

**COUNTER-TERRORISM MEASURES AND INTERNATIONAL  
HUMANITARIAN LAW: A CASE STUDY OF THE  
“TROUBLES” IN NORTHERN IRELAND**

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“In Northern Ireland, the past is the present. If we don’t deal with the past, I don’t want my grandchildren's rights to have to suffer this again. As injured people, we are living scars in society and we need to have it recognised that we have suffered.”

– *Peter Heathwood, paralyzed victim of a gunshot wound delivered by suspected loyalist gunmen in September, 1979.*<sup>1</sup>

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<sup>1</sup> *Northern Ireland: Amnesty Slams Failure to Deal with Past*, AMNESTY INT’L UK PRESS RELEASES (Sept. 12, 2013, 12:00AM), <http://www.amnesty.org.uk/press-releases/northern-ireland-amnesty-slams-failure-deal-past> [perma.cc/KN8B-TK9F] (last visited Feb. 4, 2016).

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## 1. INTRODUCTION

Few outside of Northern Ireland realize that Belfast is a city still divided by "peace walls," physical barriers that were originally constructed to divide the Catholic and Protestant neighborhoods from one another.<sup>2</sup> Belfast is possibly the last city in Western Europe that does not preserve barrier walls solely for their allure as historical novelties or their draw as tourist attractions.<sup>3</sup> Rather, nearly seventy percent of residents living near the Belfast walls want them to remain in place because they believe the structures are still necessary to prevent violence,<sup>4</sup> though over two decades have passed since the Irish Republican Army ("IRA") announced the end of its armed hostilities in Northern Ireland.<sup>5</sup> Yet, although the period of horrific violence known as the "Troubles" has been declared over,<sup>6</sup> the threat of aggression still looms in Belfast.<sup>7</sup>

<sup>2</sup> Peter Geoghegan, *Will Belfast ever have a Berlin Wall Moment and tear down its peace walls?*, THE GUARDIAN (Sept. 29, 2015, 02:30 EDT), <http://www.theguardian.com/cities/2015/sep/29/belfast-berlin-wall-moment-permanent-peace-walls> [perma.cc/WS2G-QZ9N] (last visited Feb. 4, 2016); Henry McDonald, *No end in Sight for Belfast 'Peace Walls'*, THE GUARDIAN (Sept. 25, 2012, 19:04 EDT), <http://www.theguardian.com/uk/2012/sep/26/belfast-peace-walls-republicans-loyalists> [https://perma.cc/33PL-R2EP] (last visited Feb. 4, 2016); see also Henry McDonald, *Belfast 'Peace Walls' Will Come Down Only by Community Consent*, THE GUARDIAN (Dec. 3, 2013, 08:51 EDT), <http://www.theguardian.com/uk-news/2013/dec/03/belfast-peace-walls-dismantled-community-consent-minister> [perma.cc/DDD4-GJQT] (last visited Feb. 4, 2016).

<sup>3</sup> McDonald, *Belfast 'Peace Walls' Will Come Down Only by Community Consent*, *supra* note 2 (noting that Belfast's peace walls are "highly unusual among such barriers around the world because most of those living closest to them continue to support their existence in successive opinion polls, mainly because of fear of attack from the community on the other side").

<sup>4</sup> McDonald, *No end in Sight for Belfast 'Peace Walls'*, *supra* note 2.

<sup>5</sup> Vincent Kearney, *'It's Over': Reporting the IRA Ceasefire 20 Years Ago*, BBC NEWS (Aug. 27, 2014), <http://www.bbc.com/news/uk-northern-ireland-28957532> [https://perma.cc/T8F3-WWY6] (last visited March 24, 2016).

<sup>6</sup> Brian Lavery & Alan Cowell, *I.R.A. Renounces Violence, Vows to Disarm*, N.Y. TIMES (July 29, 2005), <http://www.nytimes.com/2005/07/29/world/europe/ira-renounces-use-of-violence-vows-to-disarm> [https://perma.cc/N9T6-NP58] (last visited Feb. 4, 2016) (the phrase "the Troubles" loosely refers to the period of near constant violence as militant forces battled each other on the streets of Belfast from roughly 1969 to 1980).

<sup>7</sup> Henry McDonald, *Northern Ireland Drafts in Police Reinforcements After More Violence*, THE GUARDIAN (July 17, 2014, 07:00 EDT), <http://www.theguardian.com/uk-news/2013/jul/17/northern-ireland-police-belfast> [https://perma.cc/BB9F-69QD] (detailing five consecutive nights of violence in

When the period of armed conflict officially drew to a close, the death and destruction it rendered left many questions of blame and reparations. In particular, some citizens of Northern Ireland wanted to know more about the role of the police, the national army, and their government in implementing counter-terrorism strategies during the Troubles. Decades later, many of these questions remain unanswered. Further, much of the civil and criminal litigation that arose from these questions in the immediate aftermath of the Troubles also remains unresolved, due, in large part, to the actions, or lack thereof, of the British government. Through strategic inactivity, as well as affirmative measures taken to ensure that the cases are not investigated, the government has stymied efforts of victims and their families to uncover the truth about the government's role in the Troubles. Why has this occurred?

The United Kingdom is an advanced Western nation with the resources and ability to give all of its citizens access to judicial remedies. Further, the United Kingdom does not lack the resources needed to establish a large-scale public inquiry or to launch a truth commission to address the resolution of Troubles-related violence. It has the organizational capacity to install these or other mechanisms of transitional justice, which many scholars have argued could result in healing for post-conflict Northern Ireland.<sup>8</sup> Transitional justice mechanisms are popular and innovative ideas aimed at solving complex problems that have often raged for centuries. The United Nations defines transitional justice as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve

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Belfast during the Marching Season of 2013. Rival political and sectarian groups confronted each other all over the city, lighting cars on fire and throwing petrol bombs. Five hundred additional police officers from overseas were called in to assist in calming the hostilities.)

<sup>8</sup> Christopher K. Connolly, *Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland*, 39 CORNELL INT'L L.J. 401, 402 (2006) [hereinafter Connolly, *Living on the Past*] (arguing that "the implementation of a transitional justice mechanism that confronts the legacy of the Troubles is crucial for the future of the peace process"); see Brandon Hamber, *Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 FORDHAM INT'L L.J. 1074, 1074 (2002-2003) (observing that "[c]urrently . . . the possibility of holding public hearings, advancing societal and individual healing, and taking part in or promoting a process of reconciliation (however defined) has opened wide the question [of how best to gather information concerning transitional societies] . . .") (quotation omitted).

reconciliation."<sup>9</sup> Mechanisms to achieve these goals include truth commissions, prosecutorial initiatives, institutional reform and national consultations.<sup>10</sup> These practices, or a combination of them, are often specifically tailored to meet the needs of the individual country or region that has suffered violence. Typically, however, all transitional justice mechanisms feature concurrent themes of honesty and truth telling in the hope of healing past wounds and reestablishing trust so that the citizens of a wounded region or nation can begin to move forward.

The study of transitional justice has blossomed in the last decade.<sup>11</sup> Many academics posit that, as a land in transition, inquests, truth commissions, or other mechanisms designed to resolve the trauma experienced by post-conflict societies should be applied in Northern Ireland.<sup>12</sup> Currently, many questions about the British government's involvement in the violence still remain. Thus, some feel that an organized process through which those involved can acknowledge responsibility for the past conflict and perhaps even apologize for the losses inflicted, will allow the still-divided sectarian neighborhoods to begin to heal.<sup>13</sup>

<sup>9</sup> *Transitional Justice*, UNITED NATIONS RULE OF LAW, [http://www.unrol.org/article.aspx?article\\_id=29](http://www.unrol.org/article.aspx?article_id=29) [perma.cc/2DGB-DVB2] (last visited Feb. 4, 2016).

<sup>10</sup> *Id.*

<sup>11</sup> See *About the Journal*, THE INT'L J. OF TRANSITIONAL JUST., available at [http://www.oxfordjournals.org/our\\_journals/ijtj/about.html](http://www.oxfordjournals.org/our_journals/ijtj/about.html) [https://perma.cc/G9RQ-JM7P] (last visited Mar. 18, 2016) ("Transitional justice has fast emerged as a recognised field of policy expertise, research and law, and today, is considered to be an academic discipline in its own right."). Institutes that have developed with a focus on transitional justice include the International Center for Transitional Justice (see TRANSITIONAL JUSTICE AND DISPLACEMENT, <https://www.ictj.org/our-work/research/transitional-justice-and-displacement> [https://perma.cc/6598-JZGC] (last visited Mar. 18, 2016)), as well as the Transitional Justice Programme of the NIOD Institute for War, Holocaust, and Genocidal studies (see TRANSITIONAL JUSTICE PROGRAM, <http://www.niod.nl/en/projects/transitional-justice-programme> [https://perma.cc/Z7E3-B6SX] (last visited Mar. 18, 2016)).

<sup>12</sup> Connolly, *Living on the Past*, *supra* note 8; Hamber, *supra* note 8.

<sup>13</sup> See, e.g., Patricia Lundy & Marck McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 J.L. & SOC'Y 265 (June 2008) (arguing that transitional justice needs a more participatory approach and examining the Ardoyne Commemoration Project for an example of an effective, organized truth-telling process that allows for the participation of families of victims of violence in Belfast to tell the stories of their loved ones' deaths); and ARDOYNE COMMEMORATION PROJECT,

As a civilized Western government and self-proclaimed advocate of peace, the government of the United Kingdom and the ruling body of Northern Ireland should perhaps be one of the most adamant proponents of achieving this tranquility within its domain.<sup>14</sup> Yet, as is often the case in transitioning societies,<sup>15</sup> the British government is one of the largest opponents of any further investigation into the history of violence, even after judgments by the European Court of Human Rights (“ECtHR”) have commanded such investigation.<sup>16</sup> The United Kingdom has largely ignored the

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ARDOYNE: THE UNTOLD TRUTH (2002), available at <http://cain.ulst.ac.uk/issues/victims/ardoyne/ardoyne02a.htm> [<https://perma.cc/6ABA-E98B>] (last visited Mar. 18, 2016) (“Many of these testimonies speak of the brutality of a system that treated ordinary people with utter contempt and colluded to ensure lack of disclosure, accountability and justice.”). See also Brandon Hamber, *Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 FORDHAM INT’L L.J. 1074, 1094 (noting that “at some point laying the past bare will be needed, and . . . this is the greatest, albeit difficult, guarantee of a stable future . . .”). This view is by no means universally accepted. Other historians have noted that “government initiatives to seek the ‘truth’ about historical events in Northern Ireland have both faced and created severe practical problems.” Cillian McGratten, *Historians in Post-Conflict Societies: Northern Ireland After the Troubles*, HISTORY & POLICY (Mar. 3, 2011), available at <http://www.historyandpolicy.org/policy-papers/papers/historians-in-post-conflict-societies-northern-ireland-after-the-troubles> [<https://perma.cc/7GS4-L5XQ>]. For example, judicial inquiries such as the Bloody Sunday Tribunal may be helpful in establishing basic chronologies and cause-and-effect sequences, but they also serve to impose an authoritative narrative over victims’ experiences.” *Id.*

<sup>14</sup> PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 13-14 (2013) (summarizing a news article featured in the Guardian, in which Prime Minister David Cameron notes that Britain has a long and exemplary record on human rights).

<sup>15</sup> Brandon Hamber, *Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 FORDHAM INT’L L.J. 1074, 1091 (noting that, in many cases, “[t]he practical and political challenge of making policy on matters concerning those who have suffered . . . is compounded by the fact that . . . the government is also responsible for some of the violence”); see also Connolly, *Living on the Past*, *supra* note 8, at 418 (explaining that “notions of transitional justice assume state responsibility for the majority of past abuses”).

<sup>16</sup> *Northern Ireland: Amnesty Slams Failure to Deal with Past*, AMNESTY INT’L UK PRESS RELEASES (Sept. 12, 2013, 12:00 AM), <http://www.amnesty.org.uk/press-releases/northern-ireland-amnesty-slams-failure-deal-past> [[perma.cc/KN8B-TK9F](https://perma.cc/KN8B-TK9F)] (last visited Feb. 4, 2016) (the press release “blames the failure to deliver truth and justice on a lack of political will from . . . the UK government”); see also Christine Bell, *Dealing with the Past in Northern Ireland*, 26 FORDHAM INT’L L.J. 1095, 1099 (2002-2003) (noting that “in Northern Ireland, key gaps in the issues being addressed, such as accountability for State actors, can be identified as serving to undermine the principles of equality and parity, which underlie the Agreement, and with these, confidence in the peace process”).

ECtHR judgments<sup>17</sup> and has stubbornly dismissed any proposals for implementing more widespread transitional justice mechanisms or truth telling.<sup>18</sup>

Many have presumed that the reason for the lack of interest in transitional justice displayed by the British government stems from the fact that the government does not want to revisit its ugly past.<sup>19</sup> Indeed, a thorough judicial process could expose the suspected coercive role that the British Armed Forces may have played in the bloodshed.<sup>20</sup> Although the violence was predominantly isolated within the United Kingdom, tensions within Northern Ireland caused bloodshed in other parts of the European continent, which could result in the perpetrators suffering widespread embarrassment.<sup>21 22</sup>

Most assuredly, the latter interpretation for the government's inaction is correct, but perhaps other reasoning exists for this latency as well. Unbidden, British Prime Minister David Cameron has publicly apologized to the family of renowned Belfast human rights attorney Pat Finucane for the "unacceptable" role that British forces played in bringing about Finucane's murder at the hands of militant

<sup>17</sup> See *infra* Part 3.2. (discussing the effects of the judgments of the ECtHR).

<sup>18</sup> See ALSTON & GOODMAN, *supra* note 14.

<sup>19</sup> *Northern Ireland: Victims Say "We're an Embarrassment to Politicians, but We Demand Action on the Past,"* AMNESTY INT'L UK PRESS RELEASES, available at <http://www.amnesty.org.uk/press-releases/northern-ireland-victims-say-were-embarrassment-politicians-we-demand-action-past> [perma.cc/U9YM-698K] (last visited Feb. 4, 2016) (suggesting that British politicians are embarrassed by the government's past acts).

<sup>20</sup> Some sources estimate that British state forces were directly responsible for about ten percent of the deaths in Northern Ireland, and could have indirectly facilitated many more. Cillian McGratten, *Historians in Post-Conflict Societies: Northern Ireland After the Troubles*, HISTORY & POLICY (Mar. 3, 2011), available at <http://www.historyandpolicy.org/policy-papers/papers/historians-in-post-conflict-societies-northern-ireland-after-the-troubles> [https://perma.cc/7GS4-L5XQ] (noting that British state forces such as the army and the Royal Ulster Constabulary were responsible for approximately 9.9% of the bloodshed during the Troubles).

<sup>21</sup> Connolly, *Living on the Past*, *supra* note 8, at 417-18 (noting that "[r]ather than accept responsibility for these deaths, Britain has generally 'concealed and distorted' the role of state actors in the conflict" (quoting TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, Henry J. Steiner, ed.)).

<sup>22</sup> Philip Alston & Ryan Goodman, *supra* note 14 at 922-25 (describing violence after British troops apprehended PIRA agents in Gibraltar).

Protestants.<sup>23</sup> Clearly, Cameron's behavior demonstrates a degree of willingness on behalf of the government to accept accountability for such past acts. Yet, despite Cameron's apology, the British government still refuses to launch an official, independent and transparent public inquiry into Finucane's death.<sup>24</sup> The government declines to provide the details of its role in the tragedy that such an investigation would reveal. Given that the British government has accepted a measure of guilt by issuing its apology, why has the adjudication of this case, along with so many other cases still plagued by questions and mystery, been so evasive?<sup>25</sup>

The British government's aversion to truth and its disregard for the demands of the international human rights community may be centered on more than just shame for its past misdeeds. A widespread judicial investigation into counter-terrorist acts could result in jurisprudence that defines, with specificity, which of those actions are legally permissible and which are not. In the post-September 11<sup>th</sup> age, the rules of engagement regarding counter-terrorist measures lie amidst murky and undefined judicial waters.<sup>26</sup> Where clear rules do exist, governments have broken these rules and justified the infringement in the name of domestic security. Like the clearly defined rules themselves, determinations of the merits of such self-defense arguments are equally obscure. Further, there is an absence of meaningful official admonishment from domestic judicial systems and larger international legal systems for governments that violate these rules. This lack of clarity and absence of retribution allows state actors considerable leeway to do as they please in the name of defense against terrorism. A defined body of jurisprudence could dispel the obscurity on which this

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<sup>23</sup> Henry McDonald & Owen Bowcott, *David Cameron Admits "Shocking Levels of Collusion" in Pat Finucane Murder*, THE GUARDIAN (Dec. 12, 2012, 16:17 EST), <http://www.theguardian.com/uk/2012/dec/12/david-cameron-pat-finucane-murder>[perma.cc/J79N-TA35] (last visited Feb. 4, 2016).

<sup>24</sup> See *id.* (noting that the apology has "failed to quell demands 'from [Finucane's] family, human rights organizations [sic] and the Irish government for a full public inquiry'").

<sup>25</sup> *Id.*; Henry McDonald, *Pat Finucane Murder: PM's Decision Not to Hold Independent Inquiry Upheld*, The Guardian (June 26, 2015), available at <http://www.theguardian.com/uk-news/2015/jun/26/pat-finucane-pms-decision-not-to-hold-independent-inquiry-upheld> [https://perma.cc/F34D-PACC].

<sup>26</sup> PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 386 (2013) (describing the international rules of terrorism as "unsettled" and noting that the national and legal conceptions of terrorism vary significantly).

unbounded system depends. This rationale could represent an alternative reason for why the British government refuses to attend to post-Troubles litigation.

Part 2 of this paper will briefly lay out the history of the conflict in Northern Ireland, with a special emphasis on the time period of the Troubles, when British Forces were most involved in the conflict; in particular, this paper will outline the specific role the government allegedly played.<sup>27</sup> Part 3 will examine some of the judicial methods that have been used to reveal the truth surrounding the British government's involvement in the Troubles. In particular, two separate legal battles involving the murders of Pearse Jordan and Pat Finucane will be discussed, because these cases aptly demonstrate some of the challenges that families face when trying to resolve historical murders that allegedly included government involvement or assistance.<sup>28</sup> Importantly, both cases also showcase the interplay between domestic judicial mechanisms and international judicial responses. Ultimately, this paper will demonstrate that despite numerous efforts to bring historical cases to the attention of British authorities, to this day, domestic official bodies have done little to rectify the barriers to justice that exist for victims of the Troubles and their families. In the most extreme cases, authorities have continued to actively oppose the judicial resolution of these cases.

Part 4 will consider international human rights law and humanitarian law in the context of the Troubles, and extrapolate the analysis to include post-September 11<sup>th</sup> counter-terrorism measures. The application and enforcement of human rights law in cases involving counter-terrorism measures is important because enforcement failures suggest that litigating the Troubles cases could generate examples of how best to fill this enforcement gap. Finally, Part 5 will discuss how litigating these historical cases could impact not only the United Kingdom, but also counter-terrorism legislation throughout the rest of the Western world. Ultimately, large gaps in enforcement remain in the legal field which, if defined and filled, could better clarify and standardize the rules of procedure when human rights law conflicts with security interests and counter-terrorism measures.

