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Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict

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Abstract

This Essay first explores the historical context of prisoner release in Ireland, North and South. Second, the role of prisoners in the process of conflict resolution in the 1990s is examined in the periods before and after the breakdown of the first IRA cease- fire. The provisions within the Good Friday Agreement and subsequent legislation are then analyzed in so far as they relate to prisoner release as an incentive for peace among organizations outside the peace process, decommissioning, the victims of violence, and prisoner reintegration. Finally, this Essay argues that the “prisoner issue” represents a crucial acknowledgement by the British government of the political character of the conflict and suggests that such a view will be required by all the protagonists if the Agreement is to survive.

PRISONERS, THE AGREEMENT, AND THE POLITICAL CHARACTER OF THE NORTHERN IRELAND CONFLICT

*Kieran McEvoy**

INTRODUCTION

The inclusion of provisions relating to the early release of paramilitary prisoners in the Good Friday Agreement¹ (or "Agreement") was one of the most controversial aspects of the Accord. In effect, practically all politically-motivated prisoners belonging to organizations on cease-fire will be released within two years of the scheme's commencement, by June 2000. This Essay first explores the historical context of prisoner release in Ireland, North and South. Second, the role of prisoners in the process of conflict resolution in the 1990s is examined in the periods before and after the breakdown of the first IRA cease-fire. The provisions within the Good Friday Agreement and subsequent legislation are then analyzed in so far as they relate to prisoner release as an incentive for peace among organizations outside the peace process, decommissioning, the victims of violence, and prisoner reintegration. Finally, this Essay argues that the "prisoner issue" represents a crucial acknowledgement by the British government of the political character of the conflict and suggests that such a view will be required by all the protagonists if the Agreement is to survive.

"It doesn't make any of us feel comfortable or happy to talk about releasing prisoners. But we also have to recognize that unless there is some agreement on such things there can be no agreement at all in Northern Ireland."²

The conflict in Northern Ireland has lead to a unique prison system in which, over the past thirty years, between fifty percent and seventy percent of prisoners have been imprisoned

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1. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998 [hereinafter Good Friday Agreement].

2. Interview by BBC Radio news with William Hague (Apr. 25, 1998), *reproduced in The Hague Defends His Support for Deal*, IRISH NEWS, Apr. 25, 1998 (visited Apr. 16, 1999) <http://www.irishnews.com/K_archive/250498/nnews5.html> (on file with the *Fordham International Law Journal*).

for politically motivated offences, many of them serving long sentences for the most serious of crimes.³ The prisons have been one of the key practical and ideological battlegrounds of the conflict. Paramilitary prisoners, particularly Republicans, have been willing to kill prison staff, to destroy prison property, to plan and execute escapes, and to hungerstrike until death, all in the assertion of their status as "political" rather than "ordinary" prisoners. The British government, on the other hand, has either viewed the prisons as crucial to a strategy designed to "defeat" terrorism, particularly during the "criminalisation" era of 1976-1981,⁴ or at the very least, as a mechanism to remove the "men of violence" from society while a political settlement was sought among the "constitutional parties."⁵

The prisons have also played a key role in the political developments that have lead to the peace process and the Good Friday Agreement. It is widely acknowledged that the origins of modern Sinn Féin as a political party lie in the political mobilization brought about during the hunger strike era of 1980 and 1981.⁶ Similarly, with regard to the development of the loyalist

3. ANNUAL REPORTS OF THE NORTHERN IRELAND PRISON SERVICE (HMSO, 1971-1998).

4. Criminalization was a strategy employed by the British government in Northern Ireland between 1976-1981, which sought to delegitimize and to depoliticize those involved in paramilitary violence. Internment without trial was ended, as was "Special Category Status" (in effect, *de facto* prisoner of war status), for convicted paramilitary prisoners. There were attempts to remove all practical and symbolic differences between terrorist and ordinary prisoners including segregation by paramilitary faction and the recognition of paramilitary command structures. Rigid enforcement of prison rules such as the wearing of prison uniforms and carrying out prison work were viewed as crucial in the attempts to "beat" the paramilitaries within the prisons. Allied to a tough police-lead security policy, rigorous interrogations, and the increased deployment of smaller specialist army units such as the Special Air Service ("SAS"), the government's stated intention was to portray the conflict as a law and order or security problem rather than a "political" problem, and as such, real hope of the "defeat" of terrorism was held out. For a fuller exposition of implications of this managerial strategy in the prisons, see Brian Gormally et al., *Criminal Justice in a Divided Society: Northern Ireland Prisons*, 17 CRIME & JUST. 51-135 (1993). For an account of the prisoners' resistance to criminalisation, see generally PADRAIG O'MALLEY, BITING AT THE GRAVE, THE IRISH HUNGERSTRIKES AND THE POLITICS OF DESPAIR (1990); BRIAN CAMPBELL ET AL., NOR WEEKLY SERVE MY TIME: THE H BLOCK STRUGGLE 1976-1981 (1994).

5. See, e.g., STEVEN C. GREER, SUPERGRASSES: A STUDY IN ANTI-TERRORIST LAW ENFORCEMENT IN NORTHERN IRELAND (1995).

6. See generally LIAM CLARKE, THE H BLOCKS & THE RISE OF SINN FÉIN (1987). As Gerry Adams, President of Sinn Féin, has described,

In the months after the hunger strike, we all tried to recover from the emotion and intensity of that period. All of us grieved. It was a time for reflection,

parties associated with loyalist paramilitaries (the Progressive Unionist Party (or "PUP") and the Ulster Democratic Party (or "UDP")), they too are staffed and largely lead by former prisoners and would attribute much of their political philosophy to discussion that took place among prisoners in the Maze prison (formerly Long Kesh) in the 1970s and 1980s.⁷ Serving prisoners, ex-prisoners, and prisoners' families were a crucial constituency in the Loyalist and Republican attempts at peace-building as each group moved towards their respective cease-fires. Neither Republicanism nor Loyalism would have been able to move away from political violence without the support of their prisoners, and as is widely acknowledged, the Good Friday Agreement could not have been concluded without provisions relating to the early release of such prisoners.

I. THE HISTORICAL CONTEXT OF THE EARLY RELEASE OF POLITICALLY-MOTIVATED PRISONERS IN IRELAND

Although it is little explored in the literature on conflict resolution and peace studies,⁸ the concept of the early release from prison of former combatants has a prominent role in the international experience of political conflict.⁹ More recently, the notion of the release of former combatants after a period of inter-

even as we intensified our publicity and propaganda efforts; as we reviewed the standing of Sinn Féin and the mood of our support base; as we learned the lessons of mass mobilisation and popular actions, of electoralism and broad front work.

GERRY ADAMS, *BEFORE THE DAWN: AN AUTOBIOGRAPHY* 316 (1996).

7. See generally JIM CUSACK & HENRY McDONALD, *UVF* (1997).

8. See MICHAEL VON TANGEN PAGE, *PRISONS, PEACE AND TERRORISM: PENAL POLICY, IN THE REDUCTION OF POLITICAL VIOLENCE, PRISONS* (1998).

9. In 1995, the author (with Brian Gormally) carried out an international comparative study on the relevance of prisoner release to the process of conflict resolution in South Africa, Italy, Spain, Israel/Palestine, and Ireland. That research focused upon various thematic areas including definitional questions regarding political motivation, the modalities of release, the role of victims, and reintegration, all of which were explicitly designed to feed into the debate on prisons in Northern Ireland. See BRIAN GORMALLY & KIERAN MCEVOY, *NORTHERN IRELAND ASSOCIATION FOR THE CARE AND RESETTLEMENT OF OFFENDERS, THE RELEASE AND REINTEGRATION OF POLITICALLY MOTIVATED PRISONERS IN NORTHERN IRELAND: A COMPARATIVE STUDY OF SOUTH AFRICA, ISREAL/PAL-ESTINE, ITALY, SPAIN, THE REPUBLIC OF IRELAND AND NORTHERN IRELAND* (1995); Kieran McEvoy, *Prisoner Release and Conflict Resolution: International Lessons for Northern Ireland*, *INTERNATIONAL CRIMINAL JUSTICE REVIEW* 8, 33-61 (1998). For a critical assessment of the impact of that research, see Brian Gormally & Kieran McEvoy, *The Northern Ireland Conflict and Peacemaking Criminology*, in *THINKING CRITICALLY ABOUT CRIME* 118-29 (B. MacLean & D. Milovanovic eds., 1997).

state violence has become one of the mainstays of international humanitarian law¹⁰ and indeed has been discussed as extending to non-state combatants.¹¹

One of the points often repeated during the course of the discussions on prisoner release in Northern Ireland, particularly by those who opposed such a move, was that it represented an unprecedented interference with the operation of the criminal justice process. As Ulster Unionist Security Spokesperson Ken Maginnis argued, "early releases outside the judicial system have never been made before."¹² In fact, however, there is a long British history of doing exactly that. In Anglo-Saxon legal tradition, the power of the sovereign both to dispense and mitigate punishments in the wake of battles or wars was viewed as appropriate to either individual offenders or classes of offenders from at least the seventh century. The British Parliament has enacted 110 acts of general pardon or amnesty for various classes of offenders,¹³ most of whom were involved in political or civil conflicts of one form or another. In Ireland, after every period of political violence since the fourteenth century, politically motivated offenders have been released from prison after hostilities ceased.¹⁴ An analysis of the various prisoner releases that have occurred in the twentieth century, in particular, both South and North of the border, offer crucial insights into this section of the Good Friday Agreement.

A. *Prisoner Releases in the South 1916-1962*

Following the Easter Rising of 1916 and the execution of many of the leaders of the Rising, the British government imprisoned and interned thousands of prisoners in Ireland, England,

10. DIETER FLECK & MICHAEL BOETHE, *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* (1995).

11. Laura Lopez, *Uncivil Wars—The Challenge of Applying International Humanitarian Law to Internal Armed-Conflicts*, 69 N.Y.U. L. REV. 916, 916-62 (1994).

12. *Mowlam Jail Hint Brings Political Fury*, IRISH NEWS, Aug. 11, 1997 (visited Feb. 10, 1999) <http://www.irishnews.com/k_archive/110897/news11.html> (on file with the *Fordham International Law Journal*).

13. OTTO KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* (1961).

14. Michael Mullan, Northern Ireland Association for the Care and Resettlement of Offenders, *Pardon and Amnesty in Ireland to 1937* (1995) (unpublished report on file with the *Fordham International Law Journal*).

and Wales.¹⁵ Republican prisoners began to organize themselves in the prisons and to protest their status as political prisoners using tactics such as hunger strikes, destruction of prison property, and escapes from prison.¹⁶ From December 1916 onwards, after David Lloyd George had become British Prime Minister, the release of large numbers of prisoners was ordered to "positively effect" public opinion in Ireland. In June 1917, a Cabinet decision recommended the exercise of the "royal prerogative of mercy" to many prisoners, an amnesty in all but name.¹⁷ Of the seventy-three Sinn Féin candidates returned in the 1918 election (twenty-six of them without a contest), half were sentenced or interned prisoners at the time. Faced with the decisive election result, the government began to release the remaining prisoners from the Rising and all were out by April 1919.

