR, as has been developed by the ECtHR, requires states to conduct independent, effective, transparent, and speedy investigations into deaths that have been caused either by state actors acting alone or in collusion with non-state actors.[2] The nature of this obligation has been developed in a great number of cases from across the Council of Europe, but some of the leading cases have arisen out of the Northern Ireland conflict. The principal authorities from Northern Ireland remain *Jordan, Kelly, McKerr, and Shanaghan v UK*,[3] which were all centrally concerned with the lack of independent and effective investigation of State actors who had been directly or indirectly involved in the use of force.

While each of these cases raised fact-specific issues, they pointed collectively to a number of systemic failings in both the investigative and prosecutorial processes in Northern Ireland. For example, the Coroners' Courts were criticised for offering too limited an inquiry into the circumstances surrounding controversial deaths; allegations of shortcomings were levelled at the Royal Ulster Constabulary (RUC; since replaced by the Police Service of Northern Ireland (PSNI)) for unreasonable delay in investigations, including a lack of independence in investigations involving its own members; and the office of the Director of Public Prosecutions (now PPSNI) was criticised for failing to provide the families of victims with reasons to explain why prosecutions had not been brought in their respective cases. Subsequent cases before the European Court of Human Rights have since added to the list of shortcomings noted in these seminal cases by finding, for example, that there had been unacceptable delay during a Coroners' inquest.[4]

Initial UK Government Attempts to Conform with Article 2 ECHR

The UK government, as a contracting party to the ECHR, is under an obligation to comply with the above rulings of the ECtHR, in which enforcement of the ECtHR's judgments is overseen by the Council of Europe's Committee of Ministers. In September 2002, the UK government responded to the *McKerr* and related rulings with a 'package of measures' that was intended to ensure that

[2] See Council of Europe, 'Right to Life' <http://www.coe.int/en/web/echr-toolkit/droit-a-la-vie> accessed 24 March 2015.

[3] See *Jordan v UK,* which involved the shooting of Pearse Jordan, who was unarmed at the time, by the RUC in Belfast 1992, (2003) 37 EHRR 2; *Kelly and others v UK,* involving the lethal shooting of nine men in Loughall in 1987, including one unarmed civilian and two unarmed members of the IRA, by the RUC and the SAS, (Appl No. 30054/96, May 4, 2001); *McKerr v UK,* on the shooting of three unarmed members of the IRA in Lurgan in 1982 (2002) 34 EHRR 20; and *Shanaghan v UK,* whose son Patrick what shot dead in 1991 by the UFF with claims of police collusion, (Appl No. 37715/97, May 4, 2001).

[4] *McCaughey v UK* (2014) 58 EHRR 13. Other Article 2 cases include: *McShane v UK* (2002) 35 EHRR 23; *Finucane v UK* (2003) 37 EHRR 29; *Brecknell v UK* (2008) 46 *EHRR* 42; *O'Dowd v UK* [2007] ECHR 247; *McGrath v UK* [2007] ECHR 249; *Reavey v UK* [2007] ECHR 985; *McCartney v UK* [2007] ECHR 994; and *Hemsworth v UK* [2013] ECHR 683.

future investigations would satisfy the requirements of Article 2 ECHR. In February 2005, the Committee of Ministers produced its response to the 'package of measures', and noted that the following steps had been taken, or were to be taken:

- The independent office of the Police Ombudsman for Northern Ireland had been established;
- Arrangements had been made allowing for the 'calling in' of other police forces to investigate deaths;
- A Serious Crimes Review Team - latterly the (now defunct) Historical Enquiries Team – had been created;
- Families had the option of bringing judicial review proceedings to challenge decisions not to prosecute;
- New practices had been introduced in relation to Coroners' inquests;
- Legal aid had been made available for inquests;
- Draft legislation, which became the Inquiries Act 2005, had been introduced in the Westminster Parliament.

The Committee of Ministers welcomed the UK government's stated intention to address the issues arising from the European Court of Human Rights' judgments, but considered that:

> certain general measures remain to be taken and that further information and clarifications are outstanding with regard to a number of other measures, including, where appropriate, information on the impact of these measures in practice.[5]

The Committee later called on the Government

> rapidly to take all outstanding measures and to continue to provide the Committee with all necessary information and clarifications to allow it to assess the efficacy of the measures taken, including, where appropriate, their impact in practice.[6]

The UK's package of measures was initially believed to have to meet some of the demands of Article 2 ECHR, and the Committee of Ministers made decisions that reflected that belief. For instance, the monitoring of issues related to Coroners' Courts was closed in November 2005 owing to reforms and assurances made by the UK government in relation to the inquest system.[7] Further issues were

[5] Council of Europe Interim Resolution Res DH (2005) 20, *Action of the Security Forces in Northern Ireland (Case of McKerr against the United Kingdom and five similar cases)*, adopted by the Committee of Ministers on 23 February 2005 at the 941st meeting of the Ministers' Deputies.