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<sup>27</sup> See *infra* Part 2.

<sup>28</sup> See *infra* Part 3.2.1 and 3.2.2.

Counter-terrorism is a form of warfare that emphasizes secrecy and clandestine acts, for obvious reasons of societal safety. Monitoring and apprehending non-state actors is complex and challenging, to say the least, because non-state actors, as well as their supporters, often operate in the shadows. A strongly enforced body of humanitarian law is needed to better define and protect the participants in this technologically advanced age of warfare. This paper will conclude by suggesting that, in an ideal world, the British courts represent the best possible vehicle for litigating the Troubles cases and enforcing this law, as the courts are not only well respected by both the Parliament and the citizens of the United Kingdom, but command international attention as well.<sup>29</sup> Further, because the majority of the strongest actors in the Troubles were citizens of, or have ties to, the United Kingdom, a system within the same country is more likely to understand the complexities of the conflict and to be respected by the actors involved, even though the same governmental organ contributed to the bloodshed. Despite a tumultuous past, allowing a stable and secure nation to deal with its own can be an important part of the healing process. Briefly, possible mitigating solutions such as amnesty, or the preservation of anonymity for all who come forward to recount their roles in the violence of the Troubles will be considered as mechanisms to assist the courts in achieving governmental participation.<sup>30</sup>

Ultimately, litigating the historical cases of the Troubles is important, not only because interested victims and their families deserve resolution, but also because the cases can have a wider impact on current counter-terrorism protocol. The cases are representative of many of the problems that the aftermath of broad, sweeping strokes of counter-terrorism can generate. Drawing attention to the individual cases is important, but through them there may also be acknowledgement of the broader wrongdoing of the British government in its counter-terrorism strategy which is essential. It is this wide attention to government transgressions that could beneficially contribute to international human rights law as a whole.<sup>31</sup>

It is important to note that this paper's proposals are in relation to broader human rights literature. Restrictions on what

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<sup>29</sup> See *infra* Conclusion.

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

<sup>31</sup> *Id.*

government actors may and may not do in the course of armed conflict certainly exist in the form of humanitarian law.<sup>32</sup> The Geneva Conventions are perhaps the most well-known example of war-time human rights law, and there has been a large push towards enforcing this type of legislation in unofficial armed conflict, both within and across borders. However, enforcement remains a difficult problem to tackle, as will be discussed further below. Identifying the actors, communicating human rights obligations to them, and enforcing those obligations have rarely been accomplished with success, especially in advance of the acts that we seek to preempt. Thus, "the resort to international tribunals, national courts or regional bodies" is common.<sup>33</sup> Particularly with state actors such as the United Kingdom and the United States, international law often comes secondary to domestic law and there is an unparalleled emphasis on domestic security. This attitude promotes the absence of enforcement.<sup>34</sup> Because the Troubles cases uniquely impact the United Kingdom,<sup>35</sup> they are perhaps singular in that they represent a predominantly concluded but still partially unsettled<sup>36</sup> modern opportunity for domestic courts to incorporate international humanitarian law in relation to counter-terrorism measures.

Northern Ireland is in a state of transition, and increasingly, in a state of hope. The infringements on civil rights embodied by seemingly small measures such as checkpoints and government enforced curfews, as well as the horrific infringements caused by the violence of near daily sectarian killings that once haunted the region, are a thing of the past.<sup>37</sup> Everywhere, people talk of the progress

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<sup>32</sup> Philip Alston & Ryan Goodman, *supra* note 14 at 70 (noting that a rich body of legal rules and principles has developed over time).

<sup>33</sup> *Id.* at 383.

<sup>34</sup> *Id.*

<sup>35</sup> Nearly all of the actors are citizens of the United Kingdom.

<sup>36</sup> Alec Forss, *Winning the Peace in Northern Ireland*, PEACE DIRECT; INSIGHT ON CONFLICT (Dec. 10, 2015), <http://www.insightonconflict.org/2015/12/winning-peace-northern-ireland/> [<https://perma.cc/S8XM-STDJ>] (noting that "[p]aramilitary groupings, albeit on a lesser scale compared to the past, continue to instill fear among communities and engage in gangland-style violence, with punishment attacks and even murder occurring openly on the streets").

<sup>37</sup> Connolly, *Living on the Past*, *supra* note 8, at 402. The last sectarian killing occurred in 2002. See Gerard Lawlor *Community Inquiry, Report and Recommendations*

that Northern Ireland as a whole has made.<sup>38</sup> They do not emphasize only the roles of Catholics, or only the roles of Protestants. Similarly, this paper strives to avoid adopting a sectarian position.<sup>39</sup> Rather, it focuses on the role of the British government against the people of Northern Ireland generally, regardless of what religion they happened to be, or which political stance they took. A government has a duty to protect its people, and the British government did a disservice to both “sides” by abandoning this duty. To make up for this flagrant abandonment, the actors in this conflict need to resolve the Troubles litigation in a way that not only provides closure and lasting peace, but also in a way that inspires hope for peace in the aftermath of other conflicts as well. Admittedly, this is a tall order.

This paper does not seek to propose a solution that injects humanitarian law into counter-terrorism measures in a forward-looking way. Simply put, it does not and certainly cannot seek to rectify all of the world’s problems going forward by predicting the humanitarian rules that should be applicable in the macabre game of terrorism and counter-terrorism. No one would follow them anyway – that is the point of terrorism. Rather, this paper seeks to suggest effective mechanisms to promote healing and perhaps to mitigate damages, or at least understand that they are being inflicted, which is an important dialogue that should transpire.

## 2. BACKGROUND & HISTORY OF NORTHERN IRELAND

The history of tension between the Irish and the English is ancient, going back to before the 12<sup>th</sup> century, with the series of

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(Nov. 2012), available at [http://relativesforjustice.com/wp-content/uploads/2012/11/Gerard\\_Report\\_2012-WEB1.pdf](http://relativesforjustice.com/wp-content/uploads/2012/11/Gerard_Report_2012-WEB1.pdf) [<https://perma.cc/ZF5D-MJHU>] (stating that “Gerard Lawlor was the last Catholic civilian to be shot dead as a result of the Northern Ireland conflict” on July 22, 2002).

<sup>38</sup> Connolly, *Living on the Past*, *supra* note 8, at 402.

<sup>39</sup> Of course, readers may disagree with my efforts, or with the notion that such a thing as impartiality is even possible when it comes to any recounting of the Troubles. I tend to agree that impartiality is impossible when the history of Northern Ireland is discussed, but it should nevertheless remain a lofty goal. In the astute words of Ciarán MacAirt as he introduced his book, *The McGurk’s Bar Bombing*, “history before and history since, has been a contest in itself. A similar contest may even be played out between the pages of this book – between writer and reader . . . .” As did MacAirt, I am aware of those tensions. I ask only that readers bear witness to my humble attempts to retell a history so essential to a modern understanding of the conflict moving forward.

Norman invasions into the Emerald Isle that first brought it under English rule.<sup>40</sup> As time progressed, the northeastern province of Ireland known as Ulster was predominantly settled by Scottish and English immigrants.<sup>41</sup> Ulster became economically more viable than the rest of the island, which remained Irish, and therefore the British found Ulster a more desirable foothold. In 1690, Protestant King William of Orange defeated the deposed Catholic King James II in a fierce and decisive battle outside of Dublin and took control of the country.<sup>42</sup> Known as the Battle of the Boyne, Protestants in Northern Ireland celebrate the victory over the local Irish and predominantly Catholic forces to this day, with a series of parade marches leading up to the July 12<sup>th</sup> anniversary.<sup>43</sup> Over time, Catholics have responded with their own demonstrations and marches to symbolize their displeasure with the conquering "invaders." This annual tradition of parades is known as the Marching Season, and is a period that is emotionally charged and prone to violence.<sup>44</sup>

Despite the near-constant references to religion, the contemporary conflict in Northern Ireland is largely political, not religious, in nature. However, one's religion is often an accurate

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<sup>40</sup> "For Republicans the twelfth century Norman invasions, sixteenth century Surrender and Re-grant treaties and Nine Years' War, and seventeenth and eighteenth century plantations and penal laws provide grounds for their struggle against the Loyalists." Laura K. Donahue, *Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom*, 8 (BCSIA Discussion Paper 2000-05, Aug. 2000). The sixteenth century risings by the Irish Catholics, the 1689 Siege of Derry, the 1690 Battle of the Boyne, and agrarian risings throughout the eighteenth century supply the basis for Loyalist claims. *Id.*

<sup>41</sup> See BBC, *Wars & Conflict: The Plantation User* (Sept. 18, 2014), <http://www.bbc.co.uk/history/british/plantation/> [<https://perma.cc/U2PD-VGE7>] (discussing the "plantation of Ulster" by English and Scottish Protestants on land confiscated from the Gaelic Irish).

<sup>42</sup> *More Information About: The Battle of the Boyne*, BBC HISTORY, available at [http://www.bbc.co.uk/history/events/battle\\_of\\_the\\_boyne](http://www.bbc.co.uk/history/events/battle_of_the_boyne) [[perma.cc/2XGX-R7UT](https://perma.cc/2XGX-R7UT)] (last visited Mar. 30, 2016).

<sup>43</sup> *Id.*

<sup>44</sup> See Henry McDonald, *3,000 Police Deployed for Climax of Northern Ireland's Marching Season*, THE GUARDIAN (July 13, 2015), <http://www.theguardian.com/uk-news/2015/jul/13/3000-police-northern-irelands-marching-season> [<https://perma.cc/ZB8R-6WS3>] (describing precautions taken for the 2015 marching season as well as violence in the 2013 parades, which resulted in "widespread rioting and disorder, with dozens of police officers injured in the violence").

indicator of one's views on the divisive conflict.<sup>45</sup> Before the Republic of Ireland was established, "Protestants and Catholics divided into two warring camps over the issue of Irish home rule. Most Irish Catholics desired complete independence from Britain, but Irish Protestants feared living in a country ruled by a Catholic majority."<sup>46</sup> Great Britain also had a pronounced economic interest in maintaining control over the wealthy Ulster province, and so threw its support behind the Protestant Irishmen who disfavored home rule. After a series of rebellions in 1798, 1803, 1848, 1867 and 1916, and the Irish War of Independence from 1919 to 1921,<sup>47</sup> it was agreed that the twenty-six southern counties of Ireland would be severed from British rule with the option to form their own country, now the Republic of Ireland.<sup>48</sup> The remaining six counties, together forming Ulster, would remain under British domain.<sup>49</sup> The split regarding the number of counties is what now explains the mathematically puzzling slogan of those who support one unified Irish republic, " $26 + 6 = 1$ ."<sup>50</sup>

After the divide, Ulster was ruled by a, largely British, Protestant majority that was fiercely loyal to the idea of remaining under British rule; hence, supporters of Protestant interests are known as "Loyalists," much like the "Loyalists" of the American Revolution who supported British rule as well. The Protestant majority instituted policies of discrimination all across Ulster to subdue the Catholics, who continued to support the rebellious idea of joining Ulster with the rest of the Republic of Ireland. Consequently, they are often called "Republicans." The discrimination generally included depriving Catholics of voting rights, as well as access to

<sup>45</sup> Connolly, *Living on the Past*, *supra* note 8, at 405; see also *More Information About: The Troubles*, BBC HISTORY, available at <http://www.bbc.co.uk/history/troubles> [perma.cc/8ZZN-XHFN] (last visited Mar. 30, 2016) (noting that this was a territorial conflict, not a religious one).

<sup>46</sup> *The Northern Irish Conflict, A Chronology*, INFOPLEASE, available at <http://www.infoplease.com/spot/northireland1.html> [perma.cc/FFF2-2SY2] (last visited Mar. 30, 2016).

<sup>47</sup> *Id.*

<sup>48</sup> Connolly, *Living on the Past*, *supra* note 8, at 411. See also Donahue, *supra* note 40, p. 2 (explaining that the agreement was struck to alleviate the drain on British resources and to placate some of the demands in Ireland).

<sup>49</sup> *Id.*

<sup>50</sup> Joseph E. Thompson, *America's Role in the Northern Ireland Peace Process*, in *DIASPORA LOBBIES AND THE US GOVERNMENT: CONVERGENCE AND DIVERGENCE IN MAKING FOREIGN POLICY* (Josh DeWind & Renata Segura eds., 2014).

housing, employment and education. Pogroms also resulted in the burning and destruction of Catholic homes and businesses across the region.<sup>51</sup> The pro-British Northern Irish government instituted additional security measures to consolidate its control over Ulster. In particular, the 1922 Civil Authorities (Special Powers) Act ("SPA") "empowered the Northern Ireland Parliament to impose a curfew; proscribe organizations; censor printed, audio, and visual materials; ban meetings, processions and gatherings; restrict the movement of individuals to within specific areas; and detain and intern suspects without bringing charges."<sup>52</sup> The SPA also authorized police to exercise broad powers of entry, search and seizure.<sup>53</sup> Though meant to be a temporary measure, the SPA soon "became a necessity for maintaining the North's constitutional position."<sup>54</sup> After a period of relative calm,<sup>55</sup> the SPA grew even more contentious during the 1960's, when American civil rights movements inspired Catholics to protest not only against British rule generally, but for rights equal to those enjoyed by Protestants from a pure equality standpoint as well.

Ultimately, the violent thirty-year conflict known as the "Troubles" was sparked by a Catholic civil rights march on October 5, 1968, in the town known as Derry to Catholics and called Londonderry by Protestants.<sup>56</sup> Local Protestants responded

<sup>51</sup> CIARAN MACAIRT, *THE MCGURK'S BAR BOMBING: COLLUSION, COVER-UP AND A CAMPAIGN FOR TRUTH* 143-50 (2013) (describing the destruction of Catholic homes and store fronts in predominantly Protestant towns in Ulster).

<sup>52</sup> Laura K. Donahue, *Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom*, BELFNER CENTER FOR SCI. & INT'L AFF., Discussion Paper 2000-05, at 4 (Aug. 2000), available at [http://belfercenter.ksg.harvard.edu/publication/2769/civil\\_liberties\\_terrorism\\_and\\_liberal\\_democracy.html](http://belfercenter.ksg.harvard.edu/publication/2769/civil_liberties_terrorism_and_liberal_democracy.html) [<https://perma.cc/2CSD-3GU6>] (last visited Mar. 18, 2016).

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

<sup>54</sup> *Id.*

<sup>55</sup> See *Soldiers' Stories, Northern Ireland Conflict*, BBC HISTORY, available at <http://www.history.co.uk/shows/soldiers-stories/articles/northern-ireland-conflict> [<https://perma.cc/F27X-ZPTW>] (last visited Mar. 18, 2016) ("Calm prevailed for several decades in Northern Ireland, owed in large part to the rule of Prime Minister Viscount Brookeborough, who was in office for 20 years. His political allegiance with the Ulster Unionists marginalised the Catholic minority both socially and politically.").

<sup>56</sup> *More Information About: The Troubles*, BBC HISTORY, available at <http://www.bbc.co.uk/history/troubles> [[perma.cc/8ZZN-XHFN](https://perma.cc/8ZZN-XHFN)] (last visited Mar. 30, 2016). The choice of which name to use was one way that Catholics and Protestants could easily identify each other in the course of everyday life. *Id.* Thus,

violently to the march and the situation quickly deteriorated.<sup>57</sup> Catholics and Protestants across the country rapidly consolidated their supporters and organized into pseudo-military groups that had been coagulating organically for decades.<sup>58</sup> Both groups began to target militant actors, politicians, and civilians of the opposing group alike,<sup>59</sup> often regarding “kills” (attacks on anyone known to be Protestant or Catholic that resulted in death) as badges of honor.<sup>60</sup> Graffiti and large murals delineating the boundaries of the Catholic and Protestant neighborhoods quickly sprang up, glorifying the conflict and featuring portraits of the most vicious paramilitary soldiers as heroes.<sup>61</sup> Other themes indicating support for either side

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purchasing a bus ticket to a location or mentioning the name of your hometown involved an important political choice of which name to use, and would identify your leanings to those around you instantly. *Id.*

Even the name of the state, Northern Ireland, has been highly politicized, with fiercely Republican Catholics calling it the “north of Ireland” (indicating a geographic location and not a state) and British Protestants using “Northern Ireland,” the terminology instituted to describe the state by the United Kingdom. *Id.*

<sup>57</sup> *Id.* (by 1972, the situation had deteriorated so badly that the British government suspended the Northern Ireland parliament and imposed direct rule from London).

<sup>58</sup> The most famous of these remains the Catholic IRA (Irish Republican Army), while predominant Protestant groups include the UDA (Ulster Defense Association), UDF (Ulster Defense Force) and UVF (Ulster Volunteer Force). *Id.* See *Soldiers' Stories, Northern Ireland Conflict*, BBC HISTORY, available at <http://www.history.co.uk/shows/soldiers-stories/articles/northern-ireland-conflict> [<https://perma.cc/F27X-ZPTW>] (last visited Mar. 30, 2016) (“This descent into violence precipitated the need for armed forces on both sides.”).

<sup>59</sup> Joaquin P. Terceno III, *Burying the Truth: The Murder of Belfast Human Rights Lawyer Patrick Finucane and Britain's "Secret" Public Inquires*, 74 FORDHAM L. REV. 6, 3297, 3304 (2006) (“Republican and Loyalist paramilitaries killing each other was not uncommon . . . and neither was the targeting of potentially innocent individuals believed to support the paramilitary groups.”).

<sup>60</sup> See Montgomery Sapone, *Ceasefire: The Impact of Republican Political Culture on the Ceasefire Process in Northern Ireland*, Geo. Mason U.: The Network of Peace & Conflict Stud., available at <http://www.gmu.edu/programs/icar/pcs/SAPONE71PCS.html> [<https://perma.cc/N4BN-W7K3>] (last visited Mar. 30, 2016) (“Another indication of the unchallenged legitimacy of armed struggle within the Republican community is that the IRA has never suffered from a paucity of volunteers. While it may seem incomprehensible that Provisional IRA volunteers chose to engage in military activities likely to result in death or imprisonment, to them the choice appears not only necessary but desirable. Status in [the Northern Irish] community is correlated with military competence. Bearing arms in the pursuit of Irish autonomy is considered to be the ultimate expression of Republicanism.”).