After the Anglo/Irish War, and the partition of the island in 1920-1921, discussions between the governments of the Irish Free State and Northern Ireland included the question of prisoner releases. At a meeting between Michael Collins, the Chairman of the Provisional Government in the South, and Northern premier Sir James Craig in January 1922, Collins insisted on an amnesty for those Republicans held in the North since before the Treaty was signed.¹⁸ The two leaders met again in February and finally on March 30 signed an "Agreement between the Provisional Government and the Government of Northern Ireland." The agreement included a provision that "[t]he two Governments shall, in cases agreed upon between the Signatories, arrange for the release of political prisoners in prison for offences before the date hereof. No offences committed after the 31st March, 1922, shall be open to consideration."¹⁹

In any event, no prisoners were freed as a result of the March agreement, which became redundant with the outbreak of Civil War in the South between those Republicans opposed to the Treaty and the new Free State government who supported it.

15. See generally SEAN O'MAHONEY, *FRONGOCH: UNIVERSITY OF REVOLUTION* (1987).

16. EARL LONGFORD & THOMAS P. O'NEILL, *EAMON DE VALERA* 52-60 (1974).

17. GEORGE DANGERFIELD, *THE DAMNABLE QUESTION: A STUDY IN ANGLO-IRISH RELATIONS* 258 (1976).

18. See TIM PAT COOGAN, *MICHAEL COLLINS* 340 (1990).

19. Kevin Boyle, *The Tallents Report on the Craig-Collins Pact of 30 March 1922*, XII *IRISH JURIST* 173-75 (1977).

Before bringing military courts into operation, the Provisional Government offered an amnesty on October 3, giving dissidents twelve days to lay down their arms.²⁰ By March 1923, 12,000 Republican prisoners were held by Free State forces. By virtue of the Indemnity (British Military) Act 1923²¹ (the "Indemnity Act 1923"), "[n]o action or other legal proceedings whatsoever" were allowed to be instituted against any person acting in the service of the Crown from the eve of the Easter Rising on April 23, 1916, to date. Likewise, at the end of the civil war the Indemnity Act 1923 stopped proceedings in respect of any act done on behalf of the Free State since June 27, 1922, "in the course of the suppression of the state of rebellion." De Valera, the leader of the anti-treaty faction, resisted proposals by some IRA officers to arrange a surrender of arms in exchange for an amnesty.²² The Indemnity Act 1924²³ had a wider scope applying to all parties in the conflict and lead to all anti-treaty IRA prisoners being released.

In 1938, the IRA started a bombing campaign of targets in Northern Ireland and in Britain.²⁴ In 1939, to cope with both the IRA campaign and the outbreak of the World War II, the Irish government declared a state of emergency and introduced internment once again.²⁵ Around two thousand people were interned during the war years under various provisions and hundreds were convicted by military courts. A Republican Prisoners' Release Committee was established at the end of 1945 to press for the release of remaining prisoners. The campaign grew in strength, and, lead by Sean McBride, the newly-formed Clan na Poblachta used the campaign as a vehicle in pursuing its electoral ambitions.²⁶ Clan took ten Dail seats in the general election of 1948 and formed a Coalition with Fine Gael. Within weeks of the change of government, the last five IRA prisoners were released from Portlaoise by order of the new Minister for Justice.²⁷

In December 1956, the IRA formally started its "border cam-

20. TIM PAT COOGAN, *THE IRA* (1987).

21. Indemnity (British Military) Act, 1923 (Eng.).

22. See LONGFORD & O'NEILL, *supra* note 16, at 225.

23. Indemnity (British Military) Act, 1924, ch. 12 (Eng.).

24. J. BOWYER BELL, *THE SECRET ARMY: THE IRA* (1979).

25. JOSEPH J. LEE, *IRELAND 1912-1985: POLITICS AND SOCIETY* 223 (1989).

26. See JOHN A. MURPHY, *IRELAND IN THE TWENTIETH CENTURY* (1975); see also TIM PAT COOGAN, *ON THE BLANKET: THE H BLOCK STORY* 26-27 (1980).

27. See BOWYER BELL, *supra* note 24, at 249.

paign" with attacks on Northern Ireland.²⁸ On July 4, 1957, the Irish Government introduced internment and by March 1958, 131 people were held in the Curragh. All were released, however, by March 11, 1959, a total of 206 having passed through the gates. Sentenced prisoners stood trial before the Irish District Courts and the Special Criminal Court composed of military officers. After a largely unsuccessful campaign, the IRA called a cease-fire on February 26, 1962.²⁹ Mountjoy prison held forty-two IRA men at the time of the cease-fire. By April 20, 1962, only twenty-nine IRA men remained, all of whom were unconditionally released on that date—representing a general amnesty, granted less than two months after the end of the campaign.

In sum, the history of the Southern Irish state offers several precedents for early release, or even general amnesty in the aftermath of a definitively concluded period of violent political conflict. In the early years of the Southern Irish State, its very survival depended partly on the process of genuine amnesty for opponents.³⁰ The broad precedent provided by the early releases of 1924, 1945, and 1962 would suggest that successive governments of the day, preferably with the agreement of the opposition, have sought to dispose of the question of prisoner release in whatever lawful way appears to coincide with political expediency. Such a quintessentially pragmatic approach to prisoner release was reflected by Irish governments of varying political persuasions during the current peace process and is discussed below.

28. COOGAN, *supra* note 26, at 377.

29. "The leadership of the Resistance Movement has ordered the termination of the campaign of resistance to British occupation . . . all arms and other materials have been dumped and all full-time active service volunteers have been withdrawn." Statement released by Irish Republican Publicity Bureau, Feb. 26, 1962.

30. This is not to suggest that the treatment of politically-motivated prisoners in the South should be understood as more "soft" than their Northern or British counterparts. For example, during World War II, the De Valera-led Fianna Fail Government allowed three IRA prisoners to hunger-strike to death in assertion of their status as political rather than criminal prisoners. This was a tactic that he and a number of his cabinet colleagues utilized for similar goals two decades earlier, leading to the charge by the then Labour Leader William Norton, "am I to understand that hunger or thirst strikes of this nature which were right in 1922, and 1923 are wrong in 1939?" 77 DÁIL DEB. col. 831 (Nov. 19, 1939). Rather, it could be argued that the approach taken in the South toward the prisoner question after various cessations of hostilities has been informed by a more intuitive understanding of the emotional and political significance of the prisoner issue and its historic potential to become a destabilizing element of the political landscape.

B. Prison Releases in the North 1920-1962

After the formation of the Northern Ireland state in 1920, one of the first actions by the newly-created provisional government was to introduce a state of emergency and intern those suspected of being members of the IRA. Of these prisoners, 130 were ultimately released as part of the post-treaty releases.³¹ As discussed above, a number of Craig/Collins meetings provided for the "release of political prisoners," but this release failed to materialize when high levels of political violence continued. Apart from those interned, the courts were busy trying and sentencing suspected IRA men, and the number of sentenced prisoners rose from 470 to 870 between April and October 1922. With the civil war raging in the South, divisions in the ranks in the North, and widespread loyalist violence and government repression, IRA activity petered out in the North by the autumn of 1922. Internment was ended in 1924 and internees were released. Sentenced prisoners were ultimately freed as a result of the Tri-partite Agreement, between the British government and the governments of the North and South, which was signed in December 1925. The resulting decisions on prisoner release were formed part of a package of concessions in return for increased recognition of partition by the Free State government.³²

The outbreak of World War II led to the reintroduction of internment by the government in the North, in line with their counterparts in the South.³³ By 1942, 802 suspected IRA men had been interned.³⁴ The IRA campaign of that era was seriously hampered by internments, jailing, and executions, both North and South. The Northern government released all internee's at the end of the war. As in the 1920s, at the end of World War II, the Northern government conditioned the release of interned, politically-motivated prisoners upon them keeping the peace.³⁵ However, some sentenced prisoners remained in prison for several years after the war ended.³⁶

31. See MICHAEL FARRELL, *NORTHERN IRELAND: THE ORANGE STATE* (1976).

32. See EAMON PHOENIX, *NORTHERN NATIONALISM: NATIONALISM, POLITICS AND THE CATHOLIC MINORITY IN NORTHERN IRELAND 1890-1940*, at 333-34 (1994).

33. See FRANCIS S.L. LYONS, *IRELAND SINCE THE FAMINE* (1983).

34. ROBERT FISK, *IN TIME OF WAR: ULSTER AND THE PRICE OF NEUTRALITY 1939-1945* (1983).

35. See JOHN MCGUFFIN, *INTERNMENT* (1973).

36. See FARRELL, *supra* note 31, at 168.

After the IRA "border campaign," which lasted from 1956 to 1962, eighty-nine internees were released after signing a pledge renouncing violence. Twenty-five sentenced prisoners, from a total of ninety-four prisoners sentenced for serious offenses, were released under the Royal Prerogative of Mercy. It appears that some prisoners gave a verbal undertaking, and in seven cases entered into a voluntary recognizance before a Resident Magistrate to keep the peace and be of good character for a number of years.³⁷ The attitudes of the Northern Ireland judiciary during this period are instructive, as then Lord Chief Justice MacDermott noted when sentencing a number of IRA prisoners for an arms raid in Omagh.

It may well be that when you have time for reflection you will wonder whether the sentences which I am about to pass can be reduced or abated. Whether that will ever come to pass is a matter for the executive government and not for me, but I will say this, and if you do not heed it now I hope you will later. It seems to me unlikely that your sentences will be curtailed unless at least two conditions are present—the first is that you yourselves will have turned your backs on violence, and the second is that the campaign of which you are at once the participants and the victims comes to a stop.³⁸

The response of the Unionist government to that IRA ceasefire is also of interest in 1999. Brian Faulkner, Minister of Home Affairs at the time and later Prime Minister of Northern Ireland, addressed the Stormont parliament on the day after the announcement. He began by repudiating "the implication . . . that there are persons in my prisons serving sentences for political offence," but later in a reply suggested that "persons who have been sentenced for their part in political activities" could seek to avail of the royal prerogative of mercy, as a number (unspecified) had already done. He suggested that he had "no intention of authorizing a general release" and that "the abandonment of the means to wage war will be an earnest of good faith; the retention of such will be an indication of the intent to resume the campaign."³⁹ Of the twenty-six IRA prisoners still in jail at the end of the campaign, all were released by December 1963,

37. Confidential correspondence to the author from a Northern Ireland Office source.

38. *Omagh Arms Raid Trial Concludes*, ULSTER NEWSLETTER, Dec. 16, 1954.

39. House of Commons, Official Report, Feb. 27, 1962, col. 1951 (N. Ir.).

within one year of the cessation of hostilities, with undertakings neither sought nor given and no hand over of IRA weapons.⁴⁰

The experiences of prisoner release in the North since partition are instructive for a number of reasons. First, although releases occurred more slowly in the North than in the South, the fact that they took place at all is significant given Unionist misgivings that Republicans would resume attacks on the Northern State. Second, Unionist ministers appeared more concerned with the symbolism of recognizing the political character of the IRA than their Southern counterparts. Third, as suggested by Faulkner's statement, there was a precedent of linking prisoner release to the question of the decommissioning of paramilitary weapons, although no such decommissioning took place. All of these factors featured heavily in Unionist discourses on prisoner release in the North during the current peace process.