[6] See further Ministers' Deputies CM/Inf/DH(2008) 2 22 February 2008 Cases concerning the action of Security Forces in Northern Ireland Progress achieved in implementing the Court's judgments since Interim Resolution CM/ResDH(2007)73 and outstanding issues.

[7] After resolution of the issues on: the role of the inquest procedure in securing a prosecution in respect of any criminal offence; the scope of examination of inquests; the compellability of witnesses at inquests; the disclosure of witness statements prior to the appearance of a witness at the inquest; and legal aid for the representation of the victim's family.

closed in 2007 following the reform of practices within the office of the PPSNI and the PSNI.[8] Defects in police investigations were closed in 2009 with the establishment and operation of the HET (however, on the fate of the HET see heading 3, below). The Committee acknowledged that, despite the length of time the HET had taken in completing investigations since its establishment in 2005, it could 'be viewed as a useful model for bringing a 'measure of resolution' to those affected in long-lasting conflicts'.[9] In a report of 2009 the Committee also closed the individual monitoring in the *McShane* and *Finucane* cases, but kept the *McKerr et al* cases open due to the continuing inquest proceedings. It strongly encouraged the UK government to complete those investigations without delay.

Critiques of the 'Package of Measures'

The UK government's package of measures did not, however, enjoy universal support, and criticisms of it remain. Perhaps the most prominent and consistent critic has been the human rights NGO the Committee on the Administration of Justice (CAJ), which has been very active in monitoring the UK government's adherence to its Article 2 ECHR obligations.[10] For instance, in 2012, CAJ made a submission to the Committee of Ministers in which it noted, among other things, on-going problems with the workings of Coroners' Courts and the Office of the Police Ombudsman for Northern Ireland (OPONI).[11] In relation to Coroners' Courts, CAJ noted delay in inquests into historical cases and identified the following problems under Article 2 ECHR:

- the process of appointing a jury is anonymous and therefore there is inadequate provision for vetting jurors who may have a conflict of interest or potential bias;
- inquests in Northern Ireland cannot issue verdicts of lawful or unlawful killing, which falls short of international standards;
- there have been protracted delays and litigation involving the PSNI and Ministry of Defence, particularly in relation to the disclosure of evidence to next-of-kin and other material that is said to be relevant (e.g., details of witnesses' involvement in other lethal force incidents which fall within the broader circumstances of the death);
- there have been concerns about a failure to secure the attendance of security force personnel at inquests; and
- a more general and ongoing problem of excessive delays.[12]

[8] Changes were made to, e.g., the DPP's policy on the giving of reasons.
[9] Interim Resolution CM/ResDH(2009)44.
[10] For its most recent report see CAJ, *The Apparatus of Impunity? Human Rights Violations and the Northern Ireland Conflict: A narrative of Official Limitations on Post-Agreement Investigative Mechanisms* (CAJ, 2015).
[11] CAJ, *Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) in relation to the supervision of the cases concerning the action of the security forces in Northern Ireland* (2012) Submission no.s400, DD(2012)1173.
[12] Ibid. A number of these criticisms derive from the inquest into Hugh Jordan's death; see B McCaffrey, 'Hung Jury In Jordan Case Raises New Questions About Juries In Troubles Killing Inquests', *The Detail* (29 October 2012).

With regards to the Police Ombudsman, CAJ raised questions about the office's apparent lack of independence from the police when investigating historical cases. These built upon an earlier CAJ report from June 2011 in which it noted the following shortcomings in relation to the Ombudsman's historical investigations:

- They lacked any clear definition or consistent application of the term 'collusion', with different interpretations being used depending on the circumstances of individual cases;
- That the concept of 'police criminality and misconduct' was narrowly construed;
- That the office's investigative processes were excessively slow; and
- That the Ombudsman had not communicated with or treated the families of victims appropriately, leading to pain and distress.[13]

Some of the above criticisms have been since been overtaken by events. For instance, a report by the Criminal Justice Inspectorate concluded that the Police Ombudsman is operationally independent and that it can conduct Article 2 ECHR compliant investigations.[14] However, it would also appear that other aspects of investigative processes continue to struggle to comply with the procedural obligations under Article 2 ECHR and that this places the UK government in breach of its obligations. The point is evidenced by some of CAJ's concerns, notably in relation to the issue of delays in Coroners' inquests,[15] and there are other controversial cases that continue to attract censure.

