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Abstract

This Comment explores the background of the conflict in Northern Ireland and an example of alleged past corruption in the UK security forces' use of covert agents. It discusses the legal background surrounding the enactment of RIPA, including the direct legislative history of the Act and the Act's indirect history, as evidenced through decisions of the European Court of Human Rights. It also examines the statutory framework of RIPA focusing on the provisions that serve as a check on the use of covert human surveillance in the United Kingdom and Northern Ireland. Finally, this Comment argues that RIPA is insufficient in providing full accountability and protection of human rights, as it is compelled to do under both international and domestic human rights law.

POLICING UNDERCOVER AGENTS IN THE UNITED KINGDOM: WHETHER THE REGULATION OF INVESTIGATORY POWERS ACT COMPLIES WITH REGIONAL HUMAN RIGHTS OBLIGATIONS

*Cara Hirsch**

INTRODUCTION

On the evening of Sunday, February 12, 1989, Patrick Finucane was having dinner with his wife and three children at their home in Belfast, Northern Ireland.[1] A prominent criminal defense and human rights lawyer[2] who often represented high pro-

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1. *See* Martin Flaherty, *Human Rights Violations Against Defense Lawyers: The Case of Northern Ireland*, 7 HARV. HUM. RTS. J. 87, 87 (1994) (noting date of Finucane's murder); *see also* Howard J. Russell, *New Death Breathes Life Into Old Fears: The Murder of Rosemary Nelson and the Importance of Reforming the Police in Northern Ireland*, 28 GA. J. INT'L & COMP. L. 199, 202 (1999) (stating that Finucane was shot at his home in Belfast); Mark Tran, *Men Arrested Over Belfast Solicitor's Murder: Break in the Case of Pat Finucane*, GUARDIAN (UK), July 28, 1999, at 19 (reporting that Finucane was shot in February 1989 as he was sitting down to dinner); Michael Finucane, *They Killed My Father: Michael Finucane on the Anniversary of a Murder Which is Still the Source of Explosive Scandal*, GUARDIAN (UK), Feb. 13, 2001, at 19 (recalling date of incident when author, son of Patrick Finucane, witnessed shooting of his father); AMNESTY INT'L, UNITED KINGDOM: PATRICK FINUCANE'S KILLING: OFFICIAL COLLUSION AND COVER-UP 1 (2000) [hereinafter OFFICIAL COLLUSION], *available at* http://web.amnesty.org/802568F7005C4453/0/523233FE25A2E6CC802568A30069E90C?Open (stating that Finucane resided in Belfast, Northern Ireland, with his wife and three children).

2. *See* Russell, *supra* note 1, at 202 (noting Finucane's eminent reputation as civil rights attorney); *see also* OFFICIAL COLLUSION, *supra* note 1, at 1 (discussing Finucane's prominent reputation as human rights lawyer); Chris Ryder, *Gunmen Murder IRA Solicitor*, DAILY TELEGRAPH (UK), Feb. 13, 1989, at 1 (discussing Finucane's representation of numerous high profile Republican defendants). Patrick Finucane had a reputation for challenging allegedly corrupt activities by Northern Ireland's police force, the Royal Ulster Constabulary ("RUC"). *See* NICHOLAS DAVIES, TEN-THIRTY-THREE 155-56 (1999) (detailing Finucane's effective legal challenges to controversial killings by Royal Ulster Constabulary ("RUC") of Catholics, and corresponding dislike of Finucane by both British government and Protestant loyalists); *see also* Richard Harvey, *A Climate of Complicity for a Murder in Ulster*, L.A. TIMES, Mar. 21, 1989, at 7 (discussing Finucane's successful legal challenges to British abuses in Northern Ireland). Finucane's death came shortly after he had convinced an Irish trial court to compel RUC officers involved in a 1983 killing of Irish Republican Army ("IRA") members to testify in court. *See* Russell, *supra* note 1, at 202 (explaining that Finucane planned to use testimony of RUC officers to investigate controversial police killings of Nationalists). Throughout the testimony at

file republican and Irish Republican Army ("IRA")[3] members,

this trial, Finucane suggested that he hoped to probe into an alleged "shoot to kill" campaign the police had initiated against Irish Republicans and Nationalists. *Id.*

Throughout a thirty year period of conflict between Republicans (individuals committed to joining the six counties, which are currently part of the UK-held, Northern Irish province, to the southern continental Republic of Ireland) and Unionists (those committed to maintaining Northern Ireland as a part of the United Kingdom), which has been historically termed "The Troubles," there has been much suspicion over the notion that secret, officially sanctioned killings of Provisional IRA members occurred, where the RUC had been either directly or indirectly involved. Linda Moore, *Policing and Change in Northern Ireland: The Centrality of Human Rights*, 22 FORDHAM INT'L L.J. 1577, 1580-81 (1999). The RUC's alleged "shoot to kill" policy became the subject of heightened political debate in the early 1980s, in light of a succession of questionable killings of IRA members by the RUC. *See* DAVIES, *supra*, at 140-55 (providing description of alleged "shoot to kill" policy of RUC and accompanying negative public response); *see also* Russell, *supra* note 1, at 202 (noting that Finucane's desire to probe into alleged "shoot to kill" campaign led many to believe security forces played role in Finucane's murder); Moore, *supra*, at 1580-81 (detailing human rights concerns that have been raised regarding RUC's conduct during conflict, including allegations of "shoot to kill" policy in 1980s, and of collusion between RUC and loyalist paramilitary organizations). *See generally BBC: History: Policing in Northern Ireland: Wars and Conflict: The Troubles: Fact Files: Key Themes—Policing*, BBC 1, *at* http://www.bbc.co.uk/history/war/troubles/factfiles/policing.shtml (providing overview of antagonism between RUC and IRA).

3. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS AND LEGAL DEFENSE IN NORTHERN IRELAND 13-15 (1993) [hereinafter HUMAN RIGHTS AND LEGAL DEFENSE] (discussing that Irish Republican Army ("IRA") is republican paramilitary organization that has used violence to reach its political goals). Commentators note that the IRA is Northern Ireland's largest republican paramilitary group. *See* Kieran McEvoy, *Human Rights, Humanitarian Interventions and Paramilitary Activities in Northern Ireland*, *in* HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND 217 (Colin J. Harvey ed., 2001) (explaining that IRA is most significant republican paramilitary group in terms of both size and activity); *see also* TOM F. BALDY, BATTLE FOR ULSTER 50 (1987) (classifying IRA as most threatening republican paramilitary group on basis of quantity of terrorist activity conducted). The IRA was founded nearly 80 years ago, in an effort to fight for a united Ireland. *See id.* at 40 (noting formation of IRA by Michael Collins in 1919); *see also* HUMAN RIGHTS AND LEGAL DEFENSE, *supra*, at 14-15 (stating that IRA campaign to fight for united Ireland began in aftermath of First World War). In 1969, the IRA split into two factions: the Official IRA and the Provisional IRA ("PIRA"). *See id.* 14-15 (contextualizing split of IRA into Offical and Provisional ("PIRA") branches in view of increasing violence between Catholics and Protestants). The Official IRA took on a more socialist approach, while the PIRA became more militant. *See Flaherty*, *supra* note 1, at 94 (identifying PIRA as more dangerous and active than Official IRA); *see also* BALDY, *supra*, at 50 (discussing that following breakup of IRA, PIRA spent year training and acquiring weaponry). Commentators note that the PIRA initially chose to use violence in an effort to defend Catholics against loyalist paramilitary attacks (paramilitary groups working to defend what they consider to be a united-United Kingdom, including Northern Ireland), though they later began to go on the offensive, using violence to help achieve their own political goals. *See* HUMAN RIGHTS AND LEGAL DEFENSE, *supra*, at 15 (explaining that violent unionist response to peaceful Catholic civil rights demonstrations led some Catholics to also choose violence); *see also* BALDY, *supra*, at 50 (char-

Finucane had received a number of death threats over the years.[4] These threats were realized when Finucane and his family began to eat dinner that evening. Two armed gunmen broke into Finucane's home, ran into the kitchen where the family was eating, and shot Finucane fourteen times in front of his wife and children.[5] Patrick Finucane was killed in the attack,[6] and his wife, Geraldine, was injured.[7] A Protestant paramilitary group, the Ulster Freedom Fighters ("UFF")[8] claimed responsibility for

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acterizing PIRA members as disagreeing with non-violent tactics by Catholics who allowed themselves to remain open to armed attack from Protestants, while remaining unarmed themselves). *See generally* Flaherty, *supra* note 1, at 93-95 (providing overview of political and social setting of Troubles); HUMAN RIGHTS AND LEGAL DEFENSE, *supra*, at 13-16 (discussing historical background of Troubles).

4. *See* Finucane, *supra* note 1, at 19 (noting that Finucane was subject of both direct and indirect harassment by RUC); *see also* OFFICIAL COLLUSION, *supra* note 1, at 2 (discussing that prior to Finucane's death, threats escalated in both frequency and severity and were channeled via Finucane's clients as well as in telephone calls to his home). *See generally* Flaherty, *supra* note 1, at 97-118 (providing overview of conditions in Northern Ireland abusive to defense lawyers, ranging from intimidation to operating difficulties under emergency system); Russell, *supra* note 1, at 202-03 (explaining that many Catholic and Nationalist lawyers subject to harassment and threats were reluctant to complain to inactive RUC).

5. *See* Finucane, *supra* note 1, at 19 (providing first person account of scene of crime, wherein author watched his father get shot, while sister, brother, and mother similarly bore witness); *see also* John Mullin, *Confession to Lawyer's Killing 'Given RUC in 1990'*, GUARDIAN (UK), Aug. 24, 1999, at 5 (reporting that Finucane was shot fourteen times by two masked gunmen); Russell, *supra* note 1, at 202 (stating that Finucane's murder was first murder of lawyer in history of Northern Ireland's conflict); David Hearst, *Lawyers in Need of Defence: The Implications of Sunday's Murder of a Belfast Solicitor and Recent Attacks on his Profession's Impartiality in the Province*, GUARDIAN (UK), Feb. 14, 1989 at 23 (discussing that Finucane had habit of keeping front door unlocked as gesture indicating he was available to all); LAWYERS COMMITTEE FOR HUMAN RIGHTS, BEYOND COLLUSION: THE UK SECURITY FORCES AND THE MURDER OF PATRICK FINUCANE, Feb. 12, 2002, at 10 [hereinafter BEYOND COLLUSION] (noting that Finucane was shot at least dozen times at close range in head and neck).