<sup>61</sup> Jeffrey A. Sluka, *The Politics of Painting: Political Murals in Northern Ireland*, in THE PATHS TO DOMINATION, RESISTANCE AND TERROR 190, 190-195 (Carolyn

were also common, including images of William of Orange, the Battle of the Boyne, and the Titanic (which held significance for the Protestants as it was built by Protestant workers in Belfast)<sup>62</sup> as well as portraits of hunger strikers,<sup>63</sup> entrapped doves, and IRA guerillas firing weapons.<sup>64</sup>

The national government soon took action in an attempt to achieve stability over the region by dissolving the Northern Ireland regional government and instituting direct rule from London.<sup>65</sup> The new governmental system immediately utilized the regional emergency legislation that had already been a feature of the program to subdue Catholics in Northern Ireland.<sup>66</sup> British troops

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Nordstron & JoAnn Martin eds., (explaining that the murals "are important symbolic representations of the political conflict between the two ethnic communities"). See *id.* ("Republicans in Northern Ireland have successfully adapted to the misfortune by transforming the tragedy of violent death into communal benefit. The spectacular funerals of slain IRA volunteers, the treatment of the 1981 hunger strikers as martyrs, and the murals glorifying the Republican dead all testify to the capacity of Republicans to derive cultural value from politically motivated deaths. Violent death is seen not just as a necessity of the armed struggle against the British, but as a sacrifice which only serves to make the culture stronger. Although Republican culture could be negatively described as "necrophilic," the sanctification of violent death is a highly adaptive cultural practice within a militarized environment.").

<sup>62</sup> Sluka, *supra* note 61, at 194 (describing the themes common in Protestant mural painting).

<sup>63</sup> The term hunger strikers describes imprisoned Catholic activists who went on hunger strikes during their imprisonment to protest their treatment as criminals rather than as prisoners of war, with the attendant classification as political prisoners. See *Hunger Strikers in the Maze Prison*, BBC HISTORY, available at [http://www.bbc.co.uk/history/events/republican\\_hunger\\_strikes\\_maze](http://www.bbc.co.uk/history/events/republican_hunger_strikes_maze) [<https://perma.cc/26FS-22NP>] (last visited Mar. 30, 2016). Arguably the most famous of these was hunger striker Bobby Sands. *Id.* Sands was also the first activist to starve to death while in prison as a result of a hunger strike, though in total ten prisoners would die before the strike ceased. *Id.* His portrait remains an extremely common visual theme in Catholic murals. See Sluka at 198.

<sup>64</sup> See Sluka at 198-99 (describing the themes common in Catholic murals). Language and slogans on the murals included Gaelic language, quotes by and portraits of famous political figures, but also more ominous messages like "Warning! Irish Republican Army-occupied territory, British Forces enter at own risk." *Id.* at 204.

<sup>65</sup> See Donahue, *supra* note 40, at 4 (noting that direct rule was instituted in 1972).

<sup>66</sup> *Id.* at 3-4 (describing the use of emergency powers in Northern Ireland from 1922 onward).

had previously been sent in to help restore order,<sup>67</sup> and they began to operate under these laws as well.<sup>68</sup> So began the policy of direct involvement of the British Forces with the armed paramilitary groups of Northern Ireland, and the conflict that would eventually claim upwards of 3,700 lives.<sup>69</sup>

### 2.1. *Paramilitaries as Terrorists and the Implications of the Geneva Conventions*

The British government used the hostile situation to justify a rapid resort to measures that undoubtedly constituted human rights abuses in order to subdue the violence in Northern Ireland.<sup>70</sup> As the government's tactics escalated, so did the Catholic resolve that nothing short of British withdrawal from Ulster and Irish unification would suffice.<sup>71</sup>

At the same time, British officials began to deny that the scenario in Northern Ireland was a civil war and started to refer to IRA paramilitaries exclusively as "terrorists."<sup>72</sup> The informal bands of

<sup>67</sup> See *On This Day 14 August*, BBC NEWS, available at [http://news.bbc.co.uk/onthisday/hi/dates/stories/august/14/newsid\\_4075000/4075437.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/august/14/newsid_4075000/4075437.stm) [<https://perma.cc/4T9S-CHW8>] (last visited Mar. 30, 2016).

<sup>68</sup> See Donahue, *supra* note 40, at 8 ("[T]here . . . existed a tendency within the security forces to support the extension of such measures as part of their arsenal in the fight against terrorism . . .").

<sup>69</sup> Though this number may not seem large given the tragically vast scale of modern violence, it is important to keep in mind the size of the Northern Irish population. 3,700 deaths would translate into roughly 500,000 had a conflict of the same relative size occurred in the United States. Connolly, *Living on the Past*, *supra* note 8, at 411. To put this figure in perspective, 620,000 American soldiers died in the Civil War, the bloodiest war in American history to date. In contrast, 644,000 soldiers have died in all the other wars that America has fought, combined. *Civil War Facts*, <http://www.civilwar.org/education/civil-war-casualties.html> [<https://perma.cc/CE37-MMCN>] (last visited Mar. 30, 2016).

<sup>70</sup> See also CIARAN MACAIRT, *THE MCGURK'S BAR BOMBING: COLLUSION, COVER-UP AND A CAMPAIGN FOR TRUTH* 64 (2013) (noting that "[a]s the security situation continued to deteriorate, hard-liners in the Unionist Party pressed (Prime Minister) Brian Faulkner to adopt much tougher measures, including the introduction of internment without trial").

<sup>71</sup> *More Information About: The Troubles*, BBC HISTORY, available at <http://www.bbc.co.uk/history/troubles> [[perma.cc/8ZZN-XHFN](https://perma.cc/8ZZN-XHFN)] (last visited Mar. 30, 2016).

<sup>72</sup> See MacAirt at 82-86 (describing how the British Government criticized news reports for their political bias when reporting the violence, and pressured the Army to take a more aggressive stance in managing the media. Pro-Republican press was described as "terrorist propaganda," while Whitehall's information strategy was

loyalist paramilitants, however, were often not similarly labeled. Since the international community first endeavored to define terrorism, there has always been debate on whether organized, armed struggle by national liberation groups constituted terrorism.<sup>73</sup> Particularly during the time of the Troubles, the definition of what constitutes terrorism was far from clear.<sup>74</sup> However, the August 2004 United Nations resolution, Resolution 1566, defines terrorism in a way that can leave no doubt that, at least in present day opinion, the non-state militant groups on both sides of the struggle in Northern Ireland engaged in terrorism. The resolution states that:

criminal acts, including [those] against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provide a state of terror in the general public or in a group of person or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute . . . terrorism are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature . . .<sup>75</sup>

The issue that many in Northern Ireland now have with the decision to label the paramilitary groups in Northern Ireland as terrorists is not, however, based on whether their conduct fits the definition. Rather, some have now suggested that perhaps the labeling was a calculated attempt to circumvent the Geneva Conventions and other bodies of humanitarian law regulating

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designed to increase support for the Security Forces and diminish popular enthusiasm for the Catholic paramilitaries.)

<sup>73</sup> See PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS, 383-84 (201) (discussing the debate over the definition of a terrorist and the argument that armed struggle posed by national liberation groups (of which the IRA is arguable a member) is not terrorism). Others argue that any definition that implies that attacks on civilians could be excused in cases of armed resistance was insufficient. Also of note is the discussion of the idea of "state terrorism" in which a government might also be guilty of terrorism if it uses violence against civilians. *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 385.

conduct in war.<sup>76</sup> Similarly, the use of the phrase “the Troubles” to describe the period of conflict in Northern Ireland is thought by some to be an attempt to downplay the validity of what was in actuality a war,<sup>77</sup> thereby also circumventing a need to abide by wartime rules and restrictions. The idea that governments would use labels to deny the existence of an organized armed conflict is not new. Rather, as Sandesh Sivakumaran discusses in his article on armed opposition groups and humanitarian law, “even when there is a reasonable claim that there is a protracted armed conflict, governments often have denied the existence of a conflict, making dialogue with the parties about the application of humanitarian law rather problematic. . . .”<sup>78</sup>

Humanitarian law deals with the law of armed conflict, or the laws of war.<sup>79</sup> More specifically, the Geneva Conventions “regulate[] the conduct of armed conflict and seek[] to limit its effects. They specifically protect people who are not taking part in the hostilities.”<sup>80</sup> If the British government had declared a state of civil war, then it would have been bound by international agreements to minimize harm to civilians, protect wounded and sick soldiers regardless of their side in the conflict, and treat prisoners of war according to customary standards.<sup>81</sup> However, by intentionally failing to declare that an armed conflict existed, the British never felt

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<sup>76</sup> See MacAirt at 78, fn. 4, (“Just as we contest our shared history, so too do we contest what we call periods in our history. Many Unionists would decry the use of the word “war” to describe the three decades of conflict in Northern Ireland from the late 1960s. Instead they would use the epithet “the Troubles” as “war” would confer some form of legitimacy to what they would see as a breakdown of law and order.”); see also Interview with Daniel Holder, Director, *Committee for the Administration of Justice*, Belfast, Northern Ireland (June 2013).

<sup>77</sup> See MacAirt at 78, fn. 4, (further explaining that “Republicans view the conflict as a war against oppression and a battle for freedom” and not an uprising or a “breakdown of law and order”).

<sup>78</sup> *Id.* at 78 (describing the internal policy to “fight terrorism with terrorism”); see also PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS*, 1500 (2013).

<sup>79</sup> PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS*, 61-62 (2013).

<sup>80</sup> The Geneva Conventions of 1949 and their Additional Protocols, *International Committee of the Red Cross*, (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> [perma.cc/M3MW-EC27].

<sup>81</sup> *Id.* (noting the Contentions’ enforcement of stringent rules with corresponding ramifications to protect against “grave breaches”).

obligated to instruct their soldiers to abide by the Conventions, and indeed would have been found in violation of them.

The IRA, meanwhile, issued an official statement declaring a "war of attrition" on Great Britain, announcing that they would continue fighting until Ulster could be politically independent and free to rejoin the Republic of Ireland.<sup>82</sup> Specifically, the IRA explained that its goal was: "not to destroy the enemy, for that is utopian, but it is indeed to force him, through a prolonged war of psychological and physical attrition, to abandon our territory due to exhaustion and isolation."<sup>83</sup> Prominent members of paramilitary groups were relatively well known; they founded and/or endorsed their political parties and took part in political processes.<sup>84</sup> Often, the groups took public responsibility through the media for the deaths that their factions inflicted.<sup>85</sup> They also hosted scheduled training camps, marches and activities, maintained law and order in their communities,<sup>86</sup> and even published manuscripts, such as the

<sup>82</sup> Ignacio Cuenca-Sanchez, *The Dynamics of Nationalist Terrorism: ETA and the IRA*, 19 TERRORISM & POL. VIOLENCE 3 289, 295 (2007).

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

<sup>84</sup> See, e.g., *Saville Inquiry into Bloody Sunday*, BBC HISTORY, available at [http://www.bbc.co.uk/history/events/saville\\_inquiry\\_into\\_bloody\\_sunday](http://www.bbc.co.uk/history/events/saville_inquiry_into_bloody_sunday) [<https://perma.cc/72NZ-Q7YA>] (last visited Mar. 30, 2016) (describing testimony of witnesses to Bloody Sunday, including "that of Sinn Fein's chief negotiator Martin McGuinness. He confirmed in his statement to the inquiry that he was second-in-command of the IRA in Derry at the time of the Bloody Sunday shootings, the first time he had acknowledged his IRA membership. At the time, McGuinness was the serving education minister in the devolved Northern Irish government.").

<sup>85</sup> See, e.g., *Finucane v. United Kingdom*, 37 Eur. Ct. H.R. at 2 (2003), available at <http://amnesties-prosecution-public-interest.co.uk/themainevent/wp-content/uploads/2014/10/Finucane-v-United-Kingdom.pdf> [<https://perma.cc/HAF4-Z94>] (stating that a man "telephoned the press and stated that the illegal loyalist paramilitary group the Ulster Freedom Fighters . . . claimed responsibility for killing Patrick Finucane . . .").

<sup>86</sup> Joshua Hammer, *In Northern Ireland, Getting Past the Troubles*, SMITHSONIAN MAGAZINE (March 2009), available at <http://www.smithsonianmag.com/people-places/in-northern-ireland-getting-past-the-troubles-52862004/?no-ist> ("During the Troubles, IRA and Loyalist paramilitaries functioned as neighborhood security forces, often keeping the two sides at bay.").

*Green Book*, which was distributed to all IRA volunteers.<sup>87</sup> Fighters on both sides received military-style funerals when they died.<sup>88</sup>

In short, there were clear actors in the Troubles on both sides.<sup>89</sup> Although differentiating these actors from the general population would have been difficult and time consuming, and inevitably involve tragic mistakes, the British government could also have focused exclusively on attacking the known forces of the sectarian groups and made minimizing the destruction of civilian life a priority. The British government could have taken appropriate steps to mitigate its interference with the human rights of its own citizens in Northern Ireland. The British government could, in short, have made efforts to retain transparency and abide by its international responsibilities. Instead, by labeling the entire scenario as 'terrorism,' the government dove into the fray to the point of inflicting its own terrorist acts by attacking civilians,<sup>90</sup> as discussed in more detail in the following Section.<sup>91</sup> The British government escalated a situation that would have massive repercussions on its counter-terrorism activities decades into the future.

<sup>87</sup> RANDALL D. LAW, *TERRORISM: A HISTORY* (2009).

<sup>88</sup> See *Michael Stone Kills Three at IRA Funeral*, BBC HISTORY, available at [http://www.bbc.co.uk/history/events/michael\\_stone\\_kills\\_three\\_at\\_ira\\_funerals](http://www.bbc.co.uk/history/events/michael_stone_kills_three_at_ira_funerals) [<https://perma.cc/9857-HDE2>] (last visited Mar. 30, 2016) (discussing several funerals for both Catholic and Protestant forces).

<sup>89</sup> See *Violence in the Troubles*, BBC HISTORY, available at [http://www.bbc.co.uk/history/topics/troubles\\_violence](http://www.bbc.co.uk/history/topics/troubles_violence) [<https://perma.cc/B5RH-67ND>] (last visited Mar. 30, 2016) (differentiating between civilian deaths and deaths of paramilitaries and military forces); see also Joshua Hammer, *In Northern Ireland, Getting Past the Troubles*, SMITHSONIAN MAGAZINE (March 2009), available at <http://www.smithsonianmag.com/people-places/in-northern-ireland-getting-past-the-troubles-52862004/?no-ist> (noting Martin McGuinness, Gerry Adams and Ian Paisley as former commander of the IRA, leader of Sinn Fein and chairman of the Democratic Unionist Party, respectively).

<sup>90</sup> See BBC, *Violence in the Troubles*, ("British agents involved in such organizations (to capture and/or kill IRA volunteers) occasionally used assassination and torture and became involved in criminal enterprises, a fact that lent covert operations the air of mafia undertakings. Widespread knowledge – or at least suspicion – about the work of British commandos gave rise to the widely held opinion that London was conducting a "dirty war" against Irish republicanism in Northern Ireland.").

<sup>91</sup> See *infra* Part 2.2. The Bloody Sunday massacre, is one such example of a civilian attack during a civil rights movement, arguably designed to deter future protests of a similar nature.

## 2.2. *The British Forces and International Human Rights Violations*

In 1971, British parliament escalated the already existent emergency measures and instituted a policy of "internment," or imprisonment without trial for any and all individuals suspected of terrorist activities.<sup>92</sup> In January of 1972, in what would infamously become known as the Bloody Sunday Massacre, a British Parachute regiment attacked a civil rights protest and left thirteen Catholic civilians dead.<sup>93</sup> In 1973, the Northern Ireland Emergency Provisions Act (EPA) was passed, "retain[ing] the government's extensive powers of detention, proscription, entry, search and seizure, restrictions on the use of vehicles, the blocking up of roads, the closing of licensed premises, and the collection of information on security forces."<sup>94</sup> Britain's use of the EPA's provision regarding the collection of information about paramilitary group activities would become particularly influential in the years to come.<sup>95</sup> All of these events contributed to the increased popularization and expansion of anti-government sentiment, predominantly amongst Catholics.<sup>96</sup>

<sup>92</sup> See *More Information About: The Troubles*, BBC HISTORY, available at <http://www.bbc.co.uk/history/troubles> [perma.cc/ELW7-RECV] (last visited Mar. 30, 2016) (describing "[t]hirty years of conflict in Northern Ireland, 1968 - 1998.").

<sup>93</sup> See *Archive: Bloody Sunday*, BBC HISTORY, available at [http://www.bbc.co.uk/history/bloody\\_sunday](http://www.bbc.co.uk/history/bloody_sunday) [perma.cc/ELW7-RECV] (last visited Mar. 30, 2016) (noting that an initial government inquiry exonerated the army of all wrongdoing, but an independent public inquiry ordered by Prime Minister Tony Blair in 1998 and finally reported in 2010 "established the innocence of the victims and laid responsibility for what happened on the army").

<sup>94</sup> Donahue, *supra* note 40, at 4.

<sup>95</sup> See *infra*, p. 22, discussing the use of the EPA as a basis for a variety of judicial processes.

<sup>96</sup> Shawn Pogatchnik, *Soldier Arrested Over Rile in 1972 Bloody Sunday Massacre*, THE WORLD POST, (Nov. 11, 2015), available at [http://www.huffingtonpost.com/entry/bloody-sunday-massacre-arrest\\_us\\_5642d50de4b08cda3486a546](http://www.huffingtonpost.com/entry/bloody-sunday-massacre-arrest_us_5642d50de4b08cda3486a546) [https://perma.cc/F3TG-PE7S] ("Bloody Sunday was a threshold event in Northern Ireland's conflict, driving radicalized Catholics into the ranks of the outlawed IRA and its campaign to force Northern Ireland out of the United Kingdom."); see also CIARAN MACAIRT, *THE MCGURK'S BAR BOMBING: COLLUSION, COVER-UP AND A CAMPAIGN FOR TRUTH*, introduction (2013) (describing the aversion of Sir Harry Tuzo, General Officer commanding the British Army in Northern Ireland, to internment policies, as he knew they would incite anger and lead to further violence amongst the general populace in Northern Ireland).

The EPA was initially intended to be a temporary measure.<sup>97</sup> However, in response to the “terrorist hostilities,” the EPA was renewed.<sup>98</sup> It eventually formed the basis for a judicial process that established certain crimes as “scheduled offenses,” punishable regardless of the motive of the perpetrator, or any other surrounding circumstances of the alleged criminal activity.<sup>99</sup> This in turn gave rise to the 1974 Prevention of Terrorism (Temporary Provisions) Act, which instituted the use of now infamous “Diplock Courts”: emergency trials held without a jury, often late at night in the bowels of the jails.<sup>100</sup> Diplock Courts became prevalent because of their speed in convicting suspected paramilitaries, particularly Catholics.<sup>101</sup> Despite local criticism that the courts symbolized “the mainstay of an emergency regime which many have condemned as an affront to civil liberties,”<sup>102</sup> the legislation imposing the Diplock Courts has been renewed in a steady line of anti-terrorist legislation. Distressingly, the courts remain available for use to this day, should emergency situations arise, in much the same format as the courts of the 1970’s and 80’s.<sup>103</sup>

<sup>97</sup> Donahue, *supra* note 40, at 4.

<sup>98</sup> *Id.* at 7.

<sup>99</sup> *Id.*

<sup>100</sup> See Christopher K. Connolly, *Living on the Past: the Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland*, 39 CORNELL INT’L L.J. 401, 415 [perma.cc/74WC-SVMJ] (describing Diplock courts as an abusive tactic, “employed liberally, especially against the Catholic community”).