Perhaps the best known of these concerns the murder of the Belfast solicitor Pat Finucane, where the state's investigative response was also criticised by the European Court of Human Rights in an application to it under Article 2 ECHR.[16] The case has attracted many calls for a public inquiry, and these were originally agreed to by the UK government in the light of a recommendation made to it by the Canadian judge, Peter Cory.[17] However, the government later changed its position by instead ruling out an inquiry and ordering a legal review to be carried out by Sir Desmond De Silva QC. While the De Silva report did reveal elements of collusion in the case,[18] questions remain about whether such a legal review can satisfy Article 2 ECHR's requirement of a transparent investigation which enables a victim's relatives to have access to the investigative process. A legal

[13] CAJ, *Human Rights and Dealing with Historic Cases: A Review of the Office for the Police Ombudsman for Northern Ireland* (CAJ, 2011).
[14] Criminal Justice Inspectorate Northern Ireland (CJINI), *An Inspection into the Independence of the Office of the Police Ombudsman for Northern Ireland* (CJINI, 2011).
[15] For recent judicial recognition of the systemic problem of delay given the nature of the Coronial process see *Re Jordan's Application* [2014] NICA 76.
[16] *Finucane v UK* (2003) 37 EHRR 29.
[17] Justice P. Cory, *Cory Collusion Inquiry Report: Patrick Finucane* (Her Majesty's Stationery Office, 2004) at <http://cain.ulst.ac.uk/issues/collusion/cory/cory03finucane.pdf> accessed 24 March 2015.
[18] D. De Silva, *The Report of the Pat Finucane* Review (Her Majesty's Stationery Office, 2012). Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246867/0802.pdf> accessed 24 March 2015.

challenge to the government's position is ongoing at the time of writing this report.[19]

The above difficulties have recently attracted the attention of the Council of Europe's Commissioner for Human Rights, Mr Nils Muiznieks.[20] At a recent event on dealing with the past, held in Belfast, the Commissioner noted that the UK was in breach of its obligations by reason of its failure to conduct prompt, independent and effective investigations in accordance with Article 2 ECHR. Moreover, the Commissioner emphasised that the Government could not use limited resources as an excuse for failing to carry out investigations, even though cutbacks have been affecting government departments in Whitehall and in Northern Ireland. This plainly suggests that the need to discharge obligations under Article 2 ECHR is an ongoing and irreducible one.

The Historical Enquiries Team (HET)

Perhaps the most controversial of all of the initiatives that were put in place to deal with the past turned out to be the HET. The HET, as originally conceived, was intended to review all deaths which occurred during the conflict with a view to recommending further criminal investigation by the PSNI, where appropriate. However, while this made the HET the body with primary responsibility for looking at conflict-related deaths, it soon encountered criticisms that it was not operating in a manner that was compliant with Article 2 ECHR, with the result that its work was, in effect, suspended. To the extent that the HET was meant to provide one of the main ways in which the state might discharge its Article 2 ECHR obligations, in reality it became a further example of the systemic problems that have characterised much the state's response to use of force by its agents.

The HET was established in 2005 by the then Chief Constable, Huge Orde, as part of the PSNI. Its brief was to review all deaths attributable to the conflict in Northern Ireland, namely 3,268 deaths of which 2,002 had not been fully investigated. The principal objectives of the HET were:

- To assist in bringing a measure of resolution to those families of victims affected by deaths attributable to the Northern Ireland conflict in the years between 1968 and the signing of the Belfast Agreement in April 1998;
- To re-examine all deaths attributable to the Northern Ireland conflict and to ensure that all investigative and evidential opportunities were examined and exploited;
- To do the above in such a way as would command the confidence of the wider community.[21]

The HET's role was thus to review all available evidence and, where sufficient evidence was found to exist, to forward cases to the PSNI for further investigation. The PSNI would, on that basis, potentially forward a file to the PPS

[19] *Re Finucane's Application* [2013] NIQB 45.
[20] Vincent Kearney, 'UK must pay for Troubles Killings Investigations says European Official', *BBC News* (6 November 2014) Available at <http://www.bbc.co.uk/news/uk-northern-ireland-29941766> accessed 24 March 2015.
[21] HET, *Standard Operating Procedures* (2006).

which would decide whether or not to recommend prosecution. Up to the time that the work of the HET was discontinued, only a very small number of individuals had been convicted of troubles-related murders that had been reviewed by the HET. Statistics also indicated that, of those individuals arrested and charged as a result of the work of the HET, the clear majority had been from Loyalist groupings.[22]

In September 2013, Dave Cox, the head of the HET took early retirement following a report by HM Inspector of Constabulary (HMIC), which found that the HET had not been independent insofar as it had used former RUC and PSNI officers to investigate conflict-related deaths that had involved members of the security forces. The report also found that the HET had failed to provide effective investigations as it had adopted a mistaken view on the law of self-defence and 'reasonable force' as used by members of the security forces, as well as providing soldiers with detailed pre-interview disclosure, whereas paramilitary suspects were provided with very little such disclosure.