6. *See* Finucane, *supra* note 1, at 19 (describing watching armed gunmen shoot and kill his father); *see also* Mullin, *supra* note 5, at 5 (reporting that Finucane was killed in attack at his home).

7. *See* OFFICIAL COLLUSION, *supra* note 1, at 1 (explaining that Geraldine's injuries were likely caused by ricocheted bullet).

8. *See* BALDY, *supra* note 3, at 63 (characterizing Ulster Freedom Fighters ("UFF") as right-wing loyalist paramilitary group, targeting republican paramilitaries and, on occasion, ordinary Catholics). The Ulster Freedom Fighters ("UFF") is a cover name for a loyalist paramilitary organization, the Ulster Defense Association ("UDA"), whose intention it is to maintain the union of Northern Ireland with the United Kingdom. *See* McEvoy, *supra* note 3, at 219 (noting that Ulster Defense Association ("UDA") and UFF are same organization); *see also* BALDY, *supra* note 3, at 63 (stating that all loyalist paramilitary groups oppose republican goal of united Ireland). The UDA surfaced in 1969 as a response to the more militant approach taken by up by the PIRA. *See* BALDY,

the incident.[9]

It was not long after Finucane's murder that claims of official collusion began to emerge.[10] Evidence materialized indicating that Finucane's murder was executed with the assistance of members of Northern Ireland's police force, the Royal Ulster Constabulary ("RUC"),[11] as well as the British Army,[12] facilitated

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supra note 3, at 64 (noting date when UDA was created); *see also* McEvoy, *supra* note 3, at 219 (explaining that loyalists believe themselves entitled to use violence due to threat republicans pose to UK); HUMAN RIGHTS AND LEGAL DEFENSE, *supra* note 3, at 15 (discussing reemergence of UDA and UVF in response to resurfacing of active IRA). At its peak, the UDA had a membership that reached into the thousands. *See* BALDY, *supra* note 3, at 127 n.111 (noting that UDA's peak membership was 26,000 members in 1972). The UDA was banned in 1992 because of its engagement in terrorism. *See id.* at 65 (explaining that UDA and UFF were banned because murders had been claimed under both names).

9. *See* Tran, *supra* note 1, at 19 (reporting on loyalist group claiming responsibility for Finucane's murder); *see also* Jim Dee, *Ex-CID Officer: Special Branch Muddied Probe*, BOSTON HERALD, Jan. 6, 2002, at 18 (explaining that UDA/UFF claimed responsibility for Finucane's murder); Harvey, *supra* note 2, at 7 (stating that UFF bragged about killing of Finucane); Flaherty, *supra* note 1, at 87 (explaining that UFF alleged Finucane was member of PIRA); OFFICIAL COLLUSION, *supra* note 1, at 1 (noting that claim by UDA/UFF that Finucane was member of PIRA is denied by Finucane's family and friends, as well as by official police statements). *See generally* BRITISH IRISH RIGHTS WATCH, JUSTICE DELAYED . . .: ALLEGED STATE COLLUSION IN THE MURDER OF PATRICK FINUCANE AND OTHERS, Feb. 2000, at 1, *available at* http://www.birw.org/justice.html [hereinafter JUSTICE DELAYED] (alleging that UK security forces colluded with UDA in murder of Finucane).

10. *See* OFFICIAL COLLUSION, *supra* note 1, at 2 (noting that claims of official collusion in Finucane's murder have increased dramatically over time); *see also* Russell, *supra* note 1, at 202 (stating that defense lawyers have continuously voiced concern over collusion within RUC, given ineffectiveness of RUC's investigation); Flaherty, *supra* note 1, at 99 (asserting that collusion between security forces and loyalist paramilitaries is not isolated phenomenon); JUSTICE DELAYED, *supra* note 9, para. 1.1 (stating that claims of official collusion include participation by British army intelligence, RUC, Director of Public Prosecutions ("DPP") and government minister); AMNESTY INT'L, IN RE THE MURDER OF PATRICK FINUCANE AND THE CASE FOR A PUBLIC INQUIRY: JOINT OPINION FOR AMNESTY INTERNATIONAL, Oct. 29, 1999, para. 1, *available at:* http://www.barhumanrights.org/pdfs/patrickfinucane.pdf [hereinafter IN RE THE MURDER OF PATRICK FINUCANE] (discussing widespread calls for establishment of public inquiry in light of allegations of collusion).

11. *See* JUSTICE DELAYED, *supra* note 9, para. 1.1 (explaining controversy that has arisen regarding RUC and British army involvement in Finucane murder); *see also* IN RE THE MURDER OF PATRICK FINUCANE, *supra* note 10, para. 2 (discussing that 1999 investigation uncovered that RUC officer had prior knowledge of plans to kill Finucane); Russell, *supra* note 1, at 203 (indicating that RUC has been involved in covering up murder of Finucane and several others); Flaherty, *supra* note 1, at 104 (stating concern on behalf of many solicitors that RUC has shown little resolve in uncovering intimidation and collusion in Finucane case). *See generally* OFFICIAL COLLUSION, *supra* note 1, at 2-4 (detailing evidence linking RUC to Finucane's murder).