C. Prisoner Release and the 1994 Cease-Fires

The period before the IRA and Loyalist cease-fires in 1994 was preceded by intense discussions and negotiations within the ranks of the respective movements including the prisoners. One former Republican prisoner has suggested to the author that an earlier version of the discussion document sometimes referred to as Totally Unarmed Strategy ("TUAS"), which laid out the potential for a non-violent Republican strategy, had actually circulated among Republican prisoners in the early 1990s.⁴¹ Certainly in the period before the announcement of the cease-fire on August 31, 1994, the leadership of the IRA prisoners was con-

40. Confidential correspondence, *supra* note 37.

41. Interview with former IRA life sentenced prisoner (Jan. 17, 1996). The document referred to as Totally Unarmed Strategy ("TUAS") outlined the favorable national and international political configuration for progress on Republican goals in the absence of armed struggle. Such factors included a sympathetic Fianna Fail lead administration in Dublin, John Hume's leadership of the SDLP, the interest of the U.S. Presidency and the Irish American Lobby, and the unpopularity of the then Conservative government with fellow members of the European Union. For a more detailed discussion, see EAMONN MALLIE & DAVID MCKITTRICK, *THE FIGHT FOR PEACE: THE SECRET STORY OF THE IRISH PEACE PROCESS* (1996). Some commentators critical of the peace process suggested in the wake of the breakdown of the first IRA cease-fire in 1996 that TUAS might in fact mean "Tactical Use of Unarmed Struggle." See, e.g., Eoghan Harris, *Sinn Féin Line a Recipe for Strife*, *IRISH TIMES*, Dec. 24, 1996.

fident of the shape of the political settlement to come. As the then IRA Officer Commander Sean Lynch indicated:

[We] are a product of the political conflict. Within a negotiated settlement prisoners are one of the issues which need to be addressed. If there's a solution all prisoners should be released immediately. John Major might say differently, but all the men on this wing know that once there's a solution we're out.⁴²

The Loyalists also worked hard to ensure that their prisoners were involved in the discussions that lead to the Loyalist cease-fire in October 1994. In the weeks preceding the cease-fire declaration, leading loyalist politicians were permitted to visit their prisoners in the Maze. The Ulster Defence Association, the largest Loyalist paramilitary grouping, in particular indicated that any cease-fire was explicitly predicated upon the support of its prisoners and indeed suggested at one stage that the cease-fire announcement should take place at the Maze car park to underline the prisoners' importance.⁴³ Unlike its Republican counterparts, who had commended "the political prisoners who had sustained the struggle against all the odds for the past 25 years,"⁴⁴ the Loyalist cease-fire statement "solemnly promised to leave no stone unturned to secure their [the prisoners] freedom."⁴⁵

This subtle difference in emphasis was to characterize the behavior of both sets of protagonists in their attitudes to political engagement after the first cease-fires. The British government instigated preliminary discussions between civil servants and rep-

42. *Inside the Maze*, GUARDIAN, Feb. 21, 1994 (interview with Sean Lynch, IRA Officer Commanding Maze Prison).

43. See CUSACK & McDONALD, *supra* note 7, at 319. Senior figures within the PUP, the political wing of the UVF (the other major Loyalist paramilitary faction), have suggested to the author that while UVF prisoners were a crucial constituency in the preparations for peace, they were regarded as another battalion of the UVF and appear to have less power over political direction than their UDA counterparts in the Maze. Interview with Senior PUP Figures (Dec. 2, 1994). The Loyalist cease-fire was ultimately announced in Fernhill House Estate, a training ground for the original Ulster Volunteer Force, which had drilled there at the beginning of the century in preparation for their armed resistance to the introduction of Home Rule in Ireland.

44. Statement issued by the Irish Republican Publicity Bureau for the Irish Republican Army on August 31, 1994, declaring a complete cessation of military operations.

45. Statement issued by the Combined Loyalist military Command declaring a cessation of operational hostilities (visited Feb. 10, 1999) <<http://www.uhb.fr/Languages/Cei/cfloy94.htm>> (on file with the *Fordham International Law Journal*).

representatives from Sinn Féin and the fringe Loyalist parties in December 1994. According to one former government negotiator who attended those meetings:

[All] the Loyalists wanted to talk about was prisoners. I suppose they had come to the conclusion that the Union was safe, therefore the main issue on their agenda was the prisoners. The 'Shinners' [Sinn Féin] however seemed reluctant to be drawn on discussions regarding prisoners. . . we tried to get them to engage in it but they were having none of it.⁴⁶

While Republicans did establish a pressure group "Saoirse" to campaign for the release of politically-motivated prisoners following the first IRA cease-fire, they appeared concerned to avoid a focus upon the prisoner issue from diluting their negotiating position on other matters such as constitutional change. As one IRA prisoner interviewed by the author in 1996 argued, "I did not go to prison to get out of prison movement on prisoners will not suffice."⁴⁷ Nonetheless, the British government's failure to move on prisoner issues, even on humanitarian issues such as the transfer of prisoners back to Northern Ireland to be closer to their families, an idea that had been part of government policy since the early 1990s, was seen as indicative of the general lack of good will by a Conservative administration apparently motivated by "the negativity of mistrust."⁴⁸

The Irish government quickly recognized the political importance of the prisoner issue and began freeing prisoners within months of the 1994 cease-fire, releasing a total of thirty-six of the seventy IRA members held in the Republic's jails by February 1996 in order to "consolidate the peace process."⁴⁹

46. Confidential source.

47. Interview with former IRA prisoner (Dec. 11, 1995).

48. See TIM PAT COOGAN, *THE TROUBLES: IRELAND'S ORDEAL 1966-1995 AND THE SEARCH FOR PEACE* 381 (1995).

49. *Freed IRA Members Against Renewed Cease-fire*, *IRISH TIMES*, June 10, 1998. The significance of the interplay between pragmatism and political symbolism was highlighted in January 1995 when the Irish Government announced their intention to use the provisions of the Criminal Justice Act 1960 to release IRA prisoners. That act had originally been intended to facilitate the temporary release of "ordinary prisoners." A number of the nine IRA prisoners scheduled for release argued that such a mechanism undermined their status as political prisoners and argued that they would not leave unless release was granted under Section 33 of the Offences Against the State Act, the emergency legislation under which they were tried. The Government relinquished and the prisoners were given permanent release under the emergency legislation on the condition that they did not, "through publicity or otherwise, do anything which might

While releases were halted as a result of the breakdown of the IRA cease-fire in February 1996, they began again within weeks of the announcement of the restoration of that cease-fire in July 1997⁵⁰ and continued before and after the signing of the Good Friday Agreement.

The response by the then British government to the 1994 cease-fires in general and to the prisoner issue in particular, has been widely criticized.⁵¹ Eventually, in December 1995, over a year after the cease-fires, the government reintroduced fifty percent remission rates for paramilitary prisoners. The government emphasized that the move was designed to bring remission rates into line with the position of paramilitaries prior to 1989 and with "ordinary" prisoners, who had always been entitled to fifty percent remission, rather than as a positive contribution towards peace-building.⁵² The legislative mechanism that was used explicitly restricted flexibility on future increases in remission rates. Furthermore, with paramilitary prisoners being released on license with increased powers to revoke such licenses (a condition not applicable to "ordinaries"), the measure was widely viewed by prisoners' groupings as "minimalist and begrudging."⁵³

In the context of a failure to move on other key demands of Sinn Féin and the Loyalist parties, such as the beginning of all party negotiations and the continued insistence on the decommissioning of paramilitary weapons, many view the mishandling of the prisoner issue by the then British government as symbolic of a broader failure to accept the political character of the conflict. The IRA cease-fire ended on February 9, 1996. As one Republican activist told the author:

I wouldn't say the prisoner issue broke the first cease-fire because it didn't. However it was viewed as symptomatic, it was

cause annoyance to, or distress to any person or to the family or friends of any person who may have been affected by the offences which led to their imprisonment." *Id.*

50. *More Releases of Republican Prisoners May Be on the Way*, IRISH NEWS, Aug. 14, 1997 (visited Feb. 9, 1999) <http://www.irishnews.com/k_archive/140897/news10.html> (on file with the *Fordham International Law Journal*).

51. For a critical overview of the British government's response to the first IRA and Loyalist cease-fires, see Kieran McEvoy & Brian Gormally, *Seeing Is Believing: Positivist Terrorology, Peacemaking Criminology and the Northern Ireland Peace Process*, 8 CRITICAL CRIMINOLOGY 1, 9-30 (1997).

52. House of Commons, Official Report, Oct. 30, 1995, cols. 21-71.

53. Interview with former UVF prisoner (Nov. 5, 1995).

one matter over which the Brits had complete discretion and they blew it. It was hard to convince anyone they were serious when they wouldn't even transfer prisoners back to be near their families. When they did finally move on releases towards the end of 1995 it was far too little too late.⁵⁴

II. PRISONERS, THE RENEWED IRA CEASE-FIRE, AND NEGOTIATING THE AGREEMENT

In the period following the breakdown of the first IRA cease-fire, and with the Loyalist cease-fire showing considerable strain evidenced by a number of attacks on Catholic civilians, back bench MP Conservative Andrew Hunter suggested that the Tory government should consider reducing Loyalist prisoners' sentences in order to encourage the maintenance of the Loyalist cease-fire.⁵⁵ While the then Conservative government did not take up this suggestion, the lessons of the failures of the first IRA cease-fire appeared to have been internalized by the Labour government that replaced the Conservatives with a massive majority in May 1997.

When Tony Blair took office, he resolved to give Sinn Féin one more opportunity to join the Northern Ireland peace talks that had begun in June 1996, and from which Sinn Féin had been excluded because of the lack of an IRA cease-fire.⁵⁶ Following intensive discussions between the two governments and John Hume, the leader of the SDLP, as well as preliminary meetings with Sinn Féin, the British government published an Aide Memoir, in essence meeting the Republicans' widely-stated requirements for a restoration of the IRA cease-fire. In return for a restoration of the 1994 cessation, Sinn Féin would be guaranteed entrance to the talks within six weeks of a cease-fire, the talks would be concluded by an agreed deadline of May 1998, and the decommissioning issue would be resolved as envisaged in the Mitchell Report rather than as a pre-condition to substantive negotiations.⁵⁷ That Aide Memoir also recognized "the particular

54. Interview with Sinn Féin activist (Jan. 21, 1999).

55. *Move to Cut Loyalist Prison Sentences*, IRISH TIMES, Oct. 14, 1996 (visited Feb. 10, 1999) <<http://www.irish-times/paper/1996/html>> (on file with the *Fordham International Law Journal*).

56. Prime Minister Tony Blair, Speech at The Royal Ulster Agricultural Show, Belfast (May 16, 1997) (transcript on file with the *Fordham International Law Journal*).

57. NORTHERN IRELAND INFORMATION SERVICE, AIDE MEMOIR SETTING OUT BRITISH

sensitivities of prisoner issues on all sides.”⁵⁸ On July 19, the IRA restored its complete cessation of military operations.