In relation to Article 2 ECHR, the Committee of Ministers had closed its examination of the HET, though submissions by NGOs argued that this was premature, given that issues remained concerning its independence and effectiveness. [23] Professor Patricia Lundy had also drawn attention to inconsistencies and anomalies in the investigation of killings involving the army in comparison to paramilitaries. Critics had highlighted the influence of 'RUC corporate memory', 'cross-contamination' of organizational linkages, and the apparent inequality of approach when dealing with soldiers and civilians.[24] CAJ has called upon the Committee of Ministers to reopen the scrutiny of the HET on its ability to carry out independent and effective investigations[25] and, as noted above, the Council of Europe's Human Rights Commissioner has recently stated that there are ongoing issues as regards the UK's obligations under Article 2 ECHR.

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[22] Police Service of Northern Ireland, Freedom of Information Request No F-2011-00829 available at <http://www.psni.police.uk/het-2.pdf> accessed 24 March 2015.

[23] 1136th DH meeting (March 2012) - Communication from a NGO (Relatives for Justice) in the *McKerr* group of cases against United Kingdom (Application No. 28883/95) - Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements; 1144th DH meeting (June 2012) - Communication from NGOs (Committee on the Administration of Justice (CAJ) and the Pat Finucane Centre (PFC) (with appendices) in the *McKerr* group of cases against the United Kingdom (Application No. 28883/96) and reply of the government.

[24] Patricia Lundy, 'Exploring Home-Grown Transitional Justice and Its Dilemmas: A Case Study of the Historical Enquiries Team, Northern Ireland', (2009) 3(3) *International Journal of Transitional Justice* 321-340; Patricia Lundy, 'Can the Past be Policed? Lessons from the Historical Enquiries Team Northern Ireland' (2009) 11 *Law and Social Challenges* 109-171; Patricia Lundy, 'Paradoxes and Challenges of Transitional Justice at the "Local" Level: Historical Enquiries in Northern Ireland' (2011) 6(1) *Contemporary Social Science* 89-106; Patricia Lundy, *Research Brief: Assessment of HET Review Processes and Procedures in Royal Military Police Investigation Cases* (2012). Available at <http://eprints.ulster.ac.uk/21809> accessed 24 March 2015.

[25] Further criticisms of the HET are made by Relatives for Justice in their February 2012 submission, Communication from a NGO (Relatives for Justice) in the *McKerr* group of cases against United Kingdom (Application No. 28883/95) - Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, DH-DD(2012)244E.

It is extremely interesting to consider the use of cautions by the HET, as revealed by the HMIC report, for our purposes of exploring amnesties, prosecutions and the incentivising the truth in Northern Ireland. The HMIC noted that on a number of occasions investigative teams would not give a caution to soldiers. The HET justified this on the basis that it provided:

> maximum opportunity to obtain as much information as possible for the benefit of [the family]. People who are interviewed under caution as 'suspects' are typically either extremely guarded in what they say, or exercise their right not to say anything at all.[26]

In one instance, HET investigators felt that a soldier should be interviewed under caution but, as the soldier did not want this, they decided to proceed without the caution.[27] The HET found that when soldiers were cautioned they provided a written statement, which did not provide any real benefit to the families.[28] This contrasted with the treatment of paramilitary suspects who were interviewed by the PSNI under caution. Effectively the HET were incentivising soldiers to divulge the truth through a *de facto* amnesty by not using cautions, knowing that what was being said would not be used against them in criminal proceedings. As the HMIC concluded, 'in cases of state involvement, the HET acts as investigator and prosecutorial decision-taker'.[29] This plainly undermined the effectiveness of the HET's investigatory capacity in light of Article 2 ECHR and undoubtedly impacted negatively upon the likelihoods of prosecutions.

On 30 September 2014, it was announced that the work of the HET would cease as a result of a reduction in funding for the PSNI.[30]

Investigations under Haass-O'Sullivan and Stormont House

Before we leave the matter of how to investigate the past, we should say a few words about the proposals that were contained in the Haass-O'Sullivan document of December 2013 and those that are contained the recent Stormont House Agreement of December 2014. We feel that it is helpful to consider these together as the proposals for dealing with the past that are contained in the Stormont House Agreement appear to be based in very large part on those that were contained in the (non-implemented) Haass-O'Sullivan proposals.[31]

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[26] HET, *Review Summary Report* 2010 cited in HMIC, *Inspection of the Police Service of Northern Ireland Historical Enquiries Team* (HMIC, 2013) 81.
[27] ibid 81.
[28] ibid 82.
[29] Ibid 87.
[30] 'PSNI agency post cuts spell end of Historical Enquiries Team' *BBC News* (30 September 2014) available at <http://www.bbc.co.uk/news/uk-northern-ireland-29425544> accessed 24 March 2015.
[31] R. Haass and M. O'Sullivan, *An Agreement Among The Parties of the Northern Ireland Executive on Parades, Select Commemorations, And Related Protests; Flags And Emblems; and Contending With the Past* (OFMDFM, 2013) available at <http://www.northernireland.gov.uk/haass.pdf> accessed 24 March 2015 (hereinafter 'Haass-O'Sullivan Agreement'); Northern Ireland Office, The Stormont House Agreement (2014) available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf> (accessed 24 March 2015).