<sup>101</sup> *Id.*

<sup>102</sup> Sean Doran & John Jackson, *Diplock Courts: A Model For British Justice?*, THE INDEPENDENT (Sept. 12, 1995), <http://www.independent.co.uk/money/spend-save/diplock-courts-a-model-for-british-justice-1600830.html> [perma.cc/RMN6-F2W4].

<sup>103</sup> In 2000, the Prevention of Terrorism Act was replicated by the aptly named Terrorism Act 2000. This was then renewed with the Terrorism Act 2006, ensuring that the Diplock Courts remained legal until 2007. Donahue, *supra* note 40. In 2007, the courts were officially abolished, however, the practice continued, and in 2011, Northern Ireland’s Secretary of State announced that it would continue for the foreseeable future, due to “political[] convenien[ce]” and the “dissident threat.” Barry McCaffrey, *Non-Jury Trials “Form of Normality,”* THE DETAIL, 1 (11 April 2011), <http://www.thedetail.tv/issues/5/diplock-courts-story/non-jury-trials-form-of-normality> (last visited Jan. 21, 2016) [perma.cc/YT35-MXQD]. Since its inception, over 10,000 defendants have passed through the Diplock system, amounting to approximately one third of all serious criminal cases coming out of Northern Ireland. Sean Doran & John Jackson, *Diplock Courts: A Model For British Justice?*, THE INDEPENDENT (Sept. 12, 1995), <http://www.independent.co.uk/money/spend-save/diplock-courts-a-model-for-british-justice-1600830.html> [perma.cc/RMN6-F2W4].

The Diplock Courts were also criticized for serving to cover up illegal government activity. In 1982, the non-jury courts were used to clear members of the Royal Ulster Constabulary police force of shooting six unarmed Catholic civilians.<sup>104</sup> The courts also allegedly turned a blind eye towards police methods of interrogation that amounted to cruel, inhumane, and degrading treatment.<sup>105</sup> Though unrelated to the courts, allegations of unofficial "shoot-to-kill" policies, in which British forces and the Ulster Police Force were instructed to kill, rather than incapacitate or simply physically detain suspects, spread rapidly.<sup>106</sup> These methods were confirmed years later, in international court hearings.<sup>107</sup> Finally, collusion was rampant. There was widespread sentiment that British forces would look on and do nothing as Catholics were killed by Protestant paramilitaries.<sup>108</sup> More directly, British forces infiltrated the

<sup>104</sup> Barry McCaffrey, *Non-Jury Trials "Form of Normality,"* THE DETAIL, 4 (11 April 2011), <http://www.thedetail.tv/issues/5/diplock-courts-story/non-jury-trials-form-of-normality> (last visited Jan. 21, 2016) [perma.cc/YT35-MXQD].

<sup>105</sup> Sean Doran & John Jackson, *Diplock Courts: A Model For British Justice?*, THE INDEPENDENT (Sept. 12, 1995), <http://www.independent.co.uk/money/spend-save/diplock-courts-a-model-for-british-justice-1600830.html> [perma.cc/RMN6-F2W4] (noting that "the courts were accused by some of turning a blind eye to dubious police interrogation practices that routinely produced a prosecutor's ticket to conviction in the shape of a confession"); see also Ian Cobain, Guy Grandjean, Maggie O'Kane, Teresa Smith, *An RUC Interrogator Speaks: Northern Ireland's Forced Confessions Revealed*, THE GUARDIAN (Oct. 10, 2010) [http://www.theguardian.com/uk/video/2010/oct/11/northern-ireland-police-torture?CMP=twl\\_gu](http://www.theguardian.com/uk/video/2010/oct/11/northern-ireland-police-torture?CMP=twl_gu) [perma.cc/2YBW-2UEV] (noting that:

[h]undreds of men and women found guilty of terrorism during the Troubles in Northern Ireland are planning to appeal. Most of them were convicted on the basis of confessions they say were beaten out of them by police. A Guardian investigation has uncovered evidence from former police interrogators that the brutality was routine and sanctioned at a very high level.)

<sup>106</sup> Connolly, *Living on the Past*, *supra* note 8, at 415-16 ("In the mid-1980s, the Stalker Investigation into the actions of the RUC and British Army allegedly uncovered the existence of a 'shoot-to-kill' policy in regard to members of the IRA.").

<sup>107</sup> See, e.g., PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS, 922-25 (2013) (articulating the judgment in *McCann and Others v. United Kingdom*, in which the Court notes that all four British soldiers shot to kill IRA agents in Gibraltar after receiving inaccurate information about an alleged car bomb).

<sup>108</sup> See Martin Melaugh, *Collusion- Chronology of events in the Stevens Inquiries*, CAIN WEB SERVICE, available at <http://cain.ulst.ac.uk/issues/collusion/chron.htm> [https://perma.cc/E4JE-8J4W] (last visited Mar. 30, 2016); and Martin Melaugh, *Abstracts an Organizations - "F"*, CAIN WEB SERVICE, available at <http://cain.ulst.ac.uk/othelem/organ/forgan.htm#fru> [https://perma.cc/J36L-

paramilitary forces as secret agents and then assisted them in destroying each other,<sup>109</sup> recruited mainly Protestant paramilitaries as spies,<sup>110</sup> and supplied Protestant forces with British Army weaponry which was then used in attacks on Catholics.<sup>111</sup> Any

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HLLB] (last visited Mar. 30, 2016) (noting that Brian Nelson, a loyalist paramilitary and double agent for the British, was believed to have been involved in at least fifteen killings, fifteen attempted killings, and sixty-two conspiracies to kill during the two years that he was handled by the British, but they failed to intervene to protect any of the UDA's victims, believing Nelson's information was too valuable to compromise. Republicans claim that the agency handling Nelson was colluding with loyalist paramilitaries); *See also, infra* Part 3.2.1. (discussing Pat Finucane's death). British forces were aware of death threats against Finucane but did not establish any means of protecting the attorney, leading to accusations of collusion between loyalist paramilitaries and the forces that killed Finucane. *See* Martin Melaugh, *Collusion - Chronology of Events in the Stevens Inquiries*, CAIN WEB SERVICES, available at <http://cain.ulst.ac.uk/issues/collusion/chron.htm> [<https://perma.cc/GA8Z-E8ZC>] (last visited Mar. 30, 2016); *see also* Martin Melaugh, *Stevens Enquiry: Overview and Recommendations*, 17 April 2003, CAIN WEB SERVICES, available at <http://cain.ulst.ac.uk/issues/collusion/stevens3/stevens3summary.htm> [<https://perma.cc/5P2S-FV6L>] (last visited Mar. 30, 2016); *see generally* *Britain's Secret Terror Deals: 'Truly disturbing' BBC Panorama allegations of collusion must be fully investigated, says Amnesty International*, BELFAST TELEGRAPH, (May 28, 2015), available at <http://www.belfasttelegraph.co.uk/news/northern-ireland/britains-secret-terror-deals-truly-disturbing-bbc-panorama-allegations-of-collusion-must-be-fully-investigated-says-amnesty-international-31261593.html> [<https://perma.cc/8CX-EHTX>].

<sup>109</sup> Connolly, *Living on the Past*, *supra* note 8, at 428 n.191 (describing that "Robert Hamill, a Catholic youth, was beaten to death by a Loyalist gang in 1997, allegedly within sight of an RUC patrol that failed to intervene."); *see also* Robert Hamill Inquiry, <http://www.roberthamillinquiry.org> [[perma.cc/TT65-ETS4](https://perma.cc/TT65-ETS4)] (last visited Feb. 13, 2006). Rosemary Nelson, a human rights lawyer, was killed when a bomb attached to her car exploded in 1999. Prior to the murder she had been the recipient of threats and abuse from RUC officers. *See* Rosemary Nelson Inquiry, <http://www.rosemarynelsoninquiry.org> [[perma.cc/Y9VU-FWLS](https://perma.cc/Y9VU-FWLS)] (last visited Feb. 13, 2006). Billy Wright, jailed leader of the Loyalist Volunteer Force (LVF) paramilitary organization, was murdered by Republican fellow-prisoners under suspicious circumstances in 1997. *See* Billy Wright Inquiry, <http://www.billywrightinquiry.org> [[perma.cc/7WLH-MU9R](https://perma.cc/7WLH-MU9R)] (last visited Feb. 13, 2006).

<sup>110</sup> *See* Melaugh, (explaining that the Force Research Unit, a special unit of British Military Intelligence, sought to identify and recruit members of Republican and Loyalist paramilitary groups who could be persuaded to work as double agents for the Unit).

<sup>111</sup> Ian Cobain, *UK Accused of Helping to Supply Arms for Northern Ireland Loyalist Killings*, THE GUARDIAN (Oct. 15, 2012), available at <http://www.theguardian.com/uk/2012/oct/15/uk-arms-northern-ireland-loyalist-massacre> [<https://perma.cc/7J7U-9SXX>] ("The Ministry of Defence and the Police Service of Northern Ireland (PSNI) are being sued by relatives of six men murdered by a loyalist gunman . . . . The authorities are alleged to have assisted - or at least turned a

available methodology "became seen as a critical part of the ongoing fight against terrorism."<sup>112</sup> Naturally, everything was allegedly done in the interest of stabilizing the region and procuring national security.

The summary of human rights abuses that the British Armed Forces engaged in is not only relevant as background information, it is important for understanding the history of the conflict. The impact of litigating the cases of victims who were subjected to these particular abuses would no longer carry the same legal force of weight if the remnants of these types of strategies were no longer in use by the British government today. However, as this paper will explore further, it is likely that the United Kingdom continues to invade the rights of its citizens to privacy, fair trials, independent investigations and the right to be free of arbitrary internment.<sup>113</sup>

For example, in 2010, litigants in two cases (one involving mortgage fraud and another an armed robbery at Heathrow Airport) lost the right to a trial by jury due to the remnants of the Diplock Court system.<sup>114</sup> They appealed the decisions.<sup>115</sup> In July of 2013, a non-governmental organization, Privacy International,

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blind eye - as about 300 automatic rifles and pistols, hundreds of grenades and an estimated 30,000 rounds of ammunition were smuggled into Belfast in 1987.").

<sup>112</sup> Donahue, *supra* note 40.

<sup>113</sup> See *Concerns and Recommendations on the United Kingdom*, HUMAN RIGHTS WATCH (June 22, 2015), available at <https://www.hrw.org/news/2015/06/22/human-rights-watch-concerns-and-recommendations-united-kingdom> [<https://perma.cc/W9JZ-6SUV>] ("Significant evidence that UK authorities were complicit in torture and rendition to torture is already available. In 2009, Human Rights Watch documented complicity by the UK security services in torture in Pakistan. In September 2011, our research also revealed that the UK security services were complicit in the rendition of two prominent opponents of the Gaddafi regime, Sami al-Saadi and Abdul Hakim Belhadj, to Libya under Muammar Gaddafi, despite knowledge that they were likely to be tortured. Criminal investigations into both cases have been ongoing for several years with no public statements as to when they will be concluded and if anyone will be prosecuted."); see *infra* Part 4 (suggesting that because many known counter-terrorism measures of the Troubles violate international law, and still others have remained undisclosed due to government fears of compromising current counter-terrorism efforts, it is reasonable to suspect that current measures also infringe upon the internationally recognized rights of civilians).

<sup>114</sup> Barry McCaffrey, *Non-Jury Trials "Form of Normality,"* THE DETAIL, 4-5 (April 11, 2011), <http://www.thedetail.tv/issues/5/diplock-courts-story/non-jury-trials-form-of-normality> (last visited Jan. 21, 2016) [[perma.cc/YT35-MXQD](https://perma.cc/YT35-MXQD)].

<sup>115</sup> *Id.*

launched legal action against the British government over alleged privacy infringements.<sup>116</sup> The suit alleges that the “UK Government is accessing wide-ranging intelligence information from the U.S. and is conducting mass surveillance on citizens across the UK,” and furthermore that the government’s “expansive spying regime is seemingly operated outside of the rule of law, lacks any accountability, and is neither necessary nor proportionate.”<sup>117</sup> The progress of the proceedings is unknown; although initially filed in administrative court, the plaintiffs were forced to file the claim with the Investigatory Powers Tribunal (“IPT”) at the government’s insistence.<sup>118</sup> The IPT is a secretive body that does not need to publish its proceedings or justify the reasons for its decisions.<sup>119</sup> The last voluntary publication the IPT made was on a preliminary point of law, adjacent to a larger proceeding, dated July 24, 2013.<sup>120</sup>

Transparent publications (or rulings) regarding citizens’ rights to privacy, trials by jury, and other matters of human rights could have an enormous impact on current proceedings in the United Kingdom. A body of precedent by the tribunals involved would at least establish the standard by which these types of alleged violations are adjudged. Several other Western countries that allegedly engage in similar practices might also take note of such precedent, were it to exist. The historical cases of the Troubles are an exemplar of human-rights related issues, and, if litigated, could establish a body of jurisprudence with consistency and clarity. To be sure, this would be an undertaking of great depth. However, it could also prove that great consequences exist for the countries that continue to commit such violations. The outcome of a

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<sup>116</sup> *Privacy International Files Legal Challenge against UK Government over Mass Surveillance Programmes*, PRIVACY INT’L 1 (July 8, 2013), available at <https://www.privacyinternational.org/press-releases/privacy-international-files-legal-challenge-against-uk-government-over-mass> [perma.cc/HE39-794R].

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Key IPT Rulings*, INVESTIGATORY POWERS, available at <http://www.ipt-uk.com/section.aspx?pageid=8> [<https://perma.cc/N268-L7QU>] (last visited Mar. 30, 2016) (clarifying that the IPT is actually required “not to disclose material provided to it which would threaten the national interest, national security, operations against serious crime or any functions of the intelligence agencies”).

<sup>120</sup> In the publication, the IPT declared that the covert recording of an interview voluntarily given by a member of the public to a public authority figure did not constitute “surveillance” under the meaning of the Regulation of Investigatory Powers Act of 2000. *Id.*

comprehensive body of jurisprudence condemning this behavior, at least in its most egregious forms, would serve to place shame and condemnation on present day over-broad counter-terrorism activity as it impacts citizen-civilian human rights.

The impact of counter-terrorism measures upon the rights of armed opposition groups in accordance with humanitarian law is more complex. Today, as was the case during the conflict in Northern Ireland, suspected terrorists' rights are more easily infringed upon than civilians' rights because of their identification as "terrorists." As discussed above, the question of whether an armed conflict even exists against or between such groups can be a convoluted issue. The natural consequence of such a question is whether then, as now, a government engaged with those it identifies as "terrorists" is required to at least attempt to abide by humanitarian law whenever possible. Further at issue is whether then, and now, such governments actively seek to evade the use of humanitarian law to regulate their own conduct in the conflict.

Though modern allegations of human rights abuses had been swirling for some time, in 2010 evidence surfaced that the government of the United Kingdom was complicit in the internment of UK citizens in Guantanamo Bay.<sup>121</sup> British officials were also collusive in CIA-led torture, including sleep-deprivation techniques and water boarding for purposes of interrogation and other reasons.<sup>122</sup> At the end of 2013, the Gibson Report was published. This internal investigative document announced that British soldiers were clearly aware of, and complicit in, such activities for years.<sup>123</sup> The Report also absolved the British soldiers and their superiors of any burden to report the torturous acts of other non-British actors, justifying this conclusion under the Geneva

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<sup>121</sup> Richard Norton-Taylor & Ian Cobain, *M16 'Turned Blind Eye' to Torture of Rendered Detainees, Finds Gibson Report*, THE GUARDIAN (Dec. 19, 2013), <http://www.theguardian.com/uk-news/2013/dec/19/gibson-report-mi6-detainees-torture-cooperated> [perma.cc/PN3P-69W8].

<sup>122</sup> *Id.*

<sup>123</sup> See *Concerns and Recommendations on the United Kingdom*, HUMAN RIGHTS WATCH (June 22, 2015), available at <https://www.hrw.org/news/2015/06/22/human-rights-watch-concerns-and-recommendations-united-kingdom> [https://perma.cc/W9JZ-6SUV] ("While the report does not reach any firm conclusions, it strongly suggests that UK security services, at least in some cases, were aware that detainees were being tortured by foreign governments yet continued to engage with them.").

Convention.<sup>124</sup> Many human rights groups have questioned the extent of the Report's accuracy and bias.<sup>125</sup> In a statement that may have sounded eerily familiar to some in Northern Ireland, Jack Straw, the former foreign secretary, urged Parliament never to forget the context in which the collusion was committed, and noted that "the allegations of torture arose in the 'aftermath of the world's most appalling terrorist atrocity ever, on 11 September 2001."<sup>126</sup> In short, Straw's message was that even extreme violations of human rights could be justified, when terrorism is involved.

Perhaps tellingly, the Gibson report was never completed after startling evidence regarding the treatment of Libyan dissidents was uncovered. That revelation resulted in orders for the termination of the Report project and an internal police investigation into the Libyan matter.<sup>127</sup> Due to this about-face, many have again expressed concerns that the issue will not be adequately addressed due to bias. First, those being investigated felt that the writers of the Gibson Report had ulterior motives,<sup>128</sup> and those writers again made the

<sup>124</sup> See Richard Norton-Taylor & Ian Cobain, *M16 'Turned Blind Eye' to Torture of Rendered Detainees, Finds Gibson Report*, THE GUARDIAN (Dec. 19, 2013), available at <http://www.theguardian.com/uk-news/2013/dec/19/gibson-report-mi6-detainees-torture-cooperated> [perma.cc/PN3P-69W8] ("M16 officers were under no obligation to report breaches of the Geneva conventions.").

<sup>125</sup> See *Concerns and Recommendations on the United Kingdom*, HUMAN RIGHTS WATCH (June 22, 2015), available at <https://www.hrw.org/news/2015/06/22/human-rights-watch-concerns-and-recommendations-united-kingdom> [https://perma.cc/W9JZ-6SUV] (noting that the Gibson Report "was shelved by the government in January 2012 before it had concluded its work or questioned any witnesses, after nongovernmental organizations (NGOs) strongly criticised its inadequate powers and lack of independence.").

<sup>126</sup> Richard Norton-Taylor & Ian Cobain, *M16 'Turned Blind Eye' to Torture of Rendered Detainees, Finds Gibson Report*, THE GUARDIAN (Dec. 19, 2013), <http://www.theguardian.com/uk-news/2013/dec/19/gibson-report-mi6-detainees-torture-cooperated> [perma.cc/PN3P-69W8].