The refreshing pragmatism of the new Labour government⁵⁹ quickly manifested itself in the area of prisoners. In August, less than a month after the IRA cease-fire, Dr. Marjorie Mowlam indicated that while she was not yet ready to consider prisoner releases “as the cease-fire holds, other options become possible.”⁶⁰ The reticence shown by the Republicans during the first cease-fire, with respect to discussing prisoners also appeared to have dissipated in the context of prisoners release as part of the all party peace negotiations, rather than in bilateral negotiations with civil servants. In September 1997, on a visit to the Maze and Maghaberry prisons, Sinn Féin Chief Negotiator Martin McGuinness assured IRA prisoners in the Maze and Maghaberry that “their release and the transfer and release of prisoners from England was a priority for us and that there could be not be a peace settlement without the release of all political prisoners.”⁶¹

The British government’s willingness to engage realistically on the prisoner issue was severely tested when UDA prisoners voted in January 1998 to withdraw their support for the peace process.⁶² As noted above, UDA prisoners appeared to exercise considerably greater influence over their political wing, the UDP, than their counterparts in the IRA and UVF wings of the Maze. With a number of killings carried out over the Christmas 1997 period, some of them subsequently admitted by the UDA,

GOVERNMENT’S POSITION ON THE ENTRY OF SINN FÉIN INTO POLITICAL DEVELOPMENT TALKS (June 15, 1997).

58. *Id.*

59. In 1996, a similar formulation that led to the renewal of the IRA cease-fire had been offered to John Major’s Government and rejected as “not properly fitting the Government’s position.” NORTHERN IRELAND INFORMATION SERVICE, GOVERNMENT STATEMENT ON NORTHERN IRELAND (1998) (on file with the *Fordham International Law Journal*).

60. *Mowlam Jail Hint Brings Political Fury*, IRISH NEWS, Aug. 11, 1997 (visited Feb. 10, 1999) <http://www.irishnews.com/k_archive/110897/news11.html> (on file with the *Fordham International Law Journal*).

61. *Sinn Féin Briefs IRA Prisoners*, IRISH NEWS, Sept. 19, 1997 (visited Feb. 10, 1999) <http://www.irishnews.com/k_archive/190997/news13.html> (on file with the *Fordham International Law Journal*).

62. *UDA Prisoners Reject Peace*, IRISH NEWS, Jan. 5, 1998 (visited Feb. 10, 1999) <http://www.irishnews.com/k_archive/050198/news13.html> (on file with the *Fordham International Law Journal*).

the Secretary of State took the decision to go into the prison and speak directly to the leadership of the UDA prisoners. This decision was a remarkable event, given that much of the past thirty years had been characterized by a refusal (formally at least) by the British government to recognize paramilitary command structures within the prisons. A fourteen point document was presented to the UDA prisoners, which included provisions on the question of early release.⁶³ In what was widely perceived to have been a huge political gamble, Dr. Mowlam successfully persuaded the UDA prisoners to reverse their decision and to reinstate their support for the peace process.⁶⁴

As indicated to the UDA prisoners, in February 1998 the British government submitted a paper to the Liaison Sub committee on Confidence Building measures regarding prisoners. The British Government, having received position papers from a number of the political parties (UDP, PUP, SDLP, Sinn Féin, and the Irish Government—the rest of the parties did not address the issue), indicated a willingness to “work out an account of what could happen in respect of prisoner releases in the context of a peaceful and lasting settlement being agreed.”⁶⁵ In effect, the government’s position had clearly moved from whether prisoner release would happen, to a view on the modalities of release and the role of prisoners in the overall settlement.

For those individuals involved in negotiating the section of the agreement dealing with prisoners on behalf of Sinn Féin and the Loyalist parties, the first of their key objectives was to ensure that the process for release would be completed within an

63. “We [the British government] recognise that prisoner issues are important to parties on both sides. They too need to be resolved, alongside progress on other issues, to the satisfaction of the participants in the process. We have responsibility to maintain community confidence in the criminal justice system and in the political process. We are prepared in the liaison committees on confidence building measures to discuss parties concerns and to work out an account of what would happen in respect of prisoner releases in the context of an overall political settlement being agreed.” See *Prisoners Fate Tied to Settlement*, IRISH NEWS, Jan. 10, 1998 (visited Feb. 10, 1999) <http://www.irishnews.com/k_archive/100198/news5.html> (on file with the *Fordham International Law Journal*) (reprinting statement by British government).

64. See *She’s Brave, She’s Crazy*, ULSTER NEWSLETTER, Jan. 9, 1998; *The Gamble Pays Off: Loyalists Prisoners Their Position After Talks with Mowlam*, IRISH TIMES, Jan. 10, 1998; Brendan Anderson, *New Hope as Maze Gamble Pays Off*, IRISH NEWS, Dec. 10, 1998; *Finding Hope in the Maze*, GUARDIAN, Jan. 10, 1998.

65. LIAISON SUB-COMMITTEE ON CONFIDENCE BUILDING MEASURES, THE BRITISH GOVERNMENT, PRISON ISSUES, (Feb. 4, 1998).

agreed time-frame. As Progressive Unionist prisons spokesperson William Smith indicated in March 1998, "[t]he PUP will not entertain any agreement that does not include a comprehensive release scheme to begin at the point of the agreement and within a given time frame."⁶⁶ In the final hours of negotiation, as a two year time frame for completion of the releases emerged as the most likely outcome, a number of remarkable events occurred including an approach by senior Republican Gerry Kelly to the Loyalists for an agreement on a one-year time scale.⁶⁷ The other key objective, also ultimately successful, was to ensure that prisoner release was not conditioned upon prior decommissioning of paramilitary weapons.

For mainstream Unionists, the provisions relating to all qualifying prisoners being released within two years were clearly among the most unpalatable elements of the Agreement. A number of senior figures within the Ulster Unionist Party, such as Jeffrey Donaldson, dissented from the leadership on the day the Agreement was concluded on the specific issues of prisoner release and the failure to address decommissioning.⁶⁸ The British government made frantic efforts to minimize the consequences of the releases, including a much copied hand written note from the Prime Minister's Chief of Staff, dated the day of the Agreement, pointing out the high numbers of prisoners who would have been released in any case under existing remission arrangements.⁶⁹ The final draft of the prisoner section of the Agreement provided for the establishment of an independent commission in both North and South, excluded organizations not on cease-fire, contained a two-year time frame, created a deadline for enacting enabling legislation of June 1998, and made specific reference to the need for appropriate reintegration mechanisms for paramilitary prisoners.⁷⁰

66. *Prisoner Releases Crucial Says PUP*, IRISH NEWS, Mar. 20, 1998 (visited Feb. 10, 1999) <http://www.irishnews.com/k_archive/200398/nnews7.html> (on file with the *Fordham International Law Journal*).

67. Interview with Sinn Féin activist (Jan. 25, 1999). According to Sinn Féin, the Loyalists rejected Kelly's approach.

68. See Donaldson's *Fears Centre on Weapons and Prisoners*, BELFAST TELEGRAPH, May 18, 1998.

69. Hand Written Note from Jonathon Powell, Prime Minister's Chief of Staff, to Ken Maginnis MP, Apr. 10, 1998.

70. 1. Both Governments will put in place mechanisms to provide for an accelerated programme for the release of prisoners, including trans-

A. Prisoners and the Referenda Campaign

In the weeks and months following the conclusion of the Agreement, during the referenda in North and South to implement its provisions and the subsequent elections to the Northern Ireland Assembly, prisoners were to remain at the top of the political agenda. As Sinn Féin prepared for its historic Ard Fheis party conference to consider the party's view of the Agreement and the difficult question of moving away from its abstentionist past to take up seats in the Northern Assembly, Republicans requested the temporary release of a number of prisoners to address the conference. Both the British and Irish governments accepted the importance of a public endorsement from the prisoners to the Republican party faithful. In total, twenty-seven IRA prisoners were given parole for the Ard Fheis, two from Maghaberry, eight from Portlaoise prison in the Republic, and the rest from the Maze.⁷¹

Among those present at the Sinn Féin rally were a number of prisoners who had recently been transferred from Britain to the Irish Republic (the "Balcombe Street Gang"). These prisoners, the longest serving Republicans who had each served twenty-two years in British prisons, received an emotional and tumultu-

ferred prisoners, convicted of scheduled offences in Northern Ireland or, in the case of those sentenced outside Northern Ireland, similar offences (referred to hereafter as qualifying prisoners). Any such arrangements will protect the rights of individual prisoners under national and international law.

2. Prisoners affiliated to organisations which have not established or are not maintaining a complete and unequivocal cease-fire will not benefit from the arrangements. The situation in this regard will be kept under review.
3. Both Governments will complete a review process within a fixed time frame and set prospective release dates for all qualifying prisoners. The review process would provide for the advance of the release dates of qualifying prisoners while allowing account to be taken of the seriousness of the offences for which the person was convicted and the need to protect the community. In addition, the intention would be that should the circumstances allow it, any qualifying prisoners who remained in custody two years after the commencement of the scheme would be released at that point.
4. The Governments will seek to enact the appropriate legislation to give effect to these arrangements by the end of June 1998.

Good Friday Agreement, *supra* note 1, Prisoners.

71. *High Profile Prisoners at Ard Fheis*, IRISH TIMES, May 11, 1998 (visited Feb. 9, 1999) <<http://www.irish-times.com/irish-times/paper/1998/0511/html>> (on file with the *Fordham International Law Journal*).

ous welcome. Michael O'Brien, Officer Commanding of the IRA prisoners in Portlaoise, used the example of these prisoners in his speech in favor of taking up seats in the Northern Assembly.⁷² With support also forthcoming from the IRA's Officer Commanding in the Maze and the female prisoners at Maghaberry, the Sinn Féin leadership secured an overwhelming majority for the Agreement and its strategy to take up their seats.⁷³

While the unequivocal backing of the prisoners undoubtedly eased the passage of dramatic changes in Republican policy, the televised images of IRA bombers being cheered and lauded as heroes had a predictably negative effect among Unionists in the North. While those Unionist led by David Trimble campaigning for a "Yes" vote in the referendum had established an early pole lead, the images emanating from the Sinn Féin Ard Fheis have been well described as "Christmas for the No Vote."⁷⁴ Unionist sources claimed that the Unionist "Yes" vote dropped by ten percent in the immediate aftermath of the Dublin Conference.⁷⁵ While Irish Premier Bertie Ahern defended his and the British government's decision to release the prisoners for the

72. You may ask what has this got to do with the proposed assembly. It is this: after 23 years in British prisons, these men are our own Mandelas. They are fit, they are strong, they are unbowed, humorous, politically astute and aware, and they are full of honest opinion and integrity. And all of that comes on the back of trust, belief and above all, unity during those 23 years in the belly of the beast United we can do whatever we want, just as those united POW's who have returned from England have endured and ultimately defeated the most barbaric prison system and conditions.

Statement of Michael O'Brien of the Portlaoise Martyrs cumann i Portlaoise Prisom, to delegates of the Northern Ireland assembly, *reprinted in* Michael O'Regan, *Huge Votes in Favor of Taking Seats in Assembly*, IRISH TIMES, May 11, 1998 (visited Feb. 10, 1999) <<http://www.irish-times/paper/1998/0511/html>> (on file with the *Fordham International Law Journal*).

73. See *Ard Fheis Ends with Historic Yes Vote*, IRISH NEWS, May 11, 1998 (visited Feb. 10, 1998) <http://www.irishnews.com/k_archive/110598/news.html> (on file with the *Fordham International Law Journal*). In fact, 331 of the 350 eligible delegates at the Ard Fheis voted in favour of Sinn Féin taking up their seats in the Assembly. See O'Regan, *supra* note 72.