12. *See* Nick Hopkins, *Sinister Role of Secret Army Unit: Undercover in Ulster Police Inves-*

by their use of undercover government informers.[13] Commentators express that the murder of Patrick Finucane is evidence of a system of covert human surveillance in Britain corrupted through its inability to create a system of accountability governing the use of informers.[14] Commentators discuss that such a situation was enabled by the lack of a statutory framework governing the use of informers in the United Kingdom, both before and during the time of Finucane's murder.[15] In the year 2000, the British Parliament decided to take measures to curtail the

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tigate Claims of Collusion with Paramilitaries, GUARDIAN (UK), Apr. 28, 2001, at 2 (alleging that British Army played role in Finucane's murder); *see also* Finucane, *supra* note 1, at 19 (explaining role of secret branch of UK army intelligence services in facilitating Finucane's murder); *Brits: Dark Side of War* (BBC News Broadcast, May 31, 2000), *transcript available at* http://news.bbc.co.uk/hi/english/uk/northern_ireland/newsid_766000/766926.stm [hereinafter *Brits: Dark Side of War*] (discussing role of army intelligence agent, Brian Nelson, in murder of Finucane and others). *See generally* DAVIES, *supra* note 2, at 155-69 (providing narrative of role of Brian Nelson, in murder of Patrick Finucane); ROB LEWIS, FISHERS OF MEN (1999) (detailing role of British Army's Force Research Unit ("FRU") in clandestine operations).

13. *See* Hopkins, *supra* note 12, at 2 (stating that Brian Nelson, British agent, provided important intelligence information to Fincane's killers); IN RE THE MURDER OF PATRICK FINUCANE, *supra* note 10, paras. 4, 5(a) (indicating that RUC informer William Stobie played role in Finucane's murder); *see also* JUSTICE DELAYED, *supra* note 9, para. 1.2 (alleging that British army double agent, Brian Nelson, colluded with UDA in murder of Finucane). *See generally* Ed Moloney, *Frightened Informer Claimed RUC Forced his Silence*, SUNDAY TRIB. (UK), Jun. 27, 1999, at 1 (providing overview of role of RUC informer in murder of Finucane); Finucane, *supra* note 1, at 19 (detailing background of both Stobie's and Nelson's roles in Finucane's killing).

14. *See* BEYOND COLLUSION, *supra* note 5, at 56-63 (discussing creation of RUC culture wherein quest for intelligence gained through informers was deemed more important than bringing agents and potential agents to justice); *see also Insight: Policing the Police* (UTV television broadcast, May 1, 2001), *transcript available at* http://www.serve.com/pfc/pf/pf04052001a.html [hereinafter *Insight: Policing the Police*] (explaining that RUC Special Branch officers tampered with evidence in order to prevent information on double agents from coming to light); Dee, *supra* note 9, at 18 (reporting that RUC Special Branch officers attempted to cover up confession of one of Finucane's killers); Richard Norton-Taylor & Nick Hopkins, *Security Service Told RUC That it Could Put Spying on Terrorists Ahead of Solving Crime*, GUARDIAN (UK), Jun. 14, 2001, at 11 (reporting that UK intelligence service, MI5, gave RUC Special Branch powers allowing force to give priority to recruiting terrorist informers over solving crime). *See generally* BEYOND COLLUSION, *supra* note 5 (providing extensive overview of allegations of UK security force collusion and cover-up of murder of Patrick Finucane).

15. *See* Peter Neyroud & Alan Beckley, *Regulating Informers: The Regulation of Investigatory Powers Act, Covert Policing and Human Rights*, *in* INFORMERS: POLICING, POLICY, PRACTICE 164 (Roger Billingsley et al. eds., 2001) (explaining that concerns about potential miscarriages of justice in use of informers prompted many to question UK's traditional lack of statutory authority governing use of informers); *see also* Alisdair A. Gillespie, *The Legal Use of Participating Informers*, 5 WEB J. CURRENT LEGAL ISSUES (2000), *available at* http://webjcli.ncl.ac.uk/2000/issue5/gillespie5.html (discussing that UK's

potential for such abuse.[16] It did so by drafting the Regulation of Investigatory Powers Act 2000 ("RIPA").[17]

Part I of this Comment explores the background of the conflict in Northern Ireland and an example of alleged past corruption in the UK security forces' use of covert agents. Part I additionally discusses the legal background surrounding the enactment of RIPA, including the direct legislative history of the Act and the Act's indirect history, as evidenced through decisions of the European Court of Human Rights. Part II examines the statutory framework of RIPA focusing on the provisions that serve as a check on the use of covert human surveillance in the United Kingdom and Northern Ireland. Part II also explores criticisms of RIPA's provisions in light of both domestic and international human rights standards. Part III argues that RIPA is insufficient in providing full accountability and protection of human rights,

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previous lack of statutory authorization for use of informers may have been in conflict with human rights responsibilities).