<sup>127</sup> *Id.* Of the two Libyan cases, one "has reached an out-of-court settlement of £2.2m from the British government." In the other case, the plaintiff is seeking an apology in the courts, and a symbolic compensation of £3. *Id.* The matter is as of yet unresolved. *Id.*

<sup>128</sup> See Kent Roach, *Public Inquiries as an Attempt to Fill Accountability Gaps Left by Judicial and Legislative Review*, in CRITICAL DEBATES ON COUNTER-TERRORISM JUD. R., 183, 195 (Fergal F. Davis & Fiona de Londras eds., 2014) ("[T]he fact that Gibson had been a judge did not guarantee that he would be perceived to be independent. Controversy immediately arose over Gibson's appointment because he had served as an Intelligence Services Commissioner (ISC) from 2006 until his appointment to head the Detainee Inquiry in 2010. The ISC has statutory oversight duties with respect to covert surveillance and covert human sources used by the security services,

same accusations once the investigative procedure was internalized.<sup>129</sup> Indeed, "[d]espite promises by David Cameron and the former justice secretary, Ken Clarke, that investigations would be continued by an independent, judge-led inquiry, the government . . . handed over the task to the intelligence and security committee of selected MPs and peers."<sup>130</sup> The Gibson Report thus concluded with unanswered questions in bold-faced print about the level of involvement and participation in the torture that may have been committed by British soldiers.<sup>131</sup> Even though it identified over 200 reported cases of British involvement in illegal torture of detainees, and selected forty of those cases as deserving "particular attention" none have been addressed.<sup>132</sup>

This potential obstruction of justice echoes the allegations that the British government faced during the Troubles. Many of the counter-terrorism activities allegedly used then appear to still be in use now, albeit with more modern technology. The government's

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including otherwise illegal actions outside the United Kingdom. Both the parliamentary opposition and civil society groups raised concerns that Gibson may have in confidential reports already reviewed some of the matters that the inquiry would review. Clive Stafford Smith on behalf of the Reprieve suggested that Gibson might even be a valuable witness before his inquiry, and that applying the judicial standards of bias, he should recuse himself").

<sup>129</sup> See *UK: Broken Promise on Torture Inquiry*, HUMAN RIGHTS WATCH (Dec. 21, 2013), available at <https://www.hrw.org/news/2013/12/21/uk-broken-promise-torture-inquiry> [<https://perma.cc/43Y5-J9VV>] (noting that "[t]he government announced on December 19, though, that it would hand responsibility for further investigations to the Intelligence and Security Committee rather than establishing a judicial inquiry that addresses all the shortcomings of the Gibson inquiry;" lamenting that "[t]he Intelligence and Security Committee has a poor track record of holding the intelligence agencies to account for their role in renditions and overseas torture. . . ."; and quoting Benjamin Ward, the deputy director of the Europe and Central Asia division at Human Rights Watch, in stating that "[t]he Intelligence and Security Committee lacks the independence, transparency, and credibility to investigate these extremely serious issues. The serious questions raised by the Gibson report and the wider evidence of UK complicity in overseas torture can only be resolved by an independent judicial inquiry.").

<sup>130</sup> Richard Norton-Taylor & Ian Cobain, *M16 'Turned Blind Eye' to Torture of Rendered Detainees, Finds Gibson Report*, THE GUARDIAN (Dec. 19, 2013), <http://www.theguardian.com/uk-news/2013/dec/19/gibson-report-m16-detainees-torture-cooperated> [[perma.cc/PN3P-69W8](https://perma.cc/PN3P-69W8)].

<sup>131</sup> See *id.* ("Gibson's concerns are reflected in a series of passages, set in bold print in his report, identifying issues described as ones 'the inquiry would have wished to investigate.'").

<sup>132</sup> *Id.*

active participation in human rights violations linked to the Troubles has hopefully ceased, but the government nonetheless continues to deny requests for open police investigations, reports by the Historical Inquires Team (created for the express purpose of reporting on historical cases), trials, and inquests.<sup>133</sup>

Interestingly, further evidence has surfaced that many of the same intelligence-gathering techniques used by the British Forces during the Troubles remain in use today. Due to this fact, often, when a Troubles-related trial is pursued, the government refuses to turnover armed forces' documentation of their Troubles-related actions, as they claim the documents are too sensitive and may jeopardize the safety of current military operations.<sup>134</sup>

This declaration obviously reveals the similarity between the strategies and information-gathering processes employed during the Troubles and those employed against terrorists today. That likeness also suggests that jurisprudence arising out of the fact patterns of Troubles cases would also be applicable to modern day terrorism cases, and thus could impact how terrorism is addressed today. Because Great Britain and other Western countries continue to refuse basic judicial rights to recompense citizens who suffer from collateral damage wreaked in the pursuit of suspected terrorists (or if deceased, their families), a body of jurisprudence from a respected domestic court would not only resolve the injustices of the past, but be binding on the actions of current counter-terrorism operations as well. As a respected system of justice, the British courts' rulings could impact not only their own country's acts, but by condemning such acts, could also influence the international sphere and encourage others to follow suit.

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<sup>133</sup> The DPP must establish criminal trial proceedings, but has repeatedly declined to prosecute. An aggrieved family member cannot call for a criminal trial independently of the government.

<sup>134</sup> For example, the ECtHR summary of the case of Pearse Jordan, at paragraph 32(a), holds that certain categories of information would be withheld on "grounds of national security." *Jordan v. United Kingdom*, App. No. 24746/94, 94 Eur. Ct. H.R. at 8 (2011) available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450#{"itemid":\["001-59450"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450#{) [perma.cc/B6L6-TFJJ].

### 3. ATTEMPTS TO LITIGATE TROUBLES' CASES

#### 3.1. Domestic Struggles

As discussed above, a body of jurisprudence would prove invaluable to current human rights activists and the survivors of the Troubles, who are both still reeling from the violence. The reasons for the absence of any jurisprudence in this area is not due to a lack of effort on the part of potential plaintiffs. Though instrumental in attaining peace, the Good Friday Agreement (also known as the Belfast Agreement) instituted no comprehensive mechanism to deal with the seemingly endless body of un-litigated claims that the events of the Troubles left in its wake. Today, a hapless conglomeration of official organizations takes a piece-meal approach towards reconciling the judicial claims. Known by some who deal with the offices as the "package of measures," the services offered by offices such as the Historical Enquiries Team ("HET"), Office of the Police Ombudsman of Northern Ireland, ("OPONI"), Coroners' Office, Police Service of Northern Ireland ("PSNI", known formerly as the Royal Ulster Constabulary or "RUC"), and Public Prosecution Service ("PPS") have been likened to a leaking wall, struggling to hold back the tide of litigation.<sup>135</sup> Whenever one crack in the wall grows too large, and the flood of cases can no longer be contained, another acronym is slapped on to address the problem. Forgotten and neglected cases trickle through everywhere, however, and overall the approach is failing.<sup>136</sup> Although this poetic and apt metaphor was articulated by a community service center within Belfast, international non-governmental organizations also agree with this assessment. For example, "Amnesty [International]'s report shows that families have been failed by processes conducted by the Police Service of Northern Ireland's Historical Enquiries Team, the Office of the Police Ombudsman and various coroners' inquests . . . ."<sup>137</sup>

<sup>135</sup> Analogy attributed to Shauna Carberry. Interview with Shauna Carberry, Employee, Relatives for Justice, in Belfast, Northern Ireland (June 2013).

<sup>136</sup> *Id.*

<sup>137</sup> *Northern Ireland: Amnesty Slams Failure to Deal with Past*, AMNESTY INTERNATIONAL UK PRESS RELEASES (Sept. 12, 2013, 12:00AM), <http://www.amnesty.org.uk/press-releases/northern-ireland-amnesty-slams-failure-deal-past> [perma.cc/KN8B-TK9F].

As a result of this unorganized and stagnant situation, some victims and their families, who are anxious to learn more about the exact circumstances of their loved ones' deaths, have engaged in Public Inquiries; unofficial presentations of evidence at community centers or town halls, designed to encourage media attention for their cases. The primary goal in such an Inquiry is not to determine a perpetrator, but rather to present evidence in such a way that suggests the government prematurely closed the investigations without aptly considering pertinent evidence.<sup>138</sup>

One such Public Inquiry addressed the murder of Gerard Lawlor. His is the most recent sectarian killing to date in Northern Ireland, and many hope the last and final murder in the style of the Troubles.<sup>139</sup> His case was also one of the first to be investigated by the PSNI, the newly assembled Northern Irish police force meant to take the place of the RUC,<sup>140</sup> which was overtly sympathetic to the Protestant cause and over 92% Protestant in make-up at times.<sup>141</sup> Significantly, the shooting also came after the implementation of the United Kingdom Human Rights Act in 2000.<sup>142</sup> The Act adopts many of the provisions of the European Convention of Human Rights ("ECHR"), and declares unlawful any act by a public body or official that contradicts the ECHR.<sup>143</sup> As the ECHR requires a

<sup>138</sup> See e.g., Ian Cobain, *UK Accused of Helping to Supply Arms for Northern Ireland Loyalist Killings* (Oct. 15, 2012), available at <http://www.theguardian.com/uk/2012/oct/15/uk-arms-northern-ireland-loyalist-massacre> (describing the motivations of family members who have brought suit against the Ministry of Defence and the Police Service of Northern Ireland as an "aim to uncover the truth").

<sup>139</sup> See generally Gerard Lawlor Community Inquiry, Report and Recommendations 2 (Nov. 2012) available at [http://relativesforjustice.com/wp-content/uploads/2012/11/Gerard\\_Report\\_2012-WEB1.pdf](http://relativesforjustice.com/wp-content/uploads/2012/11/Gerard_Report_2012-WEB1.pdf) [perma.cc/ZF5D-MJHU].

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

<sup>141</sup> *The Search for Peace: The Royal Ulster Constabulary*, BBC, available at [http://news.bbc.co.uk/hi/english/static/northern\\_ireland/understanding/profiles/ruc.stm](http://news.bbc.co.uk/hi/english/static/northern_ireland/understanding/profiles/ruc.stm) [perma.cc/ZF9K-GVT7] (last visited Mar. 30, 2016) (noting that allegations of collusion between the RUC and Protestant militants continued until the force was replaced by the PSNI).

<sup>142</sup> See generally Gerard Lawlor Community Inquiry, Report and Recommendations 2 (Nov. 2012) available at [http://relativesforjustice.com/wp-content/uploads/2012/11/Gerard\\_Report\\_2012-WEB1.pdf](http://relativesforjustice.com/wp-content/uploads/2012/11/Gerard_Report_2012-WEB1.pdf) [perma.cc/ZF5D-MJHU].

<sup>143</sup> See "How the Human Rights Act Works," *Liberty Protecting Civil Liberties, Promoting Human Rights*, available at <https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/how-human-rights-act-works> [https://perma.cc/Q3JE-9YWG] (last visited Mar. 30, 2016) (explaining that "[i]t is unlawful for any public authority to act incompatibly with human rights

prompt and effective government investigation into potential human rights violations, many hoped that in the case of Gerard Lawlor, the threat of illegality would ensure that an investigation would indeed be forthcoming. Though this Act would have some significance in the government's handling of other historical cases, to the great disappointment of many human rights activists in Northern Ireland, it has yet to cause any official effect in the case of Gerard Lawlor.<sup>144</sup>

In 2002, Lawlor was shot as he walked home from a pub on the Antrim Road,<sup>145</sup> a well-known thoroughfare through a predominantly Catholic neighborhood.<sup>146</sup> His location assured his attackers that he was likely a Catholic.<sup>147</sup> Five other shooting attacks on Catholic pedestrians in Catholic neighborhoods occurred that night, but the police chose not to investigate them as potentially connected, and indeed chose not to investigate one of the attacks altogether as no one was harmed (the gun used jammed, so the gunmen sped away). An anonymous witness came forward

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(unless under a statutory duty to act in that way), and anyone whose rights have been violated can bring court proceedings against the public authority.").

<sup>144</sup> *Id.* The panel of judges at the public inquiry did consider whether ECHR Article 2 violations occurred concerning the right to a transparent, independent, prompt and effective investigation in cases where the state was implicated in the murder. *See infra* pp. 50-51. However, the state has failed to reopen the investigation, despite the applicability of the UK Human Rights Act.

<sup>145</sup> *See* Gerard Lawlor Community Inquiry, Report and Recommendations 2 (Nov. 2012) available at [http://relativesforjustice.com/wp-content/uploads/2012/11/Gerard\\_Report\\_2012-WEB1.pdf](http://relativesforjustice.com/wp-content/uploads/2012/11/Gerard_Report_2012-WEB1.pdf) [perma.cc/ZF5D-MJHU].

<sup>146</sup> *See* Map, [http://www.wesleyjohnston.com/users/ireland/maps/towns/belfast\\_religion.gif](http://www.wesleyjohnston.com/users/ireland/maps/towns/belfast_religion.gif) [https://perma.cc/99WY-MPB3] (last visited Mar. 30, 2016) (noting that the New Lodge district, which is bordered by the Antrim Road, is a predominantly Catholic neighborhood); *see also* Sean O'Hagan, "Belfast, divided in the name of peace," *The Guardian* (Jan. 21, 2012), available at <http://www.theguardian.com/uk/2012/jan/22/peace-walls-troubles-belfast-feature> [https://perma.cc/QE9N-KEXR] (discussing the sectarian history of the Antrim Road, "When I meet local Sinn Féin councillor Conor Maskey in the offices of Intercomm, a cross-community, bridge-building organisation in the Antrim Road, he tells me that nearly a third of the deaths during the Troubles occurred in a square mile radius of where we are sitting."); JEFFREY A. SLUKA, *DEATH SQUAD: THE ANTHROPOLOGY OF STATE TERROR* 129, 152 (University of Pennsylvania Press, 2000).

<sup>147</sup> *Id.* at 2. For example, on July 29, 2001, Gavin Brett was shot and killed by loyalist gunmen who likely presumed he was a Catholic because he was standing at the entrance to a GAA club. *Id.* He was, in fact, a Protestant who was keeping a friend company. *Id.* Thus, tragic mistakes based on this kind of assumption have been made in the past.

through a confidential tip line alleging that she had heard unknown men boasting later the same night that Lawlor was killed that “we done a hit on the Antrim Road. We got a wee fenian<sup>148</sup> outside the Bellevue Arms on the Antrim Road.”<sup>149</sup> This tip was not investigated or even recorded in the case files. Police later stated that this inaction was due to an effort to protect the witness’s identity, but many acquainted with the facts of the case question this justification, and scoff that “such a policy beggars belief and negates the whole purpose of setting up confidential police hotlines.”<sup>150</sup>

In Lawlor’s Inquiry, a panel of reputable judges from a variety of NGO’s and international offices unanimously found that the case investigation should not have been closed by the Northern Ireland police service.<sup>151</sup> The family also filed a complaint against the police with the Office of the Police Ombudsman of Northern Ireland, alleging possible collusion with the shooters or cover-up of relevant information; the complaint has not been received a response.<sup>152</sup>

In his article analyzing the potential for a truth commission in Northern Ireland, Kevin Connolly aptly describes British attitudes towards legal actions against military personnel accused of wrongdoing:

Britain has shown little inclination to allow its military and security personnel to face sanctions for offenses carried out in Northern Ireland. In many cases, the British state has ignored or actively covered up the role of state agents in past violence. Britain's attitudes towards past state violence are

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<sup>148</sup> Fenian is a derogative slang term for an Irish Catholic. See Dictionary.com, available at <http://dictionary.reference.com/browse/fenian> [<https://perma.cc/CKF8-G732>] (last visited Mar. 30, 2016) (“(in late Irish legends) a member of a group of warriors always ready to defend Ireland against its enemies.”).

<sup>149</sup> See generally Gerard Lawlor Community Inquiry, Report and Recommendations (Nov. 2012) available at [http://relativesforjustice.com/wp-content/uploads/2012/11/Gerard\\_Report\\_2012-WEB1.pdf](http://relativesforjustice.com/wp-content/uploads/2012/11/Gerard_Report_2012-WEB1.pdf) [[perma.cc/ZF5D-MJHU](https://perma.cc/ZF5D-MJHU)].

<sup>150</sup> *Id.* at 13.

<sup>151</sup> *Id.* at 39 (concluding that the PSNI and Police Ombudsman did not provide an effective investigation in compliance with Article 2). Of course, it is always possible to debate the independence of such judges and the accuracy of such hearings, as they are unofficial and are sponsored by families with obvious biases towards the outcomes that they desire. Again, however, the purpose is not exclusively to cultivate an accurate judgment about the case, but also to drum up local support for a public inquiry, and to encourage the media to add pressure to the government to reopen the case.

<sup>152</sup> *Id.* at 10.

predictable, and difficult to remedy, given that the transition in Northern Ireland does not go to the heart of the British state. Britain has little reason or incentive for exposing its institutions and individual actors to processes of accountability, and to the extent that groups in Northern Ireland desire such accountability, they do not enjoy the overall political leverage necessary to compel it.

The case of Gerard Lawlor is not the only example of judicial inefficiency and inaction. The list is virtually endless. Nearly everyone in Northern Ireland either knows someone who was killed, or is aware of a family who lost a loved one. Additional unresolved cases include those of Pearse Jordan (suspected to have been killed by a British police officer), Denis Brown, Jackie Mailey, James Mulvenna, William Hanna (all also suspected to have been killed in one incident by several Special Air Services soldiers in the British Army), Henry Cunningham, Terrence McCafferty, Sean Brown, Rosaleen and Mervyn McDonald, Patrick Eugene Heenan, John Doherty, Ciaran Murphy, Bernard O'Hagan, and so many others.<sup>153</sup> Providing these few names lends a certain concreteness to the multitude of unresolved cases, but so many other names could have been chosen. The overall judicial inefficiency has led some victims and families of victims to seek assistance outside of the United Kingdom all together.

### *3.2. International Judgments: The European Court of Human Rights (ECtHR) and the Troubles*

The United Kingdom has long exhibited a notorious antipathy towards regional European human rights bodies.<sup>154</sup> Though parliament ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in 1951, it was

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<sup>153</sup> *Victims Condemn Northern Ireland Troubles Prosecution Call*, BBC (Nov. 20, 2013), available at <http://www.bbc.com/news/uk-northern-ireland-25021286> (noting a variety of unsolved Troubles'-related violence cases and quoting the Democratic Unionist Party's representative, Jeffrey Donaldson, as saying that "There are 3,000 unsolved murders in Northern Ireland and those families are entitled to the right to pursue justice.").

<sup>154</sup> PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS*, 892 (2013).

“dead against anything like an international court.”<sup>155</sup> This skepticism has been attributed to a fear of compromising uniquely British political practices and institutions, and of any threat to parliamentary sovereignty.<sup>156</sup> Even in the early 1950’s, many of the government’s concerns rested on preserving British policies towards political extremists.<sup>157</sup> In an eerie echo of what the future would bring, Lord Chancellor Jowitt complained that “the Convention would prevent a future British government from detaining people without trial during a period of emergency.”<sup>158</sup>

Indeed, to this day, British legislation continues to fiercely protect the preeminence of parliamentary sovereignty over the articles of the ECHR. Only with the Human Rights Act of 1998 did the United Kingdom officially declare that it would be unlawful for any public body to act in a way incompatible with the Convention. Even then, an exception applies if a public body is following primary legislation issued by Parliament and the wording of the legislation cannot be construed in any way other than to contradict the ECHR.<sup>159</sup> With this act, the United Kingdom also agreed to “take into account,” but not necessarily adhere to, any judgment from the European Court of Human Rights.<sup>160</sup>

What did this mean for the victims of British government collusion and brutality during the Troubles? Plagued with difficulties in having their cases heard, several families were selected to represent all those who wanted their stories heard and, more importantly, wanted the truth regarding the role the government played in their loved one’s deaths. Two cases are examined here because they showcase international opinion, as well

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<sup>155</sup> *Id.* at 893 (citing Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT. ORG. 217, 238 (2000)) (quoting W.E. Beckett, “legal advisor to the Foreign Office and the initiator of the British government’s participation [in the drafting of the ECHR]”).