74. *Prisoners at Ardheis – Christmas for the No Lobby: The Prisoners Issue Could Damage the Yes Vote in Northern Ireland*, IRISH TIMES, May 12, 1998 (visited Feb. 10, 1999) <<http://www.irish-times.com/irish-times/paper/1998/0512/html>> (on file with the *Fordham International Law Journal*).

75. See Deaglan de Breadun, *Unionist Support for Agreement Drops Sharply*, IRISH TIMES, May 15, 1998 (visited Feb. 9, 1999) <<http://www.irish-times.com/irish-times/paper/1998/0515.html>> (on file with the *Fordham International Law Journal*).

Ard Fheis, reminding the Dail that prisoners "had been a significant force for peace and the agreement," he criticized the triumphant tone of the prisoners' welcome.⁷⁶ A UDP event held later in the week in Belfast, at which leading UDA prisoner Michael Stone, who was out on home leave, was treated to a similar hero's welcome did little to assuage Unionist concerns.⁷⁷ While the Unionist "Yes" vote did recover to some extent in the final days of the campaign, the prisoners question remained the most commonly identified reason for voting against the Agreement by Unionist voters.⁷⁸

Both of these events illustrated the complex balancing act required in the management of the prisoners issue within the peace process. The laudable pragmatism shown by both governments in using flexibility on prisoner issues to encourage Republicans and Loyalists away from their violent past, was offset by the serious misgivings held by large sections of Unionism towards prisoner release. While Nationalists appeared to accept prisoner release for the most part as necessary in the process, most Unionists, beyond the small electorate of the PUP and UDP, did not.⁷⁹

B. *The Prisoner Release Legislation*

The interaction between prisoner release and peacemaking is sometimes viewed in terms of a "carrot and stick" approach, wherein releases are viewed as one incentive towards ending violence and released prisoners may become "hostages" to ensure the continuance of the cease-fires.⁸⁰ Although the view of prisoners as "hostages" or "negotiating cards" has featured in some

76. *Ahern Hits Out at IRA Triumphalism*, IRISH NEWS, May 15, 1998.

77. *Crowd Hails Stone Hero*, BELFAST TELEGRAPH, May 15, 1998.

78. The releases of paramilitary prisoners was cited by fifty percent of those Official Unionist voters intending to vote "No" in the Referendum in polling a week before the Referendum. *Irish Times Mori Poll, reported in* IRISH TIMES, May 11, 1998. As one Northern Ireland Office pollster reported,

The prisoners issue is dominating [Protestant] views of the referendum. What does it mean? They think it means something more fundamental than just the moral outrage. . . . The prisoner issue becomes a symbol in their minds of a fundamental flaw, a kind of real concern, a worry, a heartache, a deeply emotional issue which then dominates everything else.

Say Hello to Gunmen, Wave Goodbye to Peace?, SUNDAY TRIBUNE, May 17, 1998.

79. The possible reasons for the differences in views between the two main communities is discussed below.

80. BRENDAN O'LEARY, *FREE THE GUNMEN* (1997).

of the discussions on prisoner release, such views are not afforded much expression in the legislation that gave effect to commitments in the Agreement. Where the carrot and stick metaphor may perhaps be of more analytical use is in relation to the question of prisoner release and encouraging recalcitrant organizations into the peace processes, as well as in the notion of prisoner release as a lever to secure concessions from paramilitary organizations with respect to decommissioning. Together with these two areas (perhaps better understood within a framework of reconciliation and healing), the issues of prisoner release and victims and the reintegration of paramilitary prisoners make up the four key areas covered by the prisoner release provisions in the Agreement.

Before examining those issues, it might be useful to offer a brief overview of the way in which prisoner release is given effect under the Northern Ireland (Sentences) Act⁸¹ (or "Sentences Act") in the North and the Criminal Justice (Release of Prisoners) Act⁸² in the Republic. Under the Northern Ireland (Sentences) Act, an independent commission was established with the responsibility for overseeing the release of "qualifying" paramilitary prisoners. The membership of that Commission included a number of prominent individuals who had long argued for the release of paramilitary prisoners.⁸³ Qualifying prisoners are defined in the Northern Ireland (Sentences) Act as prisoners convicted of a scheduled or "terrorist offence" before April 10, 1998, when the Agreement was signed. In addition, a qualifying prisoner must not be a supporter of an organization not on cease-fire. Furthermore, if released, a qualifying prisoner must not be likely to become a supporter of such an organization.

81. Northern Ireland (Sentences) Act, 1998, ch. 35 (Eng.).

82. Criminal Justice (Release of Prisoners) Act 1998 (Ir.).

83. In an appointment of considerable symbolic importance, Brian Currin, former chair of the Amnesty Commission in South Africa, which had released politically-motivated prisoners in South Africa after Mandela became President in 1994, was appointed co-chair along with retired civil servant Sir John Blelloch. In addition to his South African experience, Currin had been associated with a number of initiatives in Northern Ireland and Britain between 1995 and 1998 organized by NIACRO (the Northern Ireland Association for the Care and Resettlement of Offenders) as part of NIACRO's campaign on the release of paramilitary prisoners. With the appointment of the NIACRO Chief Executive, a member of the NIACRO Executive Committee, and a prominent Northern Ireland human rights lawyer, as well as a range of independent experts from outside Northern Ireland, the make-up of the Commission's membership appeared designed to ensure a pragmatic approach to prisoner release.

Lastly, with respect to life sentenced prisoners, the prisoner must be someone who, if released immediately, would not be a danger to the public.⁸⁴ The power of the Secretary of State to "specify" organizations under Section 3 provides for both a monitoring function in ensuring that organizations maintain their "complete and unequivocal" cease-fires and allowing sufficient flexibility to encourage organizations not on cease-fire to declare a cessation and thus ultimately to ensure that their prisoners will benefit from the early release mechanisms.⁸⁵

The process for releasing prisoners is that prisoners are encouraged to make applications for release to the commission, 446 of which were received by the Commission by August 21, 1998.⁸⁶ These applications are then passed to the Northern Ireland Prison Service for confirmation of the accuracy of the details with respect to the offenses and sentences and for confirmation that the prisoner belonged to a group eligible for release. When these applications are returned to the Commission, the prisoners are given "preliminary indication" of whether they will be freed early. This "preliminary indication" is then followed by a substantive determination.⁸⁷ Prisoners serving fixed term sentences have their sentences reduced by two-thirds.⁸⁸ For prisoners sentenced for life, the Commission calculates how long these prisoners would have normally served and reduces it by one third.⁸⁹ Any remaining prisoners are released by June 2000. Dissatisfied prisoners may appeal to a different panel of Commissioners or may request a judicial review of the decisions. The Secretary of State retains an overall power to suspend or later to revive the scheme or to prevent the release of a person adjudged to be failing to meet any of the criteria outlined above.⁹⁰ As of

84. Northern Ireland (Sentences) Act, 1998, ch. 35, § 3 (Eng.).

85. *Id.*

86. *See Prisoners Out in A Fortnight*, IRISH NEWS, Aug. 21, 1998.

87. Northern Ireland (Sentences) Act, 1998, §§ 14-15.

88. *Id.* § 4(1)(a).

89. *Id.* § 6(1)(a).

90. *Id.* § 16. There has been considerable media speculation that the Secretary of State has come under pressure from the police to delay the release of high profile UDA prisoner Johnny "Mad Dog" Adair for fear that he would use his paramilitary infrastructure to engage in the illegal drugs trade. *See RUC Plea to Keep 'Mad Dog' in Jail*, SUNDAY TIMES, Jan. 3, 1999; *RUC Silent on Adair Claim*, IRISH NEWS, Jan. 4, 1999 (visited Mar. 13, 1999) <http://www.irishnews.com/k_archive/040199/nnews2/html> (on file with the Fordham International Law Journal).

January 26, 1999, approximately 240 paramilitary prisoners have been released in the North under this scheme.

In the Irish Republic, a similar scheme has been introduced, albeit with the commission made up largely of officials in the Department of Justice. Given the Irish government's previous willingness to release prisoners, fresh legislation was perhaps not technically required. However, the Irish government was apparently well aware of the political and symbolic significance of creating a specific post-Agreement release process. As Minister for Justice John O'Donoghue explained:

While specific legislation is not necessary to allow effect to be given to the releases envisaged in the Agreement, a broader political issue is at stake. There is agreement on all sides of the House that we should do nothing which might be open to the perception that we are not complying fully with all the terms of the Agreement and in those circumstances there will be general support for the Bill.⁹¹

Releases recommenced in the Irish Republic almost immediately after the new Commission was established and have included the man convicted of the murder of Lord Louis Mountbatten in 1979.⁹² Together with the equivalent legislation for the North, these provisions may be understood in four key areas.

1. Prisoner Release as an Incentive to Peace for Dissident Paramilitary Groupings: The Carrot?

The provisions for the release of prisoners in both jurisdictions permitted for the exclusion of those groups initially opposed to the peace process and those who continued to engage in armed actions. These groupings included the Loyalist Volunteer Force ("LVF"), the Irish National Liberation Army ("INLA"), the Continuity IRA, and the "Real" IRA. In the event of a cease-fire being declared by any of these organizations, however, the legislation was sufficiently flexible to allow the respective governments to recognize such cessations. This strategy, al-

91. Irish Minister for Justice, Equality & Law Reform John O'Donoghue, Criminal Justice (Release of Prisoners) Bill 1998, Second Stage, Dail Debates Official Report, July 2, 1998.

92. *New Law Sees Six Freed from Portlaoise*, IRISH TIMES, Aug. 1, 1998; *Man Convicted of Murder of Mountbatten Is Freed*, IRISH TIMES, Aug. 7, 1998 (visited Feb. 9, 1999) <<http://www.irish-times.com/paper2/16/990807/nnews/html>> (on file with the *Fordham International Law Journal*).

lied with the changed political landscape of the post-Agreement era and the technical limitations of these smaller organizations, proved highly successful. As of January 1999, only one of the groups failed to observe a cease-fire.

The first such group in the post-Agreement era to declare a cease-fire was the dissident Loyalist grouping, the LVF, who announced a cessation in May 1998 during the run-up to the referendum.⁹³ The LVF, formed as a breakaway from the larger UVF and led by the former head of the Mid-Ulster UVF, Billy Wright, had been bitterly opposed to the peace process and the political direction taken by the UVF's political wing, the Progressive Unionist Party.⁹⁴ When Billy Wright himself was murdered in the Maze prison by the INLA in December 1997, the LVF retaliated with a number of random attacks on Catholic civilians and continued its campaign of violence up until May 1998. The LVF initially denied that it called its cease-fire in order to benefit from the early release provisions. However, its Officer Commanding in the Maze subsequently demanded "parity of esteem to prisoners from other organizations on cease-fire,"⁹⁵ and its spokesperson Pastor Kenny McClintock indicated a willingness to engage on decommissioning in return for movement on "prison conditions."⁹⁶ Its cease-fire was ultimately accepted by the British government on November 12, 1998, and the approximately twenty-five LVF prisoners became eligible to apply for release at that juncture.⁹⁷

93. The soldiers of the LVF have fought against the Irish peace process and the sell out of our country. This has not been an easy task especially when you have all the different sides fighting against you. Northern Ireland has come to a crucial part of its history, on the 22nd May people will vote for a United Ireland through a yes or vote no to remain British and hold on to everything Protestant people hold dear. . . . The LVF are now calling an unequivocal cease-fire to create the proper climate in people's minds, so when they do go to vote they will make the proper decision for Ulster and that is to vote no.