16. Regulation of Investigatory Powers Act, Explanatory Notes, 2000, ch. 23, para. 3 (Eng.) [hereinafter RIPA Explanatory Notes]; *see* Neyroud, *supra* note 15, at 165 (noting that Regulation of Investigatory Powers Act ("RIPA") was enacted in response to regional human rights pressures criticizing UK's lack of statutory framework governing use of informers). Paragraph 3 of the Explanatory Notes to the Regulation of Investigatory Powers Act 2000 provides that:

> The purpose of the [Regulation of Investigatory Powers] Act is to insure that the relevant investigatory powers are used in accordance with human rights. These powers are: the interception of communications; the acquisition of communications data (e.g. billing data); instrusive surveillance (on residential premises/in private vehicles); covert surveillance in the course of specific operations; the use of covert human intelligence sources (agents, informants, undercover officers); access to encrypted data.

RIPA Explanatory Notes, *supra*, para. 3.

17. Regulation of Investigatory Powers Act 2000, ch. 23, intro. (Eng.). *See* Neyroud, *supra* note 15, at 165 (explaining that RIPA was drafted to meet UK human rights obligations). The Regulation of Investigatory Powers Act was enacted on July 28, 2000. Regulation of Investigatory Powers Act 2000, ch. 23, intro. (Eng.). In its introductory paragraph, RIPA states:

> An Act to make provision for and about the interception of communications, the acquisition and disclosure of data relating to communications, the carrying out of surveillance, the use of covert human intelligence sources and the acquisition of the means by which electronic data protected by encryption or passwords may be decrypted or accessed; to provide for Commissioners and a tribunal with functions and jurisdiction in relation to those matters, to entries on and interferences with property or with wireless telegraphy and to the carrying out of their functions by the Security Service, the Secret Intelligence Service and the Government Communications Headquarters; and for connected purposes.

Id.

as it is compelled to do under both international and domestic human rights law.

I. *BACKGROUND SURVEILLANCE*

The conflict in Northern Ireland has been an extremely divisive force in both the Protestant and Catholic communities of that region.[18] Commentators note that this inter-community tension penetrated both the police force and government of Northern Ireland.[19] An anti-Catholic bias on behalf of certain government and security forces in Northern Ireland has posed particular difficulties regarding the use of covert informers.[20] Under a traditionally unregulated system of informer use in Northern Ireland, covert government agents have engaged in

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18. *See* BALDY, *supra* note 3, at 33-47 (describing historical circumstances that led to, and perpetuated Troubles); *see also* TIM PAT COOGAN, THE IRA 341-53 (2002) (discussing rise of republican paramilitary group, IRA, in response to Troubles); J. BOYER BELL, THE IRISH TROUBLES: A GENERATION OF VIOLENCE 1967-1992, at ix-xvii (1993) (providing overview of social conflict between Catholics and Protestants during Troubles); McEvoy, *supra* note 3, at 217-20 (discussing activities of sectarian paramilitary groups in response to conflict in Northern Ireland); Flaherty, *supra* note 1, at 93-95 (providing synopsis of Catholic and Protestant inter-community conflict since beginning of Troubles).

19. *See* DAVIES, *supra* note 2, at 37-50 (noting antagonism between Catholic community and security forces in Northern Ireland); *see also* BALDY, *supra* note 3, at 66-70 (explaining that most prominent political parties in Northern Ireland are divided along Protestant and Catholic sectarian lines); Flaherty, *supra* note 1, at 103-04 (discussing that RUC treats members of Protestant and Catholic communities differently); HUMAN RIGHTS AND LEGAL DEFENSE, *supra* note 3, at 40 (contending that RUC failed to address complaint made on behalf of Catholic community adequately); Linda Moore & Mary O'Rawe, *A New Beginning for Policing in Northern Ireland?*, *in* HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND 186-87 (Colin J. Harvey ed., 2001) (discussing historic antagonism between RUC and Catholic communities in Northern Ireland).

20. *See* DAVIES, *supra* note 2, at 100-18 (alleging that anti-Catholic sentiment on behalf of FRU's covert informer and his FRU handlers led to targeting of Catholic individuals); *see also* BEYOND COLLUSION, *supra* note 5, at 24-25 (discussing prior Protestant paramilitary activities of informer used by British Army); JUSTICE DELAYED, *supra* note 9, para 1.2 (contending that members of RUC and FRU encouraged loyalist murders of Catholics); IN RE THE MURDER OF PATRICK FINUCANE, *supra* note 10, at 2 (alleging that RUC took no action on tips it received on imminent murder of Catholic and Republican defense lawyer, Patrick Finucane); *but see* Beatrix Campbell, *Comment & Analysis: State Killings Must be Investigated: The Irish Peace Declaration Shows Britain now Accepts its Responsibility*, GUARDIAN (UK), Aug. 10, 2001, at 12 (discussing allegations of security force collusion in murder of prominent loyalist leader, Billy Wright); *Canadian Judge to Head Investigation*, IRISH TIMES, Apr. 24, 2002, at 6 (discussing upcoming independent judicial inquiry into security force collusion into controversial killing of both Protestant and Catholic individuals).

unlawful activities targeting Catholic individuals and many remain unaccountable for their actions.[21]