<sup>156</sup> *Id.*

<sup>157</sup> *See generally id.*

<sup>158</sup> *Id.* at 894.

<sup>159</sup> *See* Human Rights Act, (1998) § 3, available at <http://www.legislation.gov.uk/ukpga/1998/42/contents> [perma.cc/U8VS-PJT4] (stating that the Act does not “affect the validity, continuing operation or enforcement of any incompatible primary legislation; and does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.”).

<sup>160</sup> *Id.* at § 2.

as demonstrate the level of "account" taken, in Britain, for the judgment of the ECtHR.

### 3.2.1. *The Case of Patrick Finucane*

The murder of human rights attorney Pat Finucane is one of the most well-known tragedies of the Troubles. Finucane was shot and killed by two loyalist gunmen in front of his family during dinner at their home on the evening of February 12, 1989.<sup>161</sup> Strong allegations of organized and institutionalized government collusion in the killing have circulated since that time.<sup>162</sup> Finucane's murder is unique in that the immediate circumstances of his death became relatively well-known (many victims' families were not afforded such clarity), but Finucane's family was not satisfied by mere knowledge of the circumstances of his death. Even an apology from the Prime Minister himself has not placated them. They continue to press for disclosure of government records and a full public inquiry, which they believe could reveal the purposeful and systematic targeting of victims by the government, as well as collusion with paramilitary forces to achieve the deaths of those victims.<sup>163</sup> Such a revelation could serve an important role in establishing jurisprudence to prevent such government atrocities against its own people in the future.

No evidence has ever surfaced that Finucane was a member of the IRA or any other Republican organization. Rather, Finucane defended detainees alleged to be paramilitaries on both sides of the

<sup>161</sup> See Q&A, *The murder of Pat Finucane*, BBC (June 26, 2015), available at <http://www.bbc.com/news/uk-northern-ireland-20683378> [<https://perma.cc/HRE5-52FN>].

<sup>162</sup> Joaquin P. Terceno III, *Burying the Truth: The Murder of Belfast Human Rights Lawyer Patrick Finucane and Britain's "Secret" Public Inquires*, 74 FORDHAM L. REV. 6, 3297, 3304 (2006) (noting that "What makes Finucane's assassination different—though arguably not unique—is that, according to sixteen years of investigations, the British Army and the RUC police were complicit in his murder.").

<sup>163</sup> See Q&A, *The murder of Pat Finucane*, BBC (June 26, 2015), available at <http://www.bbc.com/news/uk-northern-ireland-20683378> [<https://perma.cc/HRE5-52FN>] ("The Finucane family have campaigned for a full public inquiry into the murder for many years and have repeatedly insisted that they will not accept anything less. The Finucanes believe that a public inquiry, where the veracity of documents and witnesses can be tested under cross-examination, is the best way of getting to the truth about the extent of security force collusion and exactly who knew what.").

conflict,<sup>164</sup> but it was his representation of alleged IRA members that likely prompted his targeting and killing.<sup>165</sup> A mere five weeks prior to his death, Finucane received death threats delivered, via his clients, by officers of the Royal Ulster Constabulary.<sup>166</sup> These included specific comments by police officers that Finucane would “meet his end” and was “getting took out.”<sup>167</sup> Clients also reported that Finucane was abused and threatened by police officers generally when he came to visit them at holding centers to prepare for cases.<sup>168</sup> Less than a month before Finucane’s death, Douglas Hogg MP, the then Parliamentary Under-Secretary of State for the Home Department, announced the government sentiment that “I have to state as a fact, but with great regret, that there are in Northern Ireland a number of solicitors who are unduly sympathetic to the cause of the IRA.”<sup>169</sup> This statement was later found to be unsubstantiated by fact.<sup>170</sup>

Following his death, Finucane’s family was adamant that these claims and threats receive adequate investigation. Uncharacteristically, the Finucane case received a police investigation that was somewhat complete, when compared to other murders that occurred during the Troubles. Certainly though, it was not nearly adequate by normal western standards. The murder weapons, which had been previously reported as stolen from Ulster Defense Regiment’s barracks, were actually found.<sup>171</sup> The Ulster

<sup>164</sup> *Finucane v. United Kingdom*, App. No. 29178/95, 95 Eur. Ct. H.R. at 2 (2002), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22606#{"itemid":\["001-22606"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22606#{) [perma.cc/JEG2-ZWWM] (discussing the circumstances of the case, at subsection A of “The Facts”).

<sup>165</sup> Terceno, *supra* note 54, at 3303 (citing the Cory Report).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Finucane v. United Kingdom*, App. No. 29178/95, 95 Eur. Ct. H.R. at 2 (2002), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22606#{"itemid":\["001-22606"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22606#{) [perma.cc/JEG2-ZWWM] (“[C]lients reported that police officers often abused and threatened to kill [Finucane] during interrogations at holding centres . . .”).

<sup>169</sup> *Finucane v. United Kingdom*, *supra* note 164.

<sup>170</sup> Joaquin P. Terceno III, *Burying the Truth: The Murder of Belfast Human Rights Lawyer Patrick Finucane and Britain’s “Secret” Public Inquires*, 74 *FORDHAM LAW REVIEW*, 3297, 3303 (2006) (noting that Hogg’s statements, based on information provided by the RUC, were determined unfounded by the Stevens enquiry).

<sup>171</sup> *Finucane v. United Kingdom*, *supra* note 164, at 3, ¶¶ 15, 18; *see also* Terceno at 3304 (“One of the weapons used to gun down Finucane had been stolen from the

Freedom Fighter<sup>172</sup> members in possession of the guns were convicted of possessing stolen property in April of 1990, but the police determined that those individuals had not been in possession of the guns at the time of the murder.<sup>173</sup> The Finucane family was also granted an inquest to determine the cause of death, but it lasted one day and the family was not able to give a statement concerning the threats made against Finucane by the RUC, as this was deemed "not relevant to the proceedings."<sup>174</sup>

In the fall of 1989, the RUC assigned Deputy Chief Constable John Stevens to investigate allegations of collusion between government security forces and loyalist paramilitaries.<sup>175</sup> His report revealed non-institutionalized, isolated incidents of collusion between Protestant paramilitary groups and the Ulster Defense Regiment,<sup>176</sup> but no collusion within the RUC.<sup>177</sup> Allegations of bias have since surfaced because the report was commissioned by the RUC and also resulted in extremely favorable findings for the police. Nonetheless, fifty-nine men were charged as a result of the report,

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British Army Ulster Defense Regiment's barracks by a quartermaster named William Stobie, who was both an agent for the RUC and a member of the paramilitary UDA. Stobie was later charged with weapon theft and Finucane's murder, but was shot dead by another paramilitary group before his trial concluded.").

<sup>172</sup> The Ulster Defense Regiment was an illegal loyalist terrorist branch of the Ulster Defense Association.

<sup>173</sup> *Finucane v. United Kingdom*, *supra* note 164, at 3, ¶ 15.

<sup>174</sup> *Finucane v. United Kingdom*, *supra* note 164, at 3.

<sup>175</sup> Jason Rodrigues, *Pat Finucane Timeline: From 1989 Murder to 2012 Report*, THE GUARDIAN (Dec. 12, 2012), available at <http://www.theguardian.com/theguardian/from-the-archive-blog/2012/dec/12/pat-finucane-timeline-murder-report> [<https://perma.cc/4LNH-FDTJ>] (In September of 1989, "Allegations that security forces colluded with loyalist groups to have republican targets killed prompt the government to send the then deputy chief constable of Cambridgeshire police, John Stevens, to Northern Ireland to investigate. Stevens' appointment is the first of the three inquiries he is to run.").

<sup>176</sup> Northern Ireland government armed forces.

<sup>177</sup> *Finucane v. United Kingdom*, *supra* note 164, at 5, ¶ 23; CAIN Web Service, *Collusion - Chronology of Events in the Stevens Inquiries*, available at <http://cain.ulst.ac.uk/issues/collusion/chron.htm> [<https://perma.cc/Z9WU-GXDV>] ("A summary of the report of the Stevens Inquiry was published (first inquiry). The main finding of the report was that there had been evidence of collusion between members of the security forces and Loyalist paramilitaries. However, it was the view of the inquiry that any collusion was "restricted to a small number of members of the security forces and is neither widespread nor institutionalized.").

including undercover agent Brian Nelson.<sup>178</sup> Nelson worked as the Chief Intelligence Officer for the illegal loyalist paramilitary group known as the Ulster Defense Association while funneling information to the British government. Nelson's handlers, British officials who liaised with the undercover agents, claimed that Nelson had "gotten out of hand and had become personally involved in loyalist murder plots."<sup>179</sup> After this revelation the issue of whether Nelson had gone rogue within the organization or whether his activities were known to, and condoned by, his British handlers then became highly contested.<sup>180</sup> After his conviction, Nelson manifested that he had independently chosen to target Finucane (rebutting allegations that his handlers had requested that Nelson suggest the hit), but that contrary to the government position, he had informed his handlers of the intended murder.<sup>181</sup> Presuming Nelson's testimony was accurate, however, then Finucane was inexplicably neither warned by British intelligence of any such threat nor protected by the police, despite that they had allegedly been made aware of the hit by Nelson.<sup>182</sup>

Nelson's confession to his involvement in Finucane's murder was passed to the Director of Public Prosecutions (DPP) and an additional inquiry into the situation was ordered.<sup>183</sup> Once completed, the findings of the inquiry were sensitive enough to be earmarked as confidential,<sup>184</sup> but the DPP suggested that the inquiry lacked sufficient evidence and declined to prosecute Nelson or any other suspects.<sup>185</sup> In relation to civil proceedings that alleged her husband's murder was committed by or with the connivance, knowledge or encouragement of the Ministry of Defence and Brian Nelson, Finucane's widow, Geraldine, requested the opportunity to

<sup>178</sup> *Finucane v. United Kingdom*, *supra* note 164, at 5, ¶ 23, 24.

<sup>179</sup> *Id.*

<sup>180</sup> *Finucane v. United Kingdom*, *supra* note 164, at 5, ¶ 24-28 (Not only was Nelson tried, but while in prison he confessed to involvement in the crime in a BBC Panorama programme, which was then sent to the Chief Constable of the RUC for further inquiries. However, in 1995 the DPP concluded that there was insufficient evidence to warrant prosecution.).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* Knowledge of, and failure to warn, the Finucane family of the intended hit on Pat Finucane became one of the central claims in the Finucane case against the government.

<sup>183</sup> *Id.* at ¶ 26.

<sup>184</sup> *Id.* at ¶ 28.

<sup>185</sup> *Id.*

view originals of the documents.<sup>186</sup> In 1999, the Ministry responded, claiming it was no longer in possession of the documents.<sup>187</sup> Shockingly, a taped confession of gunman Ken Barratt was also "lost."<sup>188</sup> At this time, Geraldine Finucane petitioned the European Court of Human Rights to hear the case.

Meanwhile, the government ordered a third inquiry. Later that year, criminal charges were brought against William Alfred Stobie, a paid police informer, for the murder of Pat Finucane.<sup>189</sup> Stobie testified that "he gave the police information on two occasions before the Finucane murder which was not acted upon" and that for the past ten years police had been in possession of information that could have convicted Stobie for other paramilitary offenses, but they declined to do so.<sup>190</sup> Two years after the charges were brought, the case against Stobie fell apart when the central witness refused to testify. Shortly after his release, Stobie was gunned down by loyalist paramilitaries.<sup>191</sup>

In February of 2002, the ECtHR agreed to hear the Finucane case. After hearing the evidence, the Court determined that Article Two of the European Convention of Human Rights was indeed implicated in the facts of the case. Article Two provides that:

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

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<sup>186</sup> *Id.* at ¶ 31.

<sup>187</sup> *Id.*

<sup>188</sup> Yasmine Ahmed, *BIRW Response to Stevens 3*, British Irish Rights Watch (June 19, 2015) available at <http://rwuk.org/inquiries/birw-response-to-stevens-3/> [<https://perma.cc/AGC2-BYUX>].

<sup>189</sup> *Finucane v. United Kingdom*, *supra* note 164, at 3, ¶ 16.

<sup>190</sup> *Id.* at 8, ¶ 36.

<sup>191</sup> *Id.* at ¶ 38.

escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."<sup>192</sup>

In relevant part, procedural interpretation of Article Two requires that a full investigation take place to determine whether a victim has been impermissibly deprived of life within the provisions of the Convention. ECtHR case law specifically requires that, in order to qualify as an appropriate investigation,

[T]he state's response to lethal force deaths caused by state actors must be (1) prompt; (2) independent, meaning that the investigators must be institutionally and hierarchically separate from the state institution (e.g. the military or police) accused of causing the death; (3) effective, in the sense of producing evidence that can lead to prosecutions of responsible individuals where this is warranted; and (4) transparent, both to the public at large as well as to the family members of the victim.<sup>193</sup>

In July of 2003, the Court came down with the opinion that the circumstances of Finucane's death and subsequent investigation warranted the application of Article Two provisions, and finally determined that indeed, a violation of the Convention had occurred.<sup>194</sup> Because the police investigation of the murder had been conducted by the same officers that were suspected of making death threats to Finucane, this constituted an impermissible lack of independence under Article Two. Also, because these threats and the allegations of collusion were never examined at all, the investigation was not effective under the meaning of Article Two.<sup>195</sup> In the eyes of the Court, the fact that the investigation was still ongoing ten years after the murder violated the requirement of promptness in the eyes of the Court. Finally, because no

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<sup>192</sup> European Convention on Human Rights, Article Two Section I (Rights and Freedoms) 6, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) [<https://perma.cc/US7V-73GS>] (last visited Mar. 30, 2016).

<sup>193</sup> Connolly, *Living on the Past*, *supra* note 8, at 423.

<sup>194</sup> Finucane v. the United Kingdom - Summary, NETHERLANDS INST. OF HUMAN RIGHTS, UTRECHT SCHOOL OF LAW, available at <http://sim.law.uu.nl/sim/caselaw/Hof.nsf/2422ec00f1ace923c1256681002b47f1/93b44b6e80ca191841256d58002eaf1f?OpenDocument> [[perma.cc/JEG2-ZWWM](https://perma.cc/JEG2-ZWWM)].

<sup>195</sup> *Id.*

documentation had been made public to either the community at large or the family, the investigation lacked the necessary transparency that the Convention demanded. Thus, on all four procedural requirements the government failed to uphold its human rights obligations under the Convention. The court recommended an independent public inquiry to determine the truth of the allegations.

At the time that the ECtHR was considering Finucane's case, the Good Friday Agreement was also nearing completion. Part of the agreement stipulated that an independent international judge would consider six cases alleging government collusion to determine if additional public inquiries were necessary. Finucane's case was among those chosen for consideration, and many hoped that this would result in the public investigation that both the Court and the family demanded. Perhaps surprisingly, in accordance with the Good Friday Agreement, the independent international judge completed his investigation and published a report of his findings. Judge Cory's report indeed found that four of the six cases had strong implications of collusion, and recommended that the public inquiries take place.<sup>196</sup>

In 2004, the government agreed to conduct the inquiries, but subsequently passed the Inquiries Act in 2005, shifting control over public inquiries from the legislative to the executive branch.<sup>197</sup> The government stated that evidence compromising national security interests made cases like Pat Finucane's the exclusive domain of the executive, and then declined to pursue the inquiry. The Finucane family has pointed to the indication that Finucane's case would implicate national security interests as evidence suggesting that the government was indeed involved in the murder, and that it was an official act and not a result of Nelson acting as a rogue agent.<sup>198</sup> Indeed, it is hard to see why a murder that was unplanned by, and unbeknownst to state actors could implicate sensitive national security information. Additionally, international human rights groups expressed outrage at the passage of the Inquiries Act, declaring that it further violated the United Kingdom's obligations

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<sup>196</sup> Terceno, *supra* note 59, at 3301.

<sup>197</sup> *Id.*

<sup>198</sup> Interview with John Finucane, Solicitor and son of Pat Finucane, Belfast, Northern Ireland (June 2013).

under the ECHR because the Act allows the government to withhold information on state involvement in a murder.<sup>199</sup>

In 2011, the government ordered a paper-based review of Finucane's death. The investigation was handled by Sir Desmond De Silva, and resulted in a report hundreds of pages in length that ultimately implicated the government in "shocking collusion" with Protestant paramilitaries that resulted in Finucane's death. The De Silva Report acknowledged:

[A] number of ways in which the State and its agents colluded in the Finucane killing, including: leaking information to loyalist paramilitaries, amongst them the UDA; failing to act on information that Finucane was under threat of attack by loyalist paramilitaries; playing "key roles" in the actual killing, including by facilitating access to the murder weapon; refusing to investigate, arrest and prosecute UDA operatives at the time, despite evidence of their criminality; and covering up collusion in the killing for over two decades.<sup>200</sup>

Undoubtedly, British officials hoped that the report, coupled with a public apology by the Prime Minister David Cameron, would placate the family and settle the Finucane case for good, thereby avoiding actual litigation on the issue.<sup>201</sup> However, the documents that form the basis of the De Silva report have not been released,

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<sup>199</sup> Terceno, *supra* note 59, at 3301.

<sup>200</sup> *Northern Ireland: 25 Years After Finucane Killing, Failure to Hold Inquiry Not Only Cruel, But Positively Sinister*, AMNESTY INT'L UK PRESS RELEASES (Feb. 12, 2014, 10:45 AM), <http://www.amnesty.org.uk/press-releases/northern-ireland-25-years-after-finucane-killing-failure-hold-inquiry-not-only-cruel> [perma.cc/FGQ4-Q7UN].