LVF Announces Unequivocal Cease-fire, IRISH NEWS, May 15, 1998 (visited Mar. 13, 1999) <http://www.irishnews.com/k_archive/150598/news2.html> (on file with the *Fordham International Law Journal*).

94. See generally CUSACK & McDONALD, *supra* note 7.

95. *LVF Chief in Maze Confirms Cease-fire*, IRISH TIMES, Aug. 12, 1998.

96. *LVF Seeks Prison Deal*, BELFAST TELEGRAPH, June 15, 1998.

97. *Mo to Accept LVF Cease-fire: Prisoners Join the Release Plan*, BELFAST TELEGRAPH, Nov. 12, 1998. The Government had been strongly encouraged to accept the bona fides of the LVF cease-fire by Unionists including First Minister Designate David Trimble as the LVF had indicated a willingness (subsequently realized) to decommission a small amount of weaponry. The Unionists believed that such a move by a Loyalist

On the Republican side, the INLA were the first of the dissident groupings to declare a cease-fire in the wake of the Agreement. The INLA is a small but ruthless Republican faction, who despite tracing its ideological roots to the fusion of Republicanism and Socialism propagated by James Connolly, have nonetheless been involved in some of the most violent sectarian and internecine armed actions of the conflict.⁹⁸ Its cease-fire was announced on August 24, 1998. Speaking from the Maze prison, INLA Officer Commanding in the jail, Christopher McWilliams, the man responsible for shooting Billy Wright in the prison the previous year, argued that "securing releases has never been our primary concern. At the end of the day, throughout the world in every conflict political prisoners have been an issue. If anything does come about, we will be part of it, we are confident of that."⁹⁹ However much it weighed in their decision making-process, there was clearly an expectation amongst INLA prisoners that they would benefit from the early release provisions. That expectation was duly realized, in the Irish Republic at least, with the announcement by the Irish government that "the INLA are to be regarded as qualifying prisoners under the provisions of the Good Friday Agreement."¹⁰⁰ Given the decision with regard to the LVF, it is presumably only a matter of time before the British government follows suit in the North.

The most recent Republican grouping to declare a cease-fire was the Real IRA. The Real IRA was formed from the ranks of the mainstream IRA following a split in 1997 about the ongoing peace process, and, in particular, the IRA's agreement that Sinn Féin could sign up to the Mitchell principles of non-violence.¹⁰¹ Lead by a number of key figures from the mainstream IRA, this small grouping was responsible for the Omagh bomb-

paramilitary grouping would increase pressure on the IRA to reciprocate, although the significance of the LVF weapons hand over was dismissed by the larger Loyalist paramilitary groupings and Republicans. *LVF Guns Handover Is a Stunt Says PUP*, IRISH NEWS, Dec. 19, 1999 (visited Mar. 13, 1999) <http://www.irishnews.com/k_archive/191298/nnews.html> (on file with the *Fordham International Law Journal*).

98. JACK HOLLAND & HENRY McDONALD, INLA: DEADLY DIVISIONS (1994).

99. See *INLA's War Is Over*, IRISH NEWS, Aug. 24, 1998 (visited Mar. 13, 1999) <http://www.irishnews.com/k_archive/240898/nnews.html> (on file with the *Fordham International Law Journal*).

100. See *INLA Prisoners to Be Freed*, IRISH NEWS, Dec. 19, 1998 (visited Mar. 13, 1999) <http://www.irishnews.com/k_archive/191298/politics10.html> (on file with the *Fordham International Law Journal*).

101. See *Staying Out in the Cold*, MAGILL, July, 1998.

ing in August, which killed twenty-nine civilians and injured scores more. After having "suspended operations" three days after the bombing and being under considerable pressure from both the security forces North and South, and the mainstream IRA, as well as being politically isolated from the Republican community, the Real IRA also called a cease-fire on September 8, 1998.¹⁰² Real IRA sources have claimed to the media that if its cease-fire holds it has an "understanding" with the Irish government, that most of its prisoners will be freed by the millennium, except for those convicted of the Omagh bombing.¹⁰³

It is difficult to assess with accuracy the role that prisoner release has played in the decisions of these smaller anti-peace process groupings to halt violence. Clearly, their prisoners expect to benefit from the early release provisions. It could well be argued that in a changed political landscape, where community support for violence is considerably reduced and an alternative non-violent direction is being offered, the release of prisoners has become a more significant incentive than it might otherwise have been.

2. Prisoner Release and Decommissioning: The Stick?

The insistence upon the prior decommissioning of paramilitary weapons before all party talks could commence is widely viewed as having lead to the collapse of the first IRA cease-fire in 1996. This issue, again at the top of the political agenda, is imbued with symbolic importance to Unionists, Loyalists, and Republicans.¹⁰⁴ For Unionists, it is portrayed as a litmus test of the good faith of those seeking to move out of political violence.¹⁰⁵ For Loyalist and Republican paramilitaries, it is an act imbued with notions of surrender and runs contrary to an ideology deep within both sets of paramilitary protagonists that views

102. See Jane Bardon, *Real IRA Cease-fire as Pressure Bites*, IRISH NEWS, Sept. 9, 1998 (visited Feb. 9, 1999) <<http://www.irishnews.com/real/true.html>> (on file with the *Fordham International Law Journal*).

103. See *Foiled Real IRA Gang to Be Freed by 2000*, IRISH NEWS, Dec. 8, 1998 (visited Feb. 9, 1999) <http://www.irishnews.com/k_archive/081298/politics8.html> (on file with the *Fordham International Law Journal*).

104. See C. McInnes, *The Decommissioning of Terrorist Weapons and the Peace Process in Northern Ireland*, 18 CONTEMP. SECURITY POL'Y 3, 83-103 (1997); Michael Von Tangen Page, *Arms Decommissioning and the Northern Ireland Peace Agreement*, 29 SECURITY DIALOGUE 4, 409-20 (1998).

105. See *Trimble Remains in Ditch over Arms*, IRISH TIMES, Dec. 29, 1998.

such weapons as the final guarantors for the defense of their communities against attack by its enemies.

Some commentators have suggested that the question of prisoner release is connected to the provisions regarding prisoner release in the Agreement.¹⁰⁶ Although no such linkages are made in the Agreement, considerable energies were expended by both Unionist and Conservative MPs in passing the bill on prisoner release to make such a connection explicit. During the referendum, British Prime Minister Tony Blair made a number of statements that went as close as possible to linking the question of prisoner release to decommissioning, primarily in order to "shore up" the hemorrhaging Unionist "YES" vote, without rewriting the Agreement. On May 6, he argued: "It is essential that organizations that want to benefit from the early release of prisoners should give up violence. Decommissioning is part of that."¹⁰⁷ In a speech delivered at Balmoral showgrounds in Belfast on May 14, 1998, Blair argued that the provisions relating to prisoner release and the other elements of agreement were underpinned by a number of safeguards.¹⁰⁸ That speech allowed pro-Agreement Unionist such as David Trimble to claim that "plain and direct linkage linking prison release and office to a permanent end to violence and decommissioning is confirmed by the Prime Minister."¹⁰⁹ However, as

106. See J. Ruane & J. Todd, *Peace Processes and Communalism in Northern Ireland*, in *IRELAND AND THE POLITICS OF CHANGE 178-95* (W. Grotty & D. Schmidt eds., 1998).

107. House of Commons, Official Report, May 6, 1998, col. 711.

108. Non-violent means must be established in an objective, meaningful and verifiable way. . . . In clarifying whether the terms and spirit of the agreement are being met and whether violence has been given up for good, there are a range of factors to be taken into account; first and foremost . . . that the so-called war is finished, done with, gone, the cease-fires are indeed complete and unequivocal, an end to bombings, killings and beatings, claimed or unclaimed, and end to targeting and the procurement of weapons, progressive dismantling of paramilitary structures actively directing and promoting violence, full co-operation with the Independent Commission on Decommissioning and no other organisations being deliberately used as proxies for violence. These factors provide evidence upon which to base an overall judgement, a judgement which will necessarily become more rigorous over time.

Statement by Prime Minister Tony Blair, *reprinted in Blair Says Accord Points to Better Future; Full Text of Blair Speech*, IRISH TIMES, May 15, 1998 (visited Feb. 10, 1999) <http://www.irishnews.com/k_archive/150598/nnews1.html> (on file with the *Fordham International Law Journal*).

109. *Blair Boost to Yes Camp*, IRISH NEWS, May 15, 1998 (visited Feb. 10, 1999) <http://www.irishnews.com/k_archive/150598/nnews1.html> (on file with the *Fordham International Law Journal*).

Trimble himself pointed out in the legislation that came before the British Parliament, any such suggestions had been "lost in translation."¹¹⁰

Like the Agreement, the relevant legislation contained no such requirement. As Tory spokesperson Andrew McKay acknowledged at the time,

the Opposition pressed for substantial decommissioning to take place before the early release of prisoners, and for this to be incorporated into the legislation that is before us. . . . The most serious omission is that it does not establish a clear legislative linkage between some actual decommissioning having taken place and the accelerated release of prisoners.¹¹¹

The Labour government has, to date, held firm that prisoner release is not linked to actual decommissioning. As Security Minister Adam Ingram told the House of Commons:

The early release of prisoners is an integral part of the Agreement, one which the government are honoring in full. The government will not depart from the Agreement by introducing a direct linkage between decommissioning and prisoner releases which is not in the Agreement nor in the Northern Ireland (Sentences) Act 1998.¹¹²

As increasing numbers of prisoners have been released, the government has come under sustained pressure to halt or to slow down prisoner releases until actual decommissioning occurs or, more recently, until an end to paramilitary punishment beatings and shootings is achieved. In an increasingly acrimonious debate, Conservatives and Unionist are explicitly accusing the Labour Government of mishandling the potential of using the prisoners as "hostages" or bargaining chips in return for progress on other issues within the realm of the paramilitaries.¹¹³

While the logic of using prisoners as a stick with which to prise concessions from or "defeat" paramilitaries is beguilingly simple, it fails to address the complex dialectic between the larger paramilitary organizations and their prisoners. Previous

110. House of Commons, Official Report, June 10, 1998, col. 1099.

111. House of Commons, Official Report, June 10, 1998, cols. 1093-94.

112. House of Commons, Official Report, Jan. 20, 1999, cols. 487-88.

113. See Frank Millar, *Bipartisanship Under Mounting Strain*, *IRISH TIMES*, Jan. 28, 1998 (visited Feb. 10, 1999) <<http://www.irish-times.com/cgi-bin/highlight.plx?TextRes=BIpartisanship&Path=/Irish-times/paper/2/16/99/0128/99.html>> (on file with the *Fordham International Law Journal*).

attempts at using prisoners in such a fashion, such as during the Criminalization era of 1976 to 1981, were an unmitigated disaster in security and political terms. Greater pragmatism in the management of prisons in the 1980s and 1990s, on the other hand, undoubtedly contributed to an environment in which paramilitaries began to consider strategies other than violence. The history of political imprisonment in Ireland would suggest that the handling of prisoners is an issue around which confidence can be built or eroded within the paramilitary constituency; it is not an issue that can be used to force concessions.