A. *The Troubles*

The Northern Irish conflict began when Northern Ireland was created as a political entity in 1920.[22] Believing that independence had not been granted to the entirety of Ireland after Irish Partition, many in the Catholic community were unwilling to accept the legitimacy of the Northern Irish government.[23] Discord between Protestants and Catholics on the basis of their political views eventually emerged into violent struggle, which has persisted to the current day.[24] Experts discuss that the partisan politics of the Northern Irish landscape also infiltrated the governmental policy and security force sentiment in the re-

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21. *See* Neyroud & Beckley, *supra* note 15, at 164 (explaining that prior to RIPA's enactment, UK had no statutory authority governing use of informers); *see also* Gillespie, *supra* note 15 (discussing potential human rights conflicts within UK's previously unregulated informer authorization system); Hopkins, *supra* note 12, at 2 (alleging that FRU played role in murder of Finucane); IN RE THE MURDER OF PATRICK FINUCANE, *supra* note 10, paras. 4, 5(a) (contending that both FRU and RUC facilitated murder of Finucane through use of covert informers); BEYOND COLLUSION, *supra* note 5, at 29, 37 (indicating that Stobie and Nelson were never successfully prosecuted for murder of Finucane).

22. *See* CHRIS RYDER, INSIDE THE MAZE 4 (2001) (explaining that after Irish Partition, republicans still desired Ireland united, North and South); *see also* BALDY, *supra* note 3, at 40 (describing discord that grew between Protestant majority community and Catholic minority community after Irish Partition); Flaherty, *supra* note 1, at 13 (noting that Northern Irish conflict began after Northern Ireland was created as political entity).

23. *See* BALDY, *supra* note 3, at 44 (explaining that Catholic population questioned legitimacy of Northern Irish government after Irish Partition); *see also* RYDER, *supra* note 22, at 4 (indicating that republican desire for autonomous Ireland did not subside after Irish Partition); Flaherty, *supra* note 1, at 93 (explaining that many Catholics viewed Protestant-dominated government of Northern Ireland as illegitimate); COOGAN, *supra* note 18, at 341-53 (discussing rise of republican paramilitary group, IRA, in aftermath of Irish Partition).

24. *See* BALDY, *supra* note 3, at 49-66 (characterizing loyalist and republican paramilitary groups that have used violent means to achieve their sectarian political goals); *see also* COOGAN, *supra* note 18, at 341-53 (explaining rise of violent paramilitary group, IRA, in response to Troubles); Henry McDonald, *Loyalists Mock Phony 'Peace': It is Ulster's Unseen War . . . Violence, Intimidation and Sectarian Attacks—Like that on Daniel McColgan*, OBSERVER (UK), Jan. 20, 2002, at 10 (reporting on contemporary rise in loyalist paramilitary violence in Northern Ireland); Gerry Moriarty, *NI Paramilitaries Ordered 683 from Homes Last Year—Report*, IRISH TIMES (Ire.), Mar. 18, 2002 (explaining that violent threats by loyalist and republican groups led close to 700 families to move from their homes in 2001).

gion.[25] Commentators allege that such bias impacted the use of covert government informers in both the British army and the RUC.[26] Commentators note that the murder of human rights lawyer, Patrick Finucane, is an example of how certain covert agents in Northern Ireland's security forces were able to engage in illegal activities targeting politically unpopular individuals, many never held responsible for their actions.[27]

1. History of the Conflict in Northern Ireland

The conflict in Northern Ireland began during the same struggle that produced autonomy for what is now the Irish Republic.[28] After World War I, the IRA engaged in a violent gue-

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25. *See* BALDY, *supra* note 3, at 44 (discussing discriminatory policies enacted by Protestant majority governing Northern Ireland Parliament after Irish Partition); *see also* RYDER, *supra* note 22, at 5 (discussing UK support for Protestant domination of Northern Ireland Parliament); Moore & O'Rawe, *supra* note 19, at 186 (noting that many Catholics in Northern Ireland perceived RUC to have loyalist/Protestant sympathies); Flaherty, *supra* note 1, at 103-04 (explaining that RUC treated Catholics and Protestants in Northern Ireland differently); HUMAN RIGHTS AND LEGAL DEFENSE, *supra* note 3, at 50-52 (discussing statement by member of Parliament, Douglass Hogg, criticizing defense lawyers of Republican defendants).

26. *See* Davies, *supra* note 2, at 100-18 (alleging that members of FRU encouraged murder of Catholics through collusion with loyalist paramilitary informer); *see also* JUSTICE DELAYED, *supra* note 9, para. 1.2 (alleging collusion between FRU, RUC, and loyalist paramilitary informers in murder of Patrick Finucane); BEYOND COLLUSION, *supra* note 5, at 24-25 (discussing loyalist sympathies of FRU informer allegedly involved in murder of Patrick Finucane); IN RE THE MURDER OF PATRICK FINUCANE, *supra* note 10, at 2 (alleging that RUC chose to take no action on tip it received from loyalist paramilitary informer regarding imminent murder of Patrick Finucane).