The Haass-O'Sullivan proposals which related to the past focused upon a two-track approach to investigations and 'information retrieval'. It was envisaged that these would exist alongside Coroners' Courts and inquiries that might be established to examine particular deaths. In terms of investigations, the proposals noted the important work that had been done by the HET but added that 'the families of many victims believe that they have not received the justice they desired or deserved'. [32] To improve upon this, it was proposed that legislation would create a wholly independent and Article 2 ECHR compliant Historical Investigations Unit (HIU) that would replace the HET and also assume the conflict-related investigative responsibilities of the PSNI and Police Ombudsman.[33]

The HIU's primary responsibility was said to be in relation to the investigation of deaths with a view to passing files to the PPS, although the proposals also envisaged that the HIU might play a role in relation to the acquisition of information about injuries suffered by other people during an incident that led to a death. Most fundamental of all to the HIU's mission was to be a so-called 'principle of choice' that would allow the families of victims to be more or less involved in its work. Hence, should a family wish to be closely involved in the work of the HIU, Haass-O'Sullivan envisaged that it would be kept informed about the progress of an investigation, have access to an advocate-counsellor, and receive a report with available information should a file not be passed to the PPS with a view to a prosecution. However, should a family to decide that it does not want to be closely involved in the work of HIU, it would have that wish 'scrupulously' observed save where a decision was to be taken to refer a file in their case to the PPS. Under those circumstances, the HIU would 'reach out to the individuals or families … [to ensure that they] … do not first learn about the Progress of their case via the media or other publicity'.[34]

The related process of information retrieval was be undertaken by an Independent Commission for Information Retrieval (ICIR). The underlying rationale for this body was said to be the need for victims and families to have knowledge about events 'in those many cases that are unlikely to be resolved through the criminal justice system, where the bar for the introduction of evidence for prosecution is necessarily high'.[35] While the proposals for the ICIR did not seek to displace the criminal justice system – they expressly stated that 'justice remains an option'[36] – they represented a highly pragmatic response to the need for a flow of information. At the heart of the proposals, there was thus an emphasis on voluntary participation with the ICIR, which meant that victims and families would be able to make requests for information that would prompt the ICIR to conduct enquiries through intermediaries and to the compile reports for families.

The option of voluntary participation was also to be open to state and non-state actors who were involved in incidents and who may have wished to provide the ICIR with information about those incidents. Such information would not lead to the identity of the deponent being revealed, and it could not subsequently be

[32] Haass-O'Sullivan Agreement, 25.
[33] Ibid 25-29.
[34] Ibid 28.
[35] ibid 29.
[36] ibid 30.

used in either civil or criminal proceedings against the person who provided it. Third parties named by deponents would also be protected in the sense that they would be invited to make representations to the ICIR on the same basis as the original deponent.

Information gathered in this way, together with HET and HIU reports, as well as other documentary evidence, would be combined to form a repository of information that could be used to develop a narrative not just about individual cases, but also about organizational patterns and practices during the conflict. To ensure that no single narrative would come to dominate, it was envisaged that the Northern Ireland Executive would establish 'an archive for conflict-related oral histories, documents and other relevant materials from individuals of all backgrounds, from Northern Ireland and beyond'.[37]

The Haass-O'Sullivan process famously ended without political agreement, but the Stormont House Agreement of December 2014 now appears to be taking some its proposals forward. For instance, the Stormont House Agreement contains a commitment to establish both the HIU and ICIR, with the former body being primed to take over outstanding cases from the HET process. While it remains to be seen quite what institutional safeguards are put in place to ensure that the HIU is fully compatible with Article 2 ECHR, the Stormont House Agreement notes that there is a need for 'an approach to dealing with the past which … is human rights compliant'.[38] It would therefore appear that Stormont House will provide the basis for an approach to the past that will be fully wedded to the demands of Article 2 ECHR.

[37] Ibid 36.
[38] The Stormont House Agreement, para. 21.