The conceptual lumping of different parts of the post conflict-resolution process is also unhelpful. For Republicans, the issue of decommissioning is clearly linked to the question of demilitarization, withdrawal of British troops, the dismantling of security installations, controls on legally held weapons by Unionists, and police reform. For the mainstream Loyalists (the UDA and UVF), decommissioning is tied up with the actions and attitudes of Republicans and their capacity to attack the Loyalist community. With regard to the question of punishment beatings and shootings, for Republicans the ending of such activities is linked to the question of an agreed formal policing structure, cultures of dependency on paramilitaries which have grown up in working class communities, and the ability of local communities to take greater responsibility for "problem solving" in their own areas.¹¹⁴ While the phenomenon is arguably even more complex in Loyalist areas,¹¹⁵ it is equally unconnected to the release of paramilitary prisoners. As Tony Blair has argued, preventing prisoners release to force an end to punishments "would have immense consequences for the prospects of lasting peace. . . . [I]t may be an imperfect process but it is better than no process at all."¹¹⁶

3. Prisoner Release and the Victims of Violence

One of the most difficult issues regarding the early release of prisoners in the process of conflict resolution is the impact of releases upon those who have been victims of the conflict. The

114. See generally JAMES AULD ET AL., *DESIGNING A SYSTEM OF COMMUNITY RESTORATIVE JUSTICE IN NORTHERN IRELAND* (1997).

115. See Tom Winston, *Alternatives to Punishment Beatings and Shootings in a Loyalist Community in Belfast*, 8 *CRITICAL CRIMINOLOGY* 1, 122-28 (1997).

116. See Millar, *supra* note 113.

experiences of the victims of political violence in Northern Ireland and Britain are well documented.¹¹⁷ The social and psychological consequences for the victims or the families of victims of a violent political conflict are severe.¹¹⁸ The release of a prisoner who has served his full sentence can in itself be traumatic for the family of those killed or injured by the prisoner.¹¹⁹ Where such releases occur earlier than laid down by the original sentence, however, such feelings may be exacerbated. For this research as well as prior research, the author has interviewed the victims of politically-motivated violence, their organizations, and spokespeople in Northern Ireland as well as in Italy, Spain, South Africa, and Israel.¹²⁰ Before outlining the broad themes that emerged from those interviews, it is important, however, to bear a number of things in mind.

First, the status of who is a "victim" in a violent political conflict is itself a contested issue, with some arguing that it should be broadened beyond simply those injured or bereaved by the actions of terrorist organizations.¹²¹ Clearly, the actions of security forces kill and injure innocent people as well as combatants. In Northern Ireland, over 360 people have been killed by the security forces; half of them were unarmed and uninvolved civilians.¹²² Only four members of the security services have been imprisoned for such offenses, and two of these have been re-

117. See MARIE-THERESA FEY ET AL., *NORTHERN IRELAND'S TROUBLES: THE HUMAN COSTS* (1999); DENZIL MCDANIEL, *ENNISKILLEN: THE REMEMBRANCE SUNDAY BOMBING* (1997); COLIN PARRY & WENDY PARRY, *TIM: AN ORDINARY BOY* (1995).

118. D. Foster & D. Skinner, *Detention and Violence: Beyond Victimology*, in *POLITICAL VIOLENCE AND THE STRUGGLE IN SOUTH AFRICA* (N.C. Manganyi & A. du Toit eds., 1990); George Straker, *Exploring the Effects of Interacting with Survivors of Trauma*, 8 J. SOC. DEV. IN AFR. 2, 33-47 (1993); D. KERSNER ET AL., *TRAUMA IN AFFECTED PEOPLE BY POLITICAL REPRESSION: CONCEPT AND APPROACH* (1994); Andrew Dawes, *The Emotional Impact of Political Violence, in CHILDHOOD AND ADVERSITY* (Andres Dawes & David Donald eds., 1994).

119. See Mike Maguire, *The Needs and Rights of Victims*, 14 CRIME & JUSTICE: A REVIEW OF RESEARCH 363-433 (1991).

120. Gormally & McEvoy, *supra* note 9.

121. See OLIVER WILKINSON, *NORTHERN IRELAND ASSOCIATION FOR THE CARE AND RESETTLEMENT OF OFFENDERS, VICTIM SUPPORT IN NORTHERN IRELAND IN THE EARLY RELEASE OF POLITICALLY MOTIVATED PRISONERS: LEARNING FROM THE INTERNATIONAL EXPERIENCE*, A CONFERENCE REPORT 25-28 (1995).

122. See AMNESTY INTERNATIONAL, *POLITICAL KILLINGS IN NORTHERN IRELAND* (1994).

leased after serving less than four years of their life sentences.¹²³ While a government investigation into the needs of victims did include reference to those killed or injured by state forces,¹²⁴ the recent decision by Minister of Victims for Northern Ireland Adam Ingram to meet with the families of IRA men killed by SAS ambushes at Loughall has caused considerable controversy.¹²⁵ Nonetheless, such victims insist that they too have a right to have their voices heard in discussions regarding prisoner release.¹²⁶

Second, international experience would suggest that the views of victims regarding early release of prisoners are not monolithic. For example, in South Africa, while there has been some attention directed at those who were subject to human rights abuses carried out by the ANC,¹²⁷ the main focus has been upon the those who had suffered at the hands of the apartheid regime. Official government policy has put the notion of retribution aside and acknowledged the dilemma of offering amnesty to those convicted of human rights abuses.¹²⁸ In Italy, much of the work concerning victims has been directed by church-based organizations and appears closely bound up with the Catholic notions of penance and atonement, including reconciliation between victims and individual prisoners.¹²⁹ In Spain, the diversity of victims' views are in effect represented through a variety of organizations. A large Madrid-based organization, known as the Association of the Victims of Terrorism, actively campaigns against the reinsertion of prisoners who have renounced violence.¹³⁰ Other victims' organizations, largely based in the Basque region, tend to be involved in the peace and reconcilia-

123. See D. Currie & B. MacLean, *Critical Reflections on the Peace Process in Northern Ireland*, 3 HUMAN. & SOC'Y 19, 101-16.

124. See KENETH BLOOMFIELD, HER MAJESTY'S STATIONERY OFFICE, *WE WILL REMEMBER THEM: REPORT OF THE NORTHERN IRELAND VICTIM COMMISSIONER*, SIR KENETH BLOOMFIELD (1998).

125. See *Victim's Sister Slams Ingram for Talking With IRA Relatives*, BELFAST TELEGRAPH, Jan. 25, 1999.

126. Interview with sister of IRA volunteer killed on active service by British soldiers (Dec. 12, 1998).

127. SKWEYIYA COMMISSION, AFRICAN NATIONAL CONGRESS, *REPORT OF THE COMMISSION OF ENQUIRY INTO COMPLAINTS BY FORMER AFRICAN NATIONAL CONGRESS PRISONERS AND DETAINEES* (1992).

128. See ALEX BORAINÉ, TRUTH AND RECONCILIATION COMMISSION, *RONDELBOSCH: JUSTICE IN TRANSMISSION* (1994).

129. Interview with Father Giuseppe Brunetta (Jan. 30, 1995).

130. Interview with Juan Perez & Paulino Baena Diaz (Mar. 9, 1995).

tion movements with both "Gesto por la Paz" and "Denon Artean" accepting and supporting early release so long as prisoners have rejected violence.¹³¹

In Northern Ireland, even those victims groupings that are viewed as most hostile to the paramilitaries have acknowledged the diversity of views among victims concerning prisoner release.¹³² Some victims have argued that that they should have a veto over any early release of prisoners.¹³³ Others, often supported by anti-Agreement Unionist politicians, have made representations to the Sentence Review Commission expressing their concerns regarding the releases.¹³⁴ Still others handcuffed themselves to the turnstiles at the Maze prison in protest of the extension of Christmas parole to several high profile prisoners including one IRA prisoner convicted of the murder of nine civilians in a bomb planted on the Shankill Road in 1993.¹³⁵

On the other side of the debate, some high profile victims have declared themselves in favor of early releases as part of a broader process of healing reconciliation and forgiveness. Mrs. Joan Wilson, wife of the deceased peace campaigner Senator Gordon Wilson and mother of Marie Wilson, who was killed by the Enniskillen bomb, suggested that prison releases should be contemplated in such a context.¹³⁶ Other prominent peace activists such as Anne McCann and Pat Campbell who have lost loved ones have spoken publicly of their support for prisoner release as a component of "peace-building."¹³⁷ Still others have

131. Interview with Inaki Garcia (Mar. 7, 1995); Interviews with Jesus Herrero & Txema Urkijo (Mar. 8, 1995).

132. See FAMILIES AGAINST INTIMIDATION AND TERROR, THE FAIT SUBMISSION TO THE NI VICTIMS' COMMISSION: "GIVING VICTIMS A FAIR DEAL" (1998).

133. ALAN MCBRIDE, PROTESTANT AND CATHOLICS ENCOUNTER, A VICTIMS PERSPECTIVE IN PERSPECTIVES ON THE RELEASE OF POLITICALLY MOTIVATED PRISONERS IN NORTHERN IRELAND: A CONFERENCE REPORT 32-34 (1995).

134. See Claire McGahon, *Prisoners Body Told of Concerns*, BELFAST TELEGRAPH, Aug. 12, 1998 (visited Apr. 16, 1999) <<http://www.belfasttelegraph.co.uk/cgi-bin/ArchiveDate.cgi.html>> (on file with the *Fordham International Law Journal*).

135. See Janet Devlin & Peter McVerry, *Freed Prisoners Storm*, BELFAST TELEGRAPH, Dec. 23, 1998 (visited Apr. 16, 1999) <<http://www.belfasttelegraph.co.uk/cgi-bin/ArchiveDate.cgi.html>> (on file with the *Fordham International Law Journal*).

136. See Noel McAdam, *We Must Understand Jail Releases*, BELFAST TELEGRAPH, Oct. 14, 1996 (visited Apr. 16, 1999) <<http://www.belfasttelegraph.co.uk/cgi-bin/ArchiveDate.cgi.html>> (on file with the *Fordham International Law Journal*).

137. NORTHERN IRELAND ASSOCIATION FOR CARING AND RESETTLEMENT OF OFFENDERS, CONFERENCE REPORT, THE RELEASE AND REINTEGRATION OF POLITICALLY MOTIVATED PRISONERS: LEARNING FROM THE INTERNATIONAL EXPERIENCE (1995).

argued that while they felt too emotionally close to the question of early releases to come to a view either in favor or against, they needed additional resources such as counseling, compensation, and other support to cope with the trauma of the early releases.¹³⁸

At a late stage in the passage of the Sentences Act, the government agreed to insert a mechanism to ensure that victims would be informed when prisoners responsible for or related to their loss were to be released in order that they might prepare themselves.¹³⁹ However, that notification system has been criticized for having been managed by the Prison Service rather than a professional agency working with victims.¹⁴⁰ Confidence in its operation has been further undermined by a number of hurtful errors that have occurred, including the decision to release an IRA prisoner on the tenth anniversary of the death of an RUC officer for whose murder he had been convicted.¹⁴¹ Clearly, the process for early release of prisoners will remain difficult for many of those bereaved and injured as a result of the conflict.