27. *See* DAVIES, *supra* note 2, at 155-69 (discussing allegations of FRU involvement in murder of Patrick Finucane, high profile solicitor, unpopular with both UK government and security forces); *see also* HUMAN RIGHTS AND LEGAL DEFENSE, *supra* note 3, at 52-57 (presenting evidence of RUC and British Army collusion into murder of Fincuane and other politically unpopular individuals); British-Irish Rights Watch, *Deadly Intelligence: State Involvement in Loyalist Murder in Northern Ireland: Summary*, Feb. 1999, *available at* http://www.lchr.org/media/finucanesumm0299.htm [hereinafter *Deadly Intelligence*] (summarizing allegations of security force collusion with loyalist paramilitary groups in sectarian murders in Northern Ireland); JUSTICE DELAYED, *supra* note 9, paras. 1-9 (detailing allegations of security force collusion into controversial killings of Patrick Finucane, Rosemary Nelson, Terence McDaid, and Gerard Slane); Campbell, *supra* note 20, at 12 (discussing allegations of State collusion into murders of politically unpopular individuals such as Patrick Finucane, Rosemary Nelson, and Billy Wright); BEYOND COLLUSION, *supra* note 5, at 37 (noting that Stobie and Nelson were never successfully prosecuted for their alleged involvement in murder of Patrick Finucane).

28. *See* RYDER, *supra* note 22, at 4 (explaining that republicans continued to desire autonomy for whole of Ireland after independence was granted to only part of what was claimed to be Ireland proper); *see also* BALDY, *supra* note 3, at 40 (describing conflict arising after Irish partition between Protestant majority and Catholic minority in newly

rilla campaign, fighting for Irish autonomy from Great Britain.[29] Ultimately Great Britain partially conceded, granting independence to twenty-six of the thirty-two counties that comprised the territory under dispute.[30] The twenty-six predominantly Catholic counties created a constitution to become the Republic of Ireland.[31] The other six counties became Northern Ireland, a self-governing entity within the United Kingdom.[32] Northern Ireland was dominated by a Protestant majority committed to maintaining ties with the UK,[33] and a significant Catholic minor-

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created Northern Ireland); Flaherty, *supra* note 1, at 13 (stating that Northern Ireland was created at same time as Irish Republic was born). *See generally* Jeremy A. Colby, *Getting to Peace: Avoiding Roadblocks on the Path to Peace in Northern Ireland*, 14 TEMP. INT'L & COMP. L.J. 1, 3 (2000) (providing overview of historical context of conflict in Northern Ireland).

29. *See* RYDER, *supra* note 22, at 1-4 (describing rise of IRA as political organization aimed at establishing home rule for Ireland); *see also* BALDY, *supra* note 3, at 40-43 (explaining that IRA began campaign in 1919 to establish autonomy for Ireland); Flaherty, *supra* note 1, at 93 (noting that Protestant groups actively resisted goal of Irish autonomy); HUMAN RIGHTS AND LEGAL DEFENSE, *supra* note 3, at 13 (explaining that IRA began guerilla campaign for Irish autonomy after World War I).

30. *See* RYDER, *supra* note 22, at 4 (contexualizing grant of autonomy to southern 26 counties of Ireland within backdrop of violent IRA campaign for Irish home rule); *see also* BALDY, *supra* note 3, at 43 (noting that Anglo-Irish Treaty of 1921 created dominion status for predominantly Catholic counties in southern part of Ireland); BRICE DICKSON, THE LEGAL SYSTEM OF NORTHERN IRELAND 3 (1993) (explaining that partition of Ireland created separate legal and judicial systems for North and South); HUMAN RIGHTS AND LEGAL DEFENSE, *supra* note 3, at 13-14 (discussing that southern 26 counties were granted British dominion status as Irish Free State); Flaherty, *supra* note 1, at 93 (noting that 26 counties were referred to as Irish Free State in time after granting of independence but before adoption of Irish Constitution).

31. *See* DICKSON, *supra* note 30, at 3 (stating that Irish Constitution was created in 1937); *see also* BALDY, *supra* note 3, at 119 (contending that creation of Irish Republic in 1949 further solidified divisions between Protestant majority in North and Catholic majority in South); RYDER, *supra* note 22, at 4 (indicating that creation of Irish Republic fell short of republican desire for autonomous Ireland, consisting of all 32 counties); Flaherty, *supra* note 1, at 93 (explaining that subsequent to creation of Irish Constitution in 1937, Irish Republic left British Commonwealth).

32. *See* BELL, *supra* note 18, at 23 (explaining that after Irish Partition, Northern Ireland was run by devolved government, with Parliament known as "Stormont"); *see also* BALDY, *supra* note 3, at 43 (explaining that Northern Ireland maintained representation at UK Parliament, in addition to functionings of Stormont); HUMAN RIGHTS AND LEGAL DEFENSE, *supra* note 3, at 14 (noting that Stormont began to operate as political body in Northern Ireland in 1922); DICKSON, *supra* note 30, at 4 (discussing wide range of internal matters dealt with by Stormont).