II. Prosecuting the Past

We turn now to consider the question of when prosecutions may be brought in respect of conflict related offences. As we noted in the introduction to this report, this can be an area of some practical difficulty, precisely because the prosecuting authority may be dealing with cases that may be forty years or more old. The relevant authority is, of course, the PPSNI, which will typically receive files that are passed to it by the PSNI. When making its decision about whether to prosecute, the PPSNI will apply a two-stage test whereby it asks: (a) whether the evidence that can be brought before the court offers a reasonable prospect of conviction and, if so; (b) whether it would be in the 'public interest' to bring the prosecution.[39] The idea of the 'public interest' is of course one that is vague and value laden, and there is considerable scope for controversy where decisions are taken with reference to the 'public interest'. That said, the PPSNI works on the assumption that there is a public interest in prosecuting anyone who is reasonably suspected of having committed a criminal offence, and it is only very rarely that prosecutions are declined on these grounds. Decisions not to prosecute are instead more readily taken for reasons associated with the available evidence.

The 'Evidential' Test

The question whether there is sufficient evidence to offer a 'reasonable prospect of a conviction' is gauged with reference to the criminal standard of proof, i.e. 'beyond a reasonable doubt'. In broad terms, the evidence that may be adduced in court falls into a number of categories that include forensic evidence, witness evidence, and circumstantial evidence. Developments in relation to DNA evidence mean that convictions can potentially be secured on the basis of such evidence alone unless there is other evidence to create a reasonable doubt about whether the defendant committed the act in question. This can be true even in relation to historical cases: for instance, IRA man Seamus Kearney was convicted of the murder of RUC Reserve Constable John Proctor on the basis of DNA evidence that was found on a cigarette butt recovered from the scene of Reserve Constable Proctor's murder.[40]

The evidential test was recently in the news when the Attorney General for Northern Ireland made an intervention on the matter of dealing with the past. In noting that prosecutions in respect of the past would often face significant difficulties, the Attorney General observed that the passage of time would inevitably mean that some evidence would either have become tainted and/or would no longer be available because of the death of eye-witnesses and so on. While the Kearney case makes clear that prosecutions are still possible in some historical cases, the Attorney General was undoubtedly correct to note that there

[39] PPSNI, *Code for Prosecutors: Revised 2008* (PPSNI, 2008), para. 4.1.2, available at <http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Code%20for%20Prosecutors/Code%20for%20Prosecutors%20Revised%202008%20FINAL.pdf> accessed 24 March 2015.

[40] 'John Proctor Murder: Life Sentence for Seamus Kearney' *BBC News* (28 November 2013) available at <http://www.bbc.co.uk/news/uk-northern-ireland-25136281> accessed 24 March 2015.

may be formidable evidential problems in other cases. The broader question for society then becomes one of whether to draw a line under the past or, as our other reports have outlined, to incentivise a truth telling process through the use of amnesties or similar measures.

The 'Public Interest' Test

It has already been noted above that the idea of the 'public interest' is one that is vague and value laden. Nevertheless, the question of when it will, or will not, be in the 'public interest' to prosecute is addressed in the *Code for Prosecutors*. For instance, the Code's starting point is

> the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law … In some instances the serious nature of the case will make the presumption a very strong one.

The Code then lists public interest considerations that would favour prosecution.[41] However, the Code also notes that there may be 'circumstances in which … prosecution is not required in the public interest' and lists the following, indicative examples:

i. Where the court is likely to impose a very small or nominal penalty.

ii. Where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgement or a genuine mistake.

iii. Where the offence is not of a serious nature and is unlikely to be repeated.

iv. Where there has been long passage of time between an offence taking place and the likely date of trial unless: (a) the offence is serious; (b) delay has been caused in part by the defendant; (c) the offence has only recently come to light; or (d) the complexity of the offence has resulted in a lengthy investigation.

v. Where a prosecution is likely to have a detrimental effect on the physical or mental health of a victim or witness, particularly where they have been put in fear.

vi. Where the defendant is elderly or where the defendant is a child or a young person.

vii. Where the defendant was at the time of the offence or trial suffering from significant mental or physical ill-health.

[41] These include: i. the seriousness of the offence i.e. where a conviction is likely to result in a significant penalty; ii. where the defendant was in a position of authority or trust and the offence is an abuse of that position; iii. where the defendant was a ringleader or an organiser of the offence; iv. where the offence was premeditated; v. where the offence was carried out by a group; vi. where the offence was carried out pursuant to a plan in pursuit of organised crime; vii. where the offence involved the possession or use of a firearm, imitation firearm or other weapon such as a knife; and viii. where the offence was motivated by hostility against a person because of their race, ethnicity, sexual orientation, disability, religion, political beliefs, age, or the like.

viii. Where the defendant has put right the loss or harm that was caused (although defendants must not be able to avoid prosecution simply because they pay compensation).

ix. Where the recovery of the proceeds of crime can more effectively be pursued by civil action brought by the Serious Organised Crime Agency.

x. Where details may be made public that could harm sources of information, international relations or national security.