4. The Reintegration of Paramilitary Prisoners

"The Governments continue to recognise the importance of measures to facilitate the reintegration of prisoners into the community by providing support both prior to and after release, including assistance directed towards availing of employment opportunities, re-training and/or re-skilling, and further education."¹⁴²

The notion of "reintegrating" paramilitary prisoners has always been a problematic one for many politically-motivated prisoners. Many politicals have traditionally been reluctant to use some of the services of professional reintegration agencies such as the Probation or NIACRO, lest they be seen as acquiescing to the label of "criminal."¹⁴³ During the conflict and in the period after the 1994 cease-fires, in asserting their status as political,

138. See WILKINSON, *supra* note 121.

139. House of Commons, Official Report, June 10, 1998, col. 1160.

140. Interview by BBC Radio Ulster "Morning Extra" with Oliver Wilkinson, Director Victim Support, Northern Ireland (Oct. 1998).

141. See Bingham: *Halt the Releases*, BELFAST TELEGRAPH, Jan. 23, 1999.

142. Good Friday Agreement, *supra* note 1, Prisoners ¶ 5.

143. Kieran McEvoy et al., *The Home Front: The Families of Politically Motivated Prisoners in Northern Ireland*, 39 BRIT. J. CRIMINOLOGY 2, 175-97 (1999).

many paramilitary prisoners and their supporters argued that they were not in need of reintegration. They argued that they were not stigmatized by their communities and that they would not have committed their "crimes" were it not for the political circumstances in which they found themselves.¹⁴⁴ The professional agencies argued that such ideological struggles should be ignored in the provision of practical services to prisoners.¹⁴⁵

As the peace process unfolded, prisoner groupings (and the professional agencies) adapted their positions to one wherein prisoners would take advantage of pre and post-release facilities. The model for such reintegration was a "self help" model, wherein the former prisoners themselves would take responsibility for the management and delivery of services. The European Union Peace and Reconciliation Fund, which was established by the European Union to support the peace process, made available £1.25 million to support prisoner reintegration in 1998. These monies are distributed through the Belfast-based Northern Ireland Voluntary Trust, a vastly-experienced grant giving agency in the non-profit sector.¹⁴⁶

Given that projects are established and run by and large according to paramilitary factions, there are now over twenty-six community-based ex-prisoner projects spread throughout Northern Ireland.¹⁴⁷ Recently, IRA-affiliated Republicans established an umbrella project, Coiste na n-Iarchimi, to manage a range of their projects and appointed a manager from outside the ranks of former Republican prisoners.¹⁴⁸ The work covered by reintegration projects include education, job skills programs, financial and welfare advice, housing, and accommodation and family-ori-

144. See SINN FÉIN SUBMISSION TO THE FORUM FOR PEACE AND RECONCILIATION (Jan. 20, 1995).

145. It is important to the peace process as a whole that the different ideological perspectives of government and of the prisoners about the reasons why they are in prison be left aside and that we see prisoner reintegration as an integral factor in rebuilding our communities. Further it will have to be recognised that progress cannot be achieved without the active participation of the prisoners themselves.

NORTHERN IRELAND ASSOCIATION FOR CARING AND RESETTLEMENT OF OFFENDERS, SUBMISSION TO THE FORUM FOR PEACE AND RECONCILIATION, Jan. 20, 1995.

146. NORTHERN IRELAND VOLUNTARY TRUST, ANNUAL REPORT OF THE NORTHERN IRELAND VOLUNTARY TRUST (1998).

147. Data made available to the author by Northern Ireland Voluntary Trust.

148. See *Prisoners Group Launched*, IRISH NEWS, Jan. 20, 1999.

entated counseling.¹⁴⁹ While there has been some criticism of the provision of EU funding to such projects,¹⁵⁰ to date these groups have not received substantial alternative funding.¹⁵¹ The real test of the commitments made in the agreement regarding reintegration will come when the EU funding is exhausted and prisoners groupings seek mainstream statutory monies.

CONCLUSION

"We are on the brink of securing the de facto recognition of the political character of the conflict, a fact represented by the release of political prisoners."¹⁵² In this important interview, Padraig Wilson, IRA Officer Commanding in the Maze, underlined the symbolic importance of the prisoner issue. The Good Friday Agreement has been famously described by the Deputy First Minister Designate Seamus Mallon of the SDLP as "Sunningdale for slow learners."¹⁵³ This reference is to the failed 1973 agreement, which contained a number of features similar to the 1998 Agreement including a power sharing executive, limited cross-border cooperation, and the establishment of some human rights and nondiscrimination protections.¹⁵⁴ Such a description of the Good Friday Agreement, however, undersells its complexity.

The Sunningdale process, like much of government policy during the period of conflict, reflected a mindset that sought to "re-establish normal constitutional politics in Northern Ireland," to build the center ground, and politically to marginalize and then to contain the paramilitaries via an effective security policy.¹⁵⁵ The Good Friday Agreement, on the other hand, is characterized by a desire to bring the bulk of "extremist" opinion inside the process (admittedly made easier in 1998 by the presence of organized political parties representative of Republicanism and Loyalism). It represents an acceptance of the political

149. See L. McSHANE, NORTHERN IRELAND VOLUNTARY TRUST, POLITICALLY MOTIVATED EX-PRISONERS SELF HELP PROJECTS, INTERIM REPORT (1998).

150. See *Fury at Euro-Cash for Ex-terrorists*, OBSERVER, Jan. 10, 1999.

151. See *Peace Pays Paltry Dividend for Victims and Ex-prisoners*, IRELAND ON SUNDAY, Aug. 17, 1998.

152. *IRA Chief in the Maze Is Ready to Seek a New Way Out*, FIN. TIMES, June 17, 1998.

153. *A Favourite Cumudgeon*, IRISH TIMES, Oct. 20, 1998.

154. See KENETH BLOOMFIELD, STORMONT IN CRISIS: A MEMOIR (1994).

155. See MICHAEL J. CUNNINGHAM, BRITISH GOVERNMENT POLICY IN NORTHERN IRELAND 1969-1989: ITS NATURE AND ITS EXECUTION (1991).

motivation of paramilitaries, an implicit acknowledgement of the state as a protagonist in the conflict, and a preference for politics over "security"—all of which underscore and are informed by a recognition of the political nature of the conflict.

Von Tangen Page has suggested that the more pragmatic approach adopted by the Irish government with respect to the question of prisoner release, when compared to the approach taken by its British counterpart, was because the Irish state had not been directly targeted by the IRA campaigning.¹⁵⁶ Quite apart from the numerous acts of violence which occurred in the Republic during the conflict, such an analysis fails to take account of the political and ideological insights into the respective states provided by prisoner releases. While the Republic utilized harsh anti-terrorist laws, banned Sinn Féin from the airwaves for almost two decades, and occasionally treated paramilitary prisoners in a severe and brutal manner, there appeared little doubt that the conflict was anything other than political among the key government protagonists.¹⁵⁷ For the British state, on the other hand, from at least 1976 onwards, the separation of the political and security arena into two distinct sets of discourses and practices meant that key state actors appeared to "lose sight" of the political character of the conflict. The mismanagement of the peace process by the John Major Government, notwithstanding its need for Unionist support at West Minister, represents at some level a state's failure to move beyond the "conflict mode" of security discourses to an acceptance of the political character of the conflict required for effective peace-building.

In a violent political struggle, the treatment of prisoners is a mirror to the state's view of the conflict. The internment of suspects without trial and the granting of special category status to prisoners in the early 1970s, the removal of such status in 1976, the attempts at criminalization until the early 1980s, and the policies of managerial pragmatism in the 1980s, all offer insights into the British government's ideological and political approach to the conflict during those eras.¹⁵⁸ While the current British government has also maintained the fiction that "there are no

156. See MICHAEL VON TANGEN PAGE, *PRISONS, PEACE & TERRORISM* 164 (1998).

157. See GERARD HOGAN & CLIVE WALKER, *POLITICAL VIOLENCE AND THE LAW IN IRELAND* (1989); F. FINLEY, *SNAKES AND LADDERS* (1998); K. WHELAN & E. MASTERSON, *BERTIE AHERN: TAOISEACH & PEACEMAKER* (1998).

158. See Brian Gormally & Kieran McEvoy, *Politics and Prison Management: The*

political prisoners in British prisons, the willingness of the Labour government to sensibly engage on the prisoners issue is indicative of a mindset that has made the necessary transformation for conflict resolution."

Acceptance of the political motivation of paramilitaries does not imply either approval or appeasement. Neither Republicans nor Loyalists have achieved the stated objectives of their respective campaigns of violence. What it does entail, however, is an ability to distinguish the securitocratic rhetoric of criminalization, to understand that unpalatable measures such as prisoner release are necessary in a process of conflict resolution, and to recognize that reform of certain structural elements of the state, such as policing and the criminal justice system, are prerequisite foundations for a new society. If power is to be devolved to the Northern Assembly in the next few months, then the next key step will be to try to ensure that the British and Irish governments acknowledgement of the political character of the conflict is spread more evenly among the Northern Ireland politicians.

It is no accident that the greatest obstacle to the Unionist Yes campaign was the issue of prisoner release. At one level, one might attribute this to the horrors of the past thirty years and the atrocities carried out by the IRA and other Republican groupings. Such an explanation is inadequate, however, as it ignores the fact that Nationalists voted overwhelmingly for an agreement which saw Loyalist prisoners released, despite the indiscriminate nature of Loyalists attacks on Catholics throughout the conflict. Another explanation, equally unconvincing, is the respective influence of Catholicism and Protestantism within Nationalism and Unionism. Such a view might juxtapose the variant theological emphasizes within the two religious blocks, the former with its new testament emphasis on forgiveness and redemption, the latter with its old testament focus upon punishment and retribution.¹⁵⁹ As with most religious explanations of Northern Ireland, such views do not stand up to analysis beyond the crudest generalizations.

The key difference between the communities on the pris-

Northern Ireland Experience, in *CONTEMPORARY ISSUES IN CRIMINOLOGY* 276-314 (L. Noaks et al. eds., 1995).

159. For a range of discussions on the interplay between religion and other socio-political aspects of attitudes towards punishment, see DARIO MELOSSI, *THE SOCIOLOGY OF PUNISHMENT: SOCIO-STRUCTURAL PERSPECTIVE* (1998).

oner issue may be attributed to their very different understandings of the conflict. For many Unionists, "terrorism" was an aberration on the body politic, a problem perpetuated by a few irredentist "men of violence" for whatever combination of criminal or psychopathic reasons. With little support or sympathy for Loyalist prisoners beyond the narrow electoral base of the fringe Loyalist parties, and no comparable historical experience of political imprisonment to the nationalist community in Ireland, the mainstream Unionist view of "terrorist" violence was sustained and nurtured by the official discourses of the state. Security force members were not protagonists to the conflict but rather upholding "law and order" in the face of vicious attack on democracy.

While the state has transformed, or at least modified its views, Unionist attitudes (both pro and anti-Agreement) have been predictably slow to follow suit. Demands for the "surrender" of weapons, security "crackdowns," exclusion of the parties associated with paramilitarism, minimal change in the security forces etc., these all continue to dominate Unionist dialogue. While issues such as the release of prisoners remain within the remit of the British government, their potential for "tripping up" the process of peace-building would appear to be limited. However, in the coming months and years, unless a transformation similar to that experienced by the British spreads to the Unionist body politic, the Good Friday Agreement will have some troubled times ahead.