33. *See* DICKSON, *supra* note 30, at 3-4 (explaining that, after Partition, Northern Ireland was governed by Parliament of Northern Ireland); *see also* BALDY, *supra* note 3, at 44 (noting that Catholics initially did not accept legitimacy of Northern Ireland); Flaherty, *supra* note 1, at 93 (stating that six counties that comprise Northern Ireland encompass province of Ulster). Protestants wanting to preserve union with the United

ity who desired an Ireland that was united, both North and South.[34]

As part of its self-governing mechanism, Northern Ireland established the Northern Ireland Parliament, also referred to as "Stormont," in 1922.[35] For the first fifty years of its existence, Stormont was dominated by a Protestant, unionist majority.[36] This majority instituted a series of policies effecting discrimination against Catholics in areas such as housing, employment, and voting rights.[37] Catholic nationalists and republicans initially re-

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Kingdom are generally referred to as "unionists." Colby, *supra* note 28, at 3-4. More extreme unionists, particularly those who advocate violence, are generally referred to as "loyalists." *Id.*

34. *See* BALDY, *supra* note 3, at 44 (explaining that Catholics initially expressed their dissatisfaction with creation of Ireland by choosing not to participate in political mechanism); *see also* RYDER, *supra* note 22, at 4 (discussing that after Northern Ireland was created, Catholic minority population did not feel that struggle for complete independence of Ireland had been realized); Flaherty, *supra* note 1, at 93-94 (explaining that Catholic minority population in Northern Ireland expressed their dissatisfaction with State in number of ways, including civil rights demonstrations, participation in paramilitary activities, and non-participation in State governance); HUMAN RIGHTS AND LEGAL DEFENSE, *supra* note 3, at 14 (recognizing that Northern Ireland was traditionally two-thirds Protestant and one-third Catholic). Catholics committed to making Northern Ireland part of the Irish Republic are commonly termed "nationalists." Colby, *supra* note 28, at 4. Those Catholics who take a more extreme stance, often advocating the use of violence, are commonly termed "republicans." *Id.*

35. *See* DICKSON, *supra* note 30, at 4 (noting that Stormont handled matters including local government, law and order, health and social services, education, planning, internal trade, industrial development and agriculture); *see also* BALDY, *supra* note 3, at 43 (explaining that, in addition to maintaining its own Parliament, Northern Ireland had representation at UK Parliament in Westminster); Flaherty, *supra* note 1, at 93 (discussing that for first half-century of its institution Stormont controlled nearly all government functions, with sole exceptions of taxation and defense); HUMAN RIGHTS AND LEGAL DEFENSE, *supra* note 3, at 14 (explaining that Stormont began operation in 1922).

36. *See* BALDY, *supra* note 3, at 44 (discussing that Protestants dominated Stormont through Unionist Party); *see also* RYDER, *supra* note 22, at 5 (explaining that British government supported Unionist domination of Northern Ireland governance); Flaherty, *supra* note 1, at 93 (noting that many Catholics rejected Protestant dominated Stormont as illegitimate); Alexander Linn, Note, *Reconciliation of the Penitent: Sectarian Violence, Prisoner Release, and Justice Under the Good Friday Peace Accord*, 26 J. LEGIS. 163, 165-66 (2000) (discussing division of Northern and Southern Ireland according to pre-existing majority populations within counties).

37. *See* BALDY, *supra* note 3, at 44 (contending that discriminatory policies enacted by loyalists in Stormont alienated Catholics and enforced loyalist belief that Catholics were disloyal to State); *see also* Linn, *supra* note 36, at 167 (discussing formation of Catholic civil rights movement in response to injustices perceived by Catholic community); Flaherty, *supra* note 1, at 93 (noting that loyalist majority in Stormont enacted discriminatory policies against Catholics regarding housing, employment, and voting rights); Brice Dickson, *Protection of Human Rights—Lessons from Northern Ireland*, 3 EUR.

sponded by engaging in peaceful civil rights demonstrations.[38] However, experts discuss that the unionist response to these protests soon became violent.[39] A cycle of violence ensued, wherein many Catholics and Protestants turned to more extreme paramilitary organizations, which used violent means to accomplish their political goals.[40]

Commentators note that the role of the police force in

HUM. RTS. L. REV. 213, 215 (2000) (explaining that discriminatory treatment of Catholics during Stormont-era strongly affected attitudes of Catholic community in Northern Ireland).

38. *See* BALDY, *supra* note 3, at 46-47 (describing rise of Northern Ireland Civil Rights Association, operating as peaceful civil rights organization aimed at challenging discrimination against Catholics); *see also* DAVIES, *supra* note 2, at 37 (explaining that Catholic civil rights movement was not focused on creating united Ireland, rather, it fought for social justice for Catholics in Northern Ireland); Christopher McCrudden, *Equality, in* HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND 77 (Colin J. Harvey ed., 2001) (commenting that anti-discrimination legislation was not introduced in Northern Ireland until 1973); Flaherty, *supra* note 1, at 93-94 (noting that Catholic civil rights movement was modeled after civil rights movement in United States); Colby, *supra* note 28, at 3 (contending that Troubles began when civil rights conflicts started in 1969).

39. *See* BALDY, *supra* note 3, at 47 (explaining that Ulster Volunteer Force ("UVF") was created in 1966 and began using violence against peaceful Catholic civil rights movement); *see also* McEvoy, *supra* note 3, at 218 (noting that loyalist paramilitary groups have traditionally used violence against Catholics in order to support union between Northern Ireland and UK and to compensate for perceived failure of UK to address threats posed by republicans to that union); Moore & O'Rawe, *supra* note 19, at 186-87 (remarking that RUC also used violence against Catholic working class