Plainly, not all of the above grounds would be relevant to conflict related offences, although some would. For instance, if the PPSNI is dealing with an offence that dates back to the 1970s, the age or health of a proposed defendant might mean that it would not be in the public interest to prosecute. In other cases, national security considerations might be relevant to the question whether to prosecute – although decisions taken on this ground have the potential to be highly controversial. It was perhaps because of this that the then Attorney General, Sir Patrick Mayhew, said the following in response to a Parliamentary question about a decision not to prosecute RUC officers who had been involved in the killing of three unarmed members of the IRA in Lurgan in 1982 (in the *McKerr* case, discussed above):

> public interest in Northern Ireland must embrace questions of national security and ….[this]…has connotations that bear upon the safety of a very large number of individuals.[42]
>
> ... As to the question of a cover-up, ... the public interest is never to be equated with the interest of the Government or of the majority party, and is never to be prayed in aid to protect the Government from, for example, embarrassment, and it has not been in this case. I cannot conceive that I should ever be pressed by any member of any Government of any party; I do not believe that any Attorney-General has ever been pressed in that way. I certainly have not been pressed, and I would never so interpret the public interest.[43]

Other cases have, however, given rise to internal governmental disputes about the relationship between national security and the public interest. For instance, the De Silva review of the murder of Pat Finucane revealed the debate within the British cabinet on whether or not the informer Brian Nelson should be prosecuted for his involvement in a number of murders. The Minister for Defence, Tom King, and Secretary of State for Northern Ireland, Peter Brooke, both voiced their opposition to prosecution on public interest grounds. They argued that it would frustrate intelligence and security efforts, which would result in lives being lost and 'kidnap attempts' against Security Service officers, as well as having a 'strong political dimension'.[44] Nonetheless, the prosecution proceeded because the authorities were of the view that there was more than sufficient evidence and the public interest test was satisfied, even if the public interest gave rise to difficult issues. As the Attorney General at the time put it:

[42] HC Deb 25 January 1988, vol. 126 col. 27.
[43] Ibid. col. 31.
[44] De Silva (n 18) para. 24.100-174.

> The public interest dilemma which we face is obviously very acute. If Nelson is prosecuted, damage will be done to the capability of the security forces and to their reputation. Moreover, if Nelson is prosecuted but no one in the Army or RUC is, then there will no doubt be accusations that the prosecuting authorities have made Nelson a scapegoat and are protecting members of the security forces. On the other hand, the public interest in prosecuting charges as serious as murder really speaks for itself, and I have to say that the gravest damage would be done to confidence in the impartial administration of justice when it became known that an Army agent had escaped any such charge on what were asserted, inevitably without detailed explanation, to be public interest grounds.[45]

It follows from the above that national security can be a consideration for prosecutors in deciding whether or not to prosecute but that it cannot act as an absolute bar, particularly where the crimes are serious and involve state actors. Furthermore, politics cannot directly dictate such decisions as the failure to prosecute those in public office could undermine public confidence in the administration of justice. Such an outcome would frustrate not only the rule of law but also the state's obligations under Article 2 ECHR, where applicable.

Instances of Prosecutions

There were of course many prosecutions over the course of the Northern Ireland conflict. Notwithstanding such prosecutions, when juxtaposed to instances where prosecutions did not occur – either for state actors (army, police of intelligence services) or paramilitaries who were in fact agents of the state working within those organisations – there have been criticisms that decisions on who was and who was not prosecuted were at times politically motivated. The absence of decisions to prosecute state actors has, on occasion, led to criticism from the European Court of Human Rights, as noted above.

Membership of a Paramilitary Organisation

One offence that frequently led to prosecution – and still can – was membership of a paramilitary organisation. Here, the legislature made it an offence to belong to a 'proscribed organisation', which typically included the IRA, the INLA, the UVF and the UDA. Professor Dermot Walsh has suggested that a membership charge was often used as a 'catch all' that could be relied upon where other charges against a defendant were dismissed or where the defendant was found not guilty of those charges at trial.[46] The sentences that could be given out would vary in accordance with the seniority of the person who was charged with the offence, and successful prosecutions could result in significant organisational difficulties for the paramilitary group in question. To avoid charges of membership, individuals would deny any suggestion that they belonged to a group so that their statements could not be used against them. In recent years

[45] Letter from Attorney General to Secretary of State for Defence, 11 March 1991, in ibid., Vol. II, p. 236-244.
[46] D. Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (London: Cobden Trust, 1983) 80. See also K. Boyle, T. Hadden and P. Hillyard, *Law and State: The Case of Northern Ireland* (London: Robertson, 1975) 67.

there have a number of prosecutions of alleged high profile members of paramilitary organisations which again, given the history of membership charges, have led to criticisms that such charges are politically motivated.