<sup>201</sup> Brian Rowan, *Pat Finucane Killing: Why Murder of Lawyer is a Death That Never Went Away*, BELFAST TELEGRAPH (Feb. 10, 2014), <http://www.belfasttelegraph.co.uk/debateni/blogs/brian-rowan/pat-finucane-killing-why-murder-of-lawyer-is-a-death-that-never-went-away-29994732.html> [perma.cc/6LBN-BCRF].

even to the family,<sup>202</sup> despite promises to publicize them<sup>203</sup> as well as other reports concerning the views of other prominent ministers drafted at the time of the violence. The family thus remains unsatisfied.<sup>204</sup>

At the twenty-five year anniversary of Finucane's death, Rights Watch UK publicly wrote to Whitehall to remind the Prime Minister of his promise to publish the reports.<sup>205</sup> They have not received a response.<sup>206</sup> Perhaps more importantly, the Finucane family now demands a full public inquiry not only for the sake of determining exactly how and why the government interacted with loyalist paramilitaries in their father's killing, but to determine the extent of government involvement in the violence of the Troubles overall.<sup>207</sup> Currently, the government has expressed no intention of adhering to the demands of the ECtHR opinion that it complete its

<sup>202</sup> British Irish Rights Watch, *Pat Finucane: The Fight for Justice*, ¶ 24, available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjKzOOB\\_ujLAhWJ8x4KHbCyCXgQFggf-MAA&url=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattach-ment\\_data%2Ffile%2F246867%2F0802.pdf&usg=AFQjCNFlq56Si\\_rr9x1XYmjV2MRq39KC6g](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjKzOOB_ujLAhWJ8x4KHbCyCXgQFggf-MAA&url=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattach-ment_data%2Ffile%2F246867%2F0802.pdf&usg=AFQjCNFlq56Si_rr9x1XYmjV2MRq39KC6g) [<https://perma.cc/E63K-2XFW>] (explaining that "Not only would the Finucane family be denied sight of many crucial documents, but they would not even know which documents they were being denied.").

<sup>203</sup> Finucane Lawyer to Publish Classified Reports, RTE NEWS (Nov. 10, 2011), available at <http://www.rte.ie/news/2011/1110/308531-finucanep/> [<https://perma.cc/X6EM-HAQQ>] ("The lawyer appointed by the British government to carry out a review of the murder of Belfast solicitor Pat Finucane and the collusion of the British security services in the killing, has said he intends to declassify and publish original intelligence documents alongside his report.").

<sup>204</sup> *British Irish Rights Watch, Pat Finucane: The Fight for Justice*, *supra* note 202 (noting that when the government explained the plan for the de Silva report, "[t]his process fell so far short of the family's most basic requirements that Geraldine Finucane brought the meeting to an end after just 30 minutes."); see also British Irish Rights Watch, press release, "27 years since the murder of Patrick Finucane: still no justice" available at <http://rwuk.org/wp-content/uploads/2016/02/Finucane-27-PR.pdf>.

<sup>205</sup> *Broken Promises and Opportunities Lost – The Finucane Case – An Update*, RIGHTS WATCH (UK) (Jan. 11, 2014, 12:49PM), <http://www.rwuk.org/all/finucanecase-update/> [<https://perma.cc/9CVJ-VHJ8>] ("The failure of the Prime Minister to expeditiously publish the views of his Ministers regarding the murder of Patrick Finucane and role of the British state in his death only serve to heighten the suspicion surrounding this case and that the de Silva review has raised more questions than it has provided answers.").

<sup>206</sup> *Id.*

<sup>207</sup> *Northern Ireland: 25 Years After Finucane Killing*, *supra* note 200.

investigatory obligations under the ECHR, and has not responded to the requests of the Finucane family.

### 3.2.2. *The Case of Pearse Jordan*

On November 25, 1992, Pearse Jordan was shot and killed by a member of the RUC, identified in legal documentation as *Sergeant A*.<sup>208</sup> According to eyewitnesses, Jordan, who was known to be a volunteer member of the IRA, was driving a car that was rammed by police officers.<sup>209</sup> He was unarmed, got out of the car and attempted to flee on foot when he was shot three times in the back. In contrast with the unofficial reports circulated to the media, the car contained no explosives, masks, guns, or other paramilitary paraphernalia.<sup>210</sup> Jordan died a short time after the shooting, and the case has become known as one implicating the shoot-to-kill policies of the police Special Support Unit, or SSU.<sup>211</sup> The SSU had been involved in six similar shootings previously.<sup>212</sup> The shootings sparked outrage when evidence showed that all six victims were unarmed and all of the SSU task members involved, including *Sergeant A*, had made false statements to cover up the truth of the incidents.<sup>213</sup>

In May of 1993, the RUC completed an investigation into the shooting and submitted its findings to the DPP.<sup>214</sup> The family was notified that the investigation was complete, and that it was deemed “satisfactory,” but was not actually informed of any findings.<sup>215</sup> This

<sup>208</sup> Hugh Jordan v. United Kingdom, App. No. 24746/94, 94 Eur. Ct. H.R. (April 8, 2011) available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450#{"itemid":\["001-59450"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450#{) [perma.cc/B6L6-TFJJ].

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Barry McCaffrey, *RUC Man Who Shot Unarmed PIRA Man Told Doctor Job Had Been ‘Great Until Ceasefire,’* THE DETAIL (Oct. 18, 2012), <http://www.thedetail.tv/issues/135/pearse-jordan-shoot-to-kill-inquest/ruc-man-who-shot-unarmed-pira-man-told-doctor-job-had-been-great-until-ceasefire> [perma.cc/PH8W-UDBM].

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* (In 1995, *Sergeant A* complained to an RUC doctor that his job had been “great, until the ceasefire,” intimating that the absence of armed conflict in Northern Ireland rendered his job boring).

<sup>214</sup> Hugh Jordan v. United Kingdom, App. No. 24746/94, 94 Eur. Ct. H.R. (April 8, 2011) available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450#{"itemid":\["001-59450"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450#{) [perma.cc/B6L6-TFJJ].

<sup>215</sup> *Id.*

was a far more typical conclusion to investigatory findings for most of the families of victims of Troubles aggression, as compared to the modicum of information that the Finucane family received. In November of the same year, the DPP notified the RUC that the evidence from the investigation was insufficient to warrant prosecution of any individual. The RUC in turn notified the Coroner's office of the finding, and the Coroner decided to hold an inquest.<sup>216</sup> Approximately one year later, the Coroner received the investigation report from the police, and notified the family that the inquest was scheduled to begin in January of 1995.<sup>217</sup> Prior to the inquest, the Secretary of State for Defense suggested, and the Coroner agreed, that certain sensitive information would be withheld from the proceeding for national security reasons, and that the identities of the officers involved would be kept confidential. Later, additional information was withheld for fear of "compromising the integrity of RUC operations."<sup>218</sup> Presumably then, these operations were still ongoing.

Over the course of the inquest, as new evidence emerged, the family repeatedly requested that the DPP reconsider its decision not to prosecute, and in the alternative suggested that the coroner was not conducting the inquest fairly. These requests delayed the inquest, which was eventually concluded in 2000, five years later, without resolution. Requests for judicial review (a process equivalent to an appeal in the United States), as well as complications with requests for legal aid, financial assistance for the family, and suggestions that vital police investigation information was being withheld from the family and their attorney were also handled with impermissible slowness, further delaying the process. Due to the hindrance, the ECtHR eventually agreed to hear the case.

After merely one year, on May 4, 2001, the ECtHR concluded that international law applied to the facts of the case, including the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which provides that the "intentional lethal use of firearms may only be made when strictly unavoidable

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<sup>216</sup> An inquest is an extremely limited investigation, designed only to determine who the deceased was, and how, when and where the deceased's death came about. Generally, an inquest is not meant to apportion criminal liability to the cause of death. *Id.* at ¶44.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at ¶ 33.

in order to protect life.”<sup>219</sup> The ECHR was also implicated, including specifically Article Two, cited above.<sup>220</sup>

The court held that no factual findings could be made because the fact-finding portion of the investigation had not yet been completed to the Court’s satisfaction (despite the “satisfactory” investigation that the police assured the family had been completed).<sup>221</sup> The Court instead found that the investigations were carried out by the police force with an impermissible absence of independence.<sup>222</sup> The victim’s family was also inadequately informed of the proceedings, and an overall lack of public scrutiny permeated the process.<sup>223</sup> The fact that the officer who shot Jordan could not be compelled to attend the inquest as a witness was also a serious shortcoming. Finally, “the absence of legal aid for the representation of the victim’s family and non-disclosure of witness statements prior to their appearance at the inquest prejudiced the ability of the applicant to participate in the inquest and contributed to long adjournments in the proceedings.”<sup>224</sup>

The Court further considered whether the procedural aspects of Article Two had been complied with, and found violations there as well.<sup>225</sup> Generally, the procedural aspects of Article Two require a prompt, transparent, independent and thorough investigation whenever a state has been implicated in the death of a citizen.<sup>226</sup> Regarding the delays causing the inquest to last over five years, the Court concluded that “the time taken in this inquest cannot be regarded as compatible with the State’s obligation under Article Two of the Convention to ensure that investigations into suspicious

<sup>219</sup> G.A. Res. 45/166, United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, ¶ 9 (1990).

<sup>220</sup> See *supra* pp. 35-36.

<sup>221</sup> *Jordan v. United Kingdom*, ¶ 23, App. No. 24746/94, 94 Eur. Ct. H.R. (Apr. 8, 2011) available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450#{"itemid":\["001-59450"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450#{) [perma.cc/B6L6-TFJI] (reciting the ICPC’s claim that “the criminal investigation into the shooting was satisfactory”).

<sup>222</sup> *Id.* at ¶ 142.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at ¶ 115 (stating that the investigation may not merely lead to the awarding of damages, but “must be able to lead to the identification and punishment of those responsible”).

<sup>226</sup> *Id.* at ¶ 105-08.

deaths are carried out promptly and with reasonable expedition."<sup>227</sup> The Court concluded by admonishing the state for practices that run counter to the professed goals of the domestic courts of "allaying suspicions and rumours" and warned that "[l]ack of such procedures will only add fuel to fears of sinister motivations, as is illustrated *inter alia* by the submissions made by the applicant concerning the alleged shoot-to-kill policy."<sup>228</sup>

Following the European Court's judgment, the Coroner scheduled the Inquest to resume in June of 2001, but the start was delayed and did not in fact begin until February of 2002. The family challenged the decision to delay, but their objection was denied. Various additional challenges and delays concerning the proceedings ensued,<sup>229</sup> until eventually the Coroner agreed to recuse himself in 2009.<sup>230</sup> The proceedings again began in 2010, and resulted in a hopelessly divided jury verdict in the fall of 2012.<sup>231</sup> Undeterred, the diligent family motioned to quash the jury verdict,

<sup>227</sup> *Id.* at ¶ 140.

<sup>228</sup> *Id.* at ¶ 144.

<sup>229</sup> These delays included a successful challenge to the Coroner's decision to ignore the ECtHR judgment and proceed on the basis of "existing Coroner's law and practice," which was not resolved until 2004. *Coroner Forced to Stand Down from Pearse Jordan Inquest*, ANPHOBLACHT (Oct. 15, 2009), <http://www.anphoblacht.com/contents/20762> [<https://perma.cc/9B8Q-Q3UL>]. The issue of the compellability of Sergeant A was also revisited, and again challenged by the family, until finally in 2012 the Sergeant, who was by then living out of the country, agreed of his own volition to come forward (the Court was still unable to compel his testimony as he was beyond the jurisdiction of British courts). *Id.*; See also Barry McCaffrey, *RUC Man Who Shot Unarmed PIRA Man Told Doctor Job Had Been 'Great Until Ceasefire'*, THE DETAIL (Oct. 18, 2012), <http://www.thedetail.tv/issues/135/pearse-jordan-shoot-to-kill-inquest/ruc-man-who-shot-unarmed-pira-man-told-doctor-job-had-been-great-until-ceasefire> [[perma.cc/PH8W-UDBM](https://perma.cc/PH8W-UDBM)].

<sup>230</sup> *Coroner Forced to Stand Down from Pearse Jordan Inquest*, ANPHOBLACHT (Oct. 15, 2009), <http://www.anphoblacht.com/contents/20762> [<https://perma.cc/9B8Q-Q3UL>].

<sup>231</sup> *RUC Man Who Shot Unarmed Pearse Jordan in the Back Fails in Bid to be Screened from Pearse's Parents*, MADDEN & FINUCANE, SOLICITORS (Feb. 20, 2016), available at <http://madden-finucane.com/2016/02/20/ruc-man-who-shot-unarmed-pearse-jordan-in-the-back-fails-in-bid-to-be-screened-from-pearses-parents/> [<https://perma.cc/GU28-W27R>] (detailing the "hopelessly divided" jury); see also *Pearse Jordan Inquest Findings Quashed in IRA Death Case*, BBC NEWS NORTHERN IRELAND (Jan. 31, 2014), <http://www.bbc.com/news/uk-northern-ireland-25981320> [[perma.cc/6BJE-Q8Y5](https://perma.cc/6BJE-Q8Y5)] (noting that "the jury was split on whether reasonable force was used, the state of belief on the part of the officer who fired the fatal shots, and whether any alternative course of action was open to him.").

and requested a new inquest.<sup>232</sup> In a landmark 129 page opinion that came down in January of 2014, the High Court in Belfast ruled that the inquest findings would indeed be quashed, and found the PSNI at fault for the eleven years of delays and failing to provide requested documentation.<sup>233</sup> Though the Coroner and Chief Constable have appealed this decision,<sup>234</sup> it nonetheless gives renewed hope that perhaps a third inquest more than a decade later, will result in justice and resolution for the Jordan family.<sup>235</sup>

#### 4. INTERNATIONAL HUMAN RIGHTS AND COUNTER-TERRORISM MEASURES IN THE UNITED KINGDOM

The judgments discussed above are meant to demonstrate not just the lack of domestic resolution for Troubles-related cases, but also the lack of enforcement for judgments of the ECtHR regarding British investigation of counter-terrorism activities during the Troubles. They also suggest a potentially gaping hole for future enforcement of international restrictions on counter-terrorism activities. Finally, the cases demonstrate the lengths to which the government will go to avoid investigating these past events, in which, until very recently, they claimed no institutional involvement. Despite the dogged attempts of victims' families and the edicts of international bodies to the contrary, the state has steadfastly refused to meaningfully investigate these historical cases. In the past, the State has cited the cost of a public inquiry as its primary reason for refusal.<sup>236</sup> However, the importance of the

<sup>232</sup> *Pearse Jordan Inquest Findings Quashed in IRA Death Case*, BBC NEWS NORTHERN IRELAND (Jan. 31, 2014), <http://www.bbc.com/news/uk-northern-ireland-25981320> [perma.cc/6BJE-Q8Y5].

<sup>233</sup> *Pearse Jordan Inquest Findings Quashed in IRA Death Case*, BBC NEWS NORTHERN IRELAND (Jan. 31, 2014), <http://www.bbc.com/news/uk-northern-ireland-25981320> [perma.cc/6BJE-Q8Y5].

<sup>234</sup> *Pearse Jordan Inquest Verdict Appealed by Coroner and Chief Constable*, BBC NEWS NORTHERN IRELAND (Mar. 13, 2014), <http://www.bbc.com/news/uk-northern-ireland-26561105> [perma.cc/2GEJ-CTRU] (noting that "Lawyers for both the coroner and chief constable are preparing challenges to the verdict.").

<sup>235</sup> *Pearse Jordan Inquest Findings Quashed in IRA Death Case*, BBC NEWS NORTHERN IRELAND (Jan. 31, 2014), <http://www.bbc.com/news/uk-northern-ireland-25981320> [perma.cc/6BJE-Q8Y5].

<sup>236</sup> Brian Rowan, *Pat Finucane Killing: Why Murder of Lawyer is a Death That Never Went Away*, BELFAST TELEGRAPH (Feb. 10, 2014), <http://www.belfasttelegraph.co.uk/debateni/blogs/brian-rowan/pat-finucane-killing-why-murder-of-lawyer-is-a-death-that-never-went-away-29994732.html> [perma.cc/6LBN-BCRF].

issue and the degree of tenacity the state has expressed may suggest that some underlying state motivation beyond concerns about cost. Recent isolated admissions of, and apologies for, the supposedly limited past government involvement in Troubles related violence, after years of denial hints at greater institution-wide policies of involvement hidden in the confidential documents that families, such as the Jordans and the Finucanes seek to disclose in ongoing litigation.

More importantly, for the purposes of this paper, the fact that disclosures of confidential documents pose a current national security risk suggests that the information they hide still has applicability to current counter terrorism measures. That the British government engaged in isolated unlawful counter-terrorism acts during the Troubles is undisputed. The Bloody Sunday Massacre in Londonderry on January 30, 1972, is probably the most famous of these.<sup>237</sup> There, Northern Irish protesters were marching in protest of British government policies of interning suspected Irish nationalists.<sup>238</sup> The march had been banned, so British soldiers were sent to disband them.<sup>239</sup> They fired indiscriminately into the crowd, killing thirteen and wounding an additional seventeen people.<sup>240</sup> A report in 1972 exonerated the British troops involved in the killing,<sup>241</sup> and indeed it was later discovered that some of the protesters were armed.<sup>242</sup> However, the report was so fraught with error and "white wash[ing]" that local citizens were outraged and even the British government quickly distanced itself from the findings.<sup>243</sup> For years,

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<sup>237</sup> *Bloody Sunday in Northern Ireland*, HISTORY.COM, <http://www.history.com/this-day-in-history/bloody-sunday-in-northern-ireland> [perma.cc/NWP4-NP9E] (last visited Mar. 30, 2016).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Saville Inquiry into Bloody Sunday*, BBC, [http://www.bbc.co.uk/history/events/saville\\_inquiry\\_into\\_bloody\\_Sunday](http://www.bbc.co.uk/history/events/saville_inquiry_into_bloody_Sunday) [perma.cc/NWP4-NP9E] (last visited Mar. 30, 2016) (describing testimony of Martin McGuinness, who was found to be carrying a "Thompson sub-machine gun" at the protest during the day in question. The previous allegations that McGuinness had fired the first shot were dismissed as there was insufficient evidence to support this conclusion.).

<sup>243</sup> The following year, a Coroner called the shooting "sheer, unadulterated murder" and in 1974 the government made "goodwill" payments to the families, though they failed to admit to any responsibility in the deaths. *Id.*

individuals in both the private sector and the government expressed a need for another investigation.<sup>244</sup> International pressure also mounted,<sup>245</sup> but none was forthcoming until 1998, when Prime Minister Tony Blair announced a judicial inquiry, headed by Lord Saville of Newdigate.<sup>246</sup> Its findings were released in 2010. As an initial matter, it was concluded that none of the victims posed a threat of causing death or serious injury to the soldiers or each other.<sup>247</sup> The soldiers of the paratrooper unit were indeed determined to be at fault for their deaths.<sup>248</sup> In a similar style to the Finucane admission, British Prime Minister David Cameron later made a statement that the deaths of the Bloody Sunday Massacre at the hands of British soldiers were both “unjustified” and “unjustifiable.”<sup>249</sup> It is this massacre that can be perceived most easily as a blatant violation of human rights on the part of the British government while it engaged in counter-terrorism during the Troubles.<sup>250</sup>

It is becoming clear that many of the measures they employed on a systematic basis were also illegal in terms of international human rights law. However, recent implicit acknowledgement that the counter-terrorism strategies used during the Troubles are still relevant to, or informative of, the measures in use today, would suggest that the current clandestine measures remain illegal as well.<sup>251</sup> This deduction would neatly explain the formidable efforts

<sup>244</sup> *Id.*

<sup>245</sup> *Bloody Sunday and the Report of the Widgery Tribunal*, CAIN (June 1997), <http://cain.ulst.ac.uk/events/bsunday/irgovt.htm> [perma.cc/UGB8-4847].