Prosecuting Members of the Security Forces

The security forces were directly responsible for killing 363 people during the conflict.[47] Notwithstanding that total, only two members of the RUC, four members of the British Army, and 17 members of the Ulster Defence Regiment (UDR) were ever convicted of murder or manslaughter.[48] Of course, a number of other cases were brought against members of the security forces for deaths caused by their actions, but the cases resulted in acquittals because the soldiers or officers were found to have acted in self-defence. One NGO has noted that in 16 cases members of the security forces were acquitted of manslaughter. In addition, one soldier had their manslaughter charge quashed on appeal, another solider had their manslaughter charge dropped, whereas one soldier was convicted of manslaughter but given a suspended sentence so that he served no time in prison.[49] Moreover, despite a number of cases being referred to the PSNI by the HET, none involved members of the security forces.[50] Since the signing of the Good Friday Agreement, there have been no successful prosecutions of state actors for conflict related events.[51] There have been four successful prosecutions of non-state actors, two Loyalist and two Republican.[52]

The Post-Conflict Release of Prisoners

One remaining matter to address is that concerning the release of prisoners who have been convicted of conflict-related offences. While release prior to the Belfast Agreement was a matter for the 'ordinary' workings of the criminal justice system, it is well-known that release after the Belfast Agreement came to be governed by the Northern Ireland (Sentences) Act 1998. This Act gave effect to those parts of the Good Friday Agreement that provided for the early release of paramilitary prisoners, and it remains in force to this day. In broad terms, the scheme of the Act is very simple - it provides that a prisoner who belongs to an organisation that is on ceasefire is eligible for release so long as the prisoner in question will not otherwise become involved in political violence or be a danger to the public. Moreover, where an individual has been convicted of a conflict-related offence after the Good Friday Agreement – for instance, as a result of the work of the HET – he or she will also be eligible to be released under the Act so long as he or she is not involved with an organisation that is not observing a ceasefire. In such cases, the Act provides that the prisoner shall serve two years in custody.

The Northern Ireland (Sentences) Act 1998 – and the part of the Good Friday Agreement that foreshadowed it – has not been without controversy, and the

[47] On the use of force by the state see A. Cadwallader, *Lethal Allies: British Collusion in Ireland* (Cork: Mercier Press, 2013).
[48] Ibid.
[49] Pat Finucane Centre, *Briefing Paper on the Office of the Director of Public Prosecutions for Northern Ireland* (2000), Appendix VIII.
[50] HMIC (n 26) 82.
[51] CAJ (n 10).
[52] Ibid.

courts have sometimes had to consider its provisions. One particularly interesting case in which they did so was *Re Williamson's Application*,[53] which was a case brought by a woman whose parents had been killed in the IRA's 'Shankill Bomb' of 1993. The case was brought because the then Secretary of State for Northern Ireland, Dr Mo Mowlam, had decided that the IRA's ceasefire had not broken down notwithstanding that the IRA had been involved in gun-running and a shooting in Belfast. In challenging the Secretary of State's decision, Michelle Williamson argued that the Secretary of State had failed to act in a way that was consistent with the requirements of the Act of 1998. She also argued that the Secretary of State had acted irrationally as she had acknowledged that the IRA had been involved in the acts in question but had still formed the view that its ceasefire had not broken down.

The application to the courts failed because the judges were of the view that the Secretary of State had neither acted contrary to the legislation nor in a way that was irrational. In reaching this conclusion, the judges noted that the Secretary of State was dealing with a politically sensitive matter and that the courts should be very slow to interfere with decisions of that kind. As a result, the scheme under the 1998 Act as applied to the IRA continued to operate and its members who were serving sentences remained eligible for release.[54]

[53] [2000] NI 281.

[54] For a discussion on the position as it applies to the On the Runs – to whom the Act of 1998 cannot apply – see the report in this series: The Historical Use of Amnesties, Immunities, and Sentence Reductions in Northern Ireland.

Conclusion

This report has considered two closely related matters: (1) the nature of the state's investigative obligations under Article 2 ECHR; and (2) the nature of prosecutorial decision-making in relation to the Northern Ireland conflict. In doing so, it has attempted to highlight some of the complexities of dealing with the past through legal rules. As has been seen, there are searching questions about the reach of Article 2 ECHR in a post-conflict setting, where doubts remain about how far the UK government is acting in accordance with its international obligations. Moreover, even where investigations into the use of force by state or non-state actors have been carried out, it has been seen that the passage of time can present formidable evidential challenges for any potential prosecution – challenges that may exist even before any matter of public interest arises for consideration.

Much would now seem to depend on what happens with the Stormont House Agreement, which, as we have seen borrows extensively from the Haass O'Sullivan proposals on dealing with the past. While it is unclear at the time of writing quite how the commitments within the Stormont House Agreement will take legislative form, the Agreement does say that the past should be dealt with in a manner that is consistent with human rights standards. If this occurs, it would seem that Article 2 ECHR will finally have been given the central and uncontested role that it should play in any process of transition.