<sup>246</sup> It was this inquiry to which British government officials pointed when they stressed the expense of such investigations as a reason for why others of a similar ilk should not ensue. *Id.*

<sup>247</sup> “Lord Saville concluded that firing by soldiers of 1 Para on Bloody Sunday caused the deaths of 13 people and injury to a similar number, none of whom was posing a threat of causing death or serious injury. What happened on Bloody Sunday strengthened the Provisional IRA, increased nationalist resentment and hostility towards the Army and exacerbated the violent conflict of the years that followed. Bloody Sunday was a tragedy for the bereaved and the wounded, and a catastrophe for the people of Northern Ireland.” *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> See generally, British Rights Watch Report, <http://rwuk.org/bloody-sunday-inquiry/> [perma.cc/2QZQ-UTWN] (last visited Mar. 30, 2016) (similarly skeptical of the British government’s justifications for bloody Sunday massacre).

<sup>251</sup> See generally, *supra* p. 54.

government officials have made to avoid any investigations of, or rulings on, past actions.

The fortuitousness of the timing of the ECtHR judgments and the September 11, 2001 attacks is notable. The terrorist attacks on September 11<sup>th</sup> constituted a turning point for international law and terrorism. Though there had been atrocities in the past that had spurred a demand for new anti-terrorism legislation,<sup>252</sup> this was by far the most compelling incident to date. Almost immediately, the United Nations recognized "an inherent right of individual or collective self-defence..."<sup>253</sup> A Counter-Terrorism Committee was established to enforce the binding U.N. resolution that all states act to take financial, penal and other regulatory measures against terrorism.

However, as with most abrupt changes in legal landscape, questions soon arose.<sup>254</sup> Unlike during the Troubles, when British actions were intra-national and thus flew predominantly under the international radar, the new international climate highlighting terrorism has placed more attention upon counter-terrorism activities and their legality.<sup>255</sup> In response, "[i]n 2004 . . . the Council adopted resolutions '[r]eminding States that they must ensure that any measures taken to combat terrorism comply with all their obligations under international law . . .'"<sup>256</sup> Amnesty International issued warnings that defining terrorism too broadly would easily bring State security concerns into conflict with individual human rights.<sup>257</sup> The European Court of Justice has expressed its opinion lamenting the failure of the Security Council to develop an independent and impartial body responsible for hearing and determining the legality of various actions against individuals

<sup>252</sup> PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS, 384-85 (2013) (referencing Russian push for anti-terrorist legislation after an attack on a school, by "[a] Chechnyan armed group", resulted in the deaths of 300 civilians, many of them children).

<sup>253</sup> *Id.* at 388; *see also* S.C. Res. 1368 (Sept. 12, 2001).

<sup>254</sup> PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS, 388-892 (2013) (noting that "[t]he attacks on 11 September 2001" were pivotal "in the relationships between international law, global institutions, and terrorism").

<sup>255</sup> *Id.* at 388-90 (discussing the Security Council's establishment of the Counter-Terrorism Committee (CTC) "to monitor the implementation" of anti-terrorist resolutions).

<sup>256</sup> *Id.* at 389 (citing S.C. Res. 1535 (2004)).

<sup>257</sup> *Id.* at 387-88.

accused of terrorism. As suddenly as it arrived, the massive tidal wave of anti-terrorist legislation that could well have dissolved every Troubles-victims' claim against Great Britain, appears to be taking an about face. International organizations are cautiously back-pedaling. As a result, new attention to restriction upon anti-terrorism measures means that historical atrocities that could well have been swept under the rug for an eternity have taken on new meaning. The victims of British brutality during the Troubles cannot go back in time to protect their rights and stop the deaths that government acts likely caused. However, litigating historical cases may act as a springboard for the enforcement of rights for those affected, as collateral damage, in an attempt to combat today's terrorist actors.

So, what exactly are the United Kingdom's legal obligations when they act in the name of counter-terrorism? Some argue that human rights conventions and charters should apply generally in these circumstances.<sup>258</sup> Dieter Fleck suggests that "[t]o the extent that certain aspects of internal disturbances and tensions may not be covered by international humanitarian law, individuals remain under the protection of international law guaranteeing fundamental human rights." A blanket application of human rights obligations would also circumvent the problem in determining whether an armed conflict is ongoing or not. Certainly, the United Kingdom has signed a great many human rights treaties that include broad commitments to honor the rights of individuals. Like the United States, however, the United Kingdom has been known to employ a host of reservations when signing a treaty. Even when signed, the treaties are not self-executing and often carry little weight within the greater scheme of parliamentary law, which remains sovereign. To attain force, Parliament must ratify the treaties and often enact complimentary legislation holding that they are enforceable within the State, as was done with the 1998 Human Rights Act, making the ECHR a more dominant force in domestic law. However, even when ratified, compliance is not assured. For example, in 2007 Parliament instituted a "control order regime" of new counter-terrorism

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<sup>258</sup> *Id.* at 1500 ("[I]t is a small step to suggest that such international human rights obligations apply at all times to all armed opposition groups.").

legislation.<sup>259</sup> "The high court, the court of appeal and parliament's joint human rights committee have all said that a significant number of the 17 control orders in force are being routinely exercised in breach of the right to liberty under article five" of the ECHR.<sup>260</sup> However, because courts may only issue a declaration of noncompliance to weaken, but not overturn parliamentary law, there is little that can truly be done to force the government to conform to the international treaty.

Meanwhile, at the time of the Troubles, and to this day,

[v]arious international treaties protecting the right of contracting states to introduce emergency legislation; confusion in the international arena, and particularly in international law, over how to handle terrorist violence; and the mistaken application of a "hierarchy of rights" both inside the United Kingdom and abroad contribute to the use of liberalism to justify emergency law.<sup>261</sup>

And, as we have already seen, once emergency law is instituted and States begin to act against terrorists, there is comparatively little that international bodies and domestic citizens alike can do to force States to rescind the legislation.<sup>262</sup> In her paper entitled "Civil Liberties, Terrorism and Liberal Democracy: Lessons from the United Kingdom," Donahue adds the observation that, "[i]n addition there also existed a tendency within the security forces to support the extension of such measures as part of their arsenal in the fight against terrorism. Once the powers had been gained, those wielding them were unwilling to see them diminished."<sup>263</sup>

The European regional human rights system, and within it the ECtHR, is the most effective human rights instrument in the world,

<sup>259</sup> Alan Travis & Vikram Dodd, *Reid Warning to Judges Over Control Orders*, THE GUARDIAN (May 24, 2007), <http://www.theguardian.com/politics/2007/may/25/uk.topstories3> [perma.cc/9G67-53KY] (last visited Jan. 28, 2016).

<sup>260</sup> *Id.* (noting that "home secretary, John Reid, made clear yesterday he is prepared to declare a 'state of emergency' to suspend key parts of the human rights convention if the law lords do not overturn a series of judgments that have weakened the anti-terrorist control order regime.").

<sup>261</sup> Donahue, *supra* note 40, p. 2.

<sup>262</sup> See *supra* notes 75-80 and accompanying Diplock courts discussion.

<sup>263</sup> Donahue, *supra* note 40, at 8.

in terms of commanding compliance with its judgments.<sup>264</sup> Yet the United Kingdom has successfully eluded even the semblance of compliance with their requests regarding investigations into the Troubles and the historical cases. Important now is the movement that internationally, actors are starting to take note of the lengths that States will go to counter terrorism.<sup>265</sup> Their attention to this issue has reached a level that would have been unprecedented before September 11<sup>th</sup>. In recent years, international human rights groups and other actors have played a game of catch-up to declare dissatisfaction with counter-terrorist measures, including those employed by the British Government during the Troubles. The British government undoubtedly violated a number of international agreements prohibiting arbitrary arrests, internment, torture and killings.<sup>266</sup> However, prior to September 11<sup>th</sup>, perceptions in Westminster abounded that its counter-terrorism measures “were both necessary and acceptable outside of Great Britain, and the symbolic importance of “antiterrorist” measures provided a direct impetus for the . . . continued operation.”<sup>267</sup>

The pro-state security measures following September 11<sup>th</sup>, and the more recent backlash to what was seen as an overreach by States, has likely made many in the United Kingdom aware that its measures are viewed as neither necessary nor acceptable. Indeed, international reprimands now circulate, including Amnesty International’s report, “Northern Ireland: Time to Deal With the Past,” which criticize Great Britain, not only for presently obstructing human rights by failing to provide adequate judicial mechanisms so that victims of the Troubles can confront the paramilitary groups, but also condemn the failure to atone for its grievous past behavior.<sup>268</sup> Relating more specifically to anti-

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<sup>264</sup> Matiangai Sirleaf, Course Lecture about International Human Rights at the University of Pennsylvania Law School (Mar. 18, 2014) (explaining that, as compared to other human rights bodies, the European system is the most advance in terms of its capabilities to hear and decide complaints, and those decisions receive the highest rate of compliance).

<sup>265</sup> Donahue’s paper is one such example.

<sup>266</sup> See *supra* notes 164-177 and accompanying discussion of counter-terrorist measures, such as the Bloody Sunday Massacre.

<sup>267</sup> Donahue, *supra* note 40, at 6.

<sup>268</sup> See generally Amnesty International, Northern Ireland: Time to Deal with the Past (2013), [http://www.amnesty.org.uk/sites/default/files/time\\_to\\_deal\\_with\\_the\\_past\\_0.pdf](http://www.amnesty.org.uk/sites/default/files/time_to_deal_with_the_past_0.pdf) [perma.cc/N2MY-6UHH] (last visited Jan. 28, 2016).

terrorism measures, in 2002 the Inter-American Commission on human rights declared that "most fundamental fair trial requirements cannot justifiably be suspended under either international human rights law or international humanitarian law . . . including those related to terrorism, regardless of whether such initiatives may be taken in time of peace or times of national emergency, including armed conflict . . ." <sup>269</sup> Other international bodies have made similar declarations. The arbitrary detentions, arrests and the Diplock Courts in the United Kingdom failed these standards and violated the international limitations on acceptable counter-terrorism measures.

#### 5. IMPACTS OF LITIGATING THE TROUBLES' CLAIMS

The often forgotten fact that the Troubles were in their heyday a mere thirty years ago, combined with the eerie similarities to some of the tactics reportedly in use against Islamic and other terrorists today, suggests that strong attention to Troubles litigation could impact current anti-terrorist activities.

Justifications for current anti-terrorist measures and those used during the Troubles are similar. Three examples of rhetoric used by British politicians in particular resonate with arguments routinely used at present to justify counter-terrorism legislation that also infringes on protected human rights. First, the British Parliament had long held the view that "Northern Ireland bears a unique history within which special powers are acceptable, or even necessary."<sup>270</sup> Thus, using special powers to handle the situation in Northern Ireland was justified, while parliament members readily admitted that no one in England would ever be forced to suffer such a radical approach. The people and the scenarios were too different. This approach of labeling was used within Northern Ireland as well, where Protestant officials realized that they would lose popular support if they ever utilized counter-terrorism measures against the

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<sup>269</sup> PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS, 387 (2013).

<sup>270</sup> Donahue, *supra* note 40, at 12-13 ("[I]nternment has been one of the facts of Irish history and one of the means for securing the State in Northern Ireland, north or south" and describing Northern Ireland as a "place apart" and a "foreign country" (quoting MP's in Westminster Parliament)). British politicians also noted that no one in England would ever suffer the procedures that apply in Northern Ireland, but that "the same situation does not apply in England." *Id.* at 13.

Loyalists.<sup>271</sup> Particularly with internment, though the counter-terrorism measures never stated that they were to be used against Catholic paramilitary groups exclusively, at their inception that was the understood purpose. This approach of labeling the sufferers of human rights violations as the “other” mirrors the easy distinctions drawn between radical Muslim terrorists and the rest of the world, justifying their need to be treated differently, and more harshly, than other criminals in light of their status as “unique.”

A second justification for counter-terrorist measures is that, while the legislation may violate some civil rights, many of the acts that are forbidden are already illegal.<sup>272</sup> Thus, the legislation is not inflicting undue harm. This is similar, but not identical to the idea that, if you are not a terrorist, you likely have nothing to worry about because you are not committing criminal activity, and so your rights will likely not be infringed. These arguments were recently used to encourage the passing of anti-terrorist legislation in the United States when confronted by concerns about infringement on civil liberties of civilians. Congressman Pence argued that the counter terrorism measures would address only illegal behavior, and that the legislation was “about trust. It is not about fear. It is about trusting the law enforcement agencies of this country.”<sup>273</sup>

A third justification that transcends time is the idea that “terrorist legislation [is] a statement that violence [will] not be tolerated.”<sup>274</sup> British MPs frequently supported implementing legislation that suspended basic rights because they felt it demonstrated that Britain rejected terrorism, and had the courage to resist violence.<sup>275</sup> This argument had the double-edged sword of simultaneously implying that any repeal of counter-terrorist

<sup>271</sup> CIARAN MACAIRT, *THE MCGURK’S BAR BOMBING: COLLUSION, COVER-UP AND A CAMPAIGN FOR TRUTH* 64 (2013) (explaining that when he called for tougher counter-terrorism measures, the Prime Minister of Northern Ireland, Brian Faulkner “realised [sic] he would lose the support of his party if Loyalists were interned.”). The measures were, however, eventually used to intern and sentence paramilitaries of both religious backgrounds. See generally Connolly, *Living on the Past*, *supra* note 8.

<sup>272</sup> Donahue, *supra* note 40, at 19.

<sup>273</sup> 107 Cong. Rec. H7220 (Oct. 24, 2001) (statement of Rep. Pence), available at <https://www.gpo.gov/fdsys/pkg/CREC-2001-10-24/pdf/CREC-2001-10-24-pt1-PgH7220-5.pdf> [<https://perma.cc/7P4Z-MTXD>] (last visited Mar. 30, 2016).

<sup>274</sup> Donahue, *supra* note 40, at 14-15 (positing that “statutes serve as a moral statement”).

<sup>275</sup> *Id.*

legislation would symbolize acquiescence to terror.<sup>276</sup> Indeed, any opponent of the legislation had to stress that it was not "going soft on terrorism,"<sup>277</sup> in much the same way that Democrats stressed their hard line opinions when critiquing Republican anti-terrorism measures in the United States following September 11<sup>th</sup>.<sup>278</sup> The similarities in the arguments used thirty years ago and those employed today are important. If the judgments concerning the measures taken in the Troubles reveal that these arguments are not sufficient to justify the human rights violations imposed against Northern Ireland, then it is likely that another country will not be capable of using similar rhetoric to defend current counter-terrorism measures with success.

Thus, because of these parallels in both the actions taken to counter terror, and the justifications used to excuse and prolong them, extensive litigation of the Troubles claims would likely have reverberating effects felt not only by the present-day counter-terrorism measures employed by Great Britain, but by those elsewhere around the world. Scholars have noted generally that many of the factors which caused the United Kingdom to implement extreme emergency measures that violated human rights law are "also at work in other liberal, democratic states faced with a terrorist challenge."<sup>279</sup>

## 6. CONCLUSION

Are there means available by which the Troubles' claims can still be resolved? By holding parliamentary sovereignty above international law, the British government has apparently stymied many attempts to apply much of international human rights legislation to historical cases. International law on the whole faces problems of enforcement. Perhaps the best method by which to confront the historical cases comes from the British courts themselves. By setting national jurisprudence on a pedestal, the United Kingdom has created a powerful mechanism to curb

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<sup>276</sup> *Id.* at 14 (noting that "[i]n the absence of a cessation in terrorist activity, repeal might . . . indicate . . . a level of acceptance either of some degree of violence or of the use of violence for political ends").

<sup>277</sup> *Id.* at 16.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 2.

counter-terrorism measures, and the British courts are in a uniquely capable place to do so regarding the Troubles cases because they involved solely citizens of the United Kingdom. In recent years, the courts have begun to take a harder stance to protect civil liberties despite the war on terror.<sup>280</sup> The recent decision to order a new inquest for the Pearse Jordan case is one such example. Though they would likely face great political opposition, should the courts decide to get serious about forcing greater conformity to the ECHR and human rights generally, a decision to litigate the Troubles claims would be the perfect vehicle to do so, because those claims specifically raise the debate between security and protecting civil rights.

Though large scale transitional justice mechanisms will likely never be endorsed by British officials, perhaps there are some suggestions that British courts could take from these mechanisms should they become more serious about litigating the Troubles' cases. The truth commission in South Africa was well known for its liberal use of amnesty to those who came forward, in exchange for their honest and open recounting of past events. It remains unclear at this point if the families of victims of the Troubles would be open to a process that involved amnesty provisions. However, many families stressed a desire to learn the truth about the involvement of the British government, especially regarding the higher-up policies of Westminster regarding Northern Ireland.<sup>281</sup> The years of cover-ups and collusion seem to make them yearn merely for truth from their government, and not for abject punishment for the perpetrators of the crimes.<sup>282</sup> Though by no means a thorough consensus, the start of a conversation about the goals of the families suggests that amnesty could be a means of compromise the British courts might invoke.

If amnesty is not a sufficiently strong incentive to bring witnesses and actors forward, ensuring anonymity to government actors may be another option. In the second Jordan inquest,

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<sup>280</sup> Alan Travis & Vikram Dodd, *Reid Warning to Judges Over Control Orders*, THE GUARDIAN (May 24, 2007), <http://www.theguardian.com/politics/2007/may/25/uk.topstories3> [perma.cc/9G67-53KY] (last visited Jan 28, 2016) (detailing "the continuing struggle between ministers and the courts over civil liberties and the fight against terrorism").

<sup>281</sup> J.R. van Hoeven, *A Narrative of Historical Cases 5* (Committee for the Administration of Justice, January 2014) (unpublished manuscript).

<sup>282</sup> *Id.*

government officials and police officers involved in the crime testified behind a screen to protect their identities. While this method would also assist in obtaining the truth behind the deaths of their loved ones, it has met with less enthusiasm from families. The gratification of the truth might be somewhat tainted if the perpetrators and the superior officials who gave the orders resulting in victims' deaths remain forever hidden by false names and mysterious testimony.

If the claims from the Troubles are not resolved, the international community should more clearly address loopholes of enforcement in humanitarian law. The Geneva Conventions and other charters apply in times of war, but increasingly, modern warfare looks very different from the more distinctive battles in days of old and the enforcement of rules becomes more important. Different too from the legacy of the past is the attention being paid to counter-terrorism. Traditionally, if the international community is to break new ground quickly regarding human rights law, the attention paid to the issue is a needed catalyst for the change. Thus, history suggests that if recognition of humanitarian law is to be expanded, now is the time to do it. This paper explores the Troubles not only because the people of Northern Ireland deserve to have this violent chapter in their society's history resolved, but because it may serve to demonstrate the destruction counter-terrorism can cause if left unchecked. Should Great Britain take responsibility for this smaller example of destruction, then perhaps we can assign the stories of the victims of the Troubles even greater meaning. They can be honored not simply as lives lost, but as a vehicle to protecting the lives of future members of society the next time justifications of counter-terrorism seek to unleash an onslaught on human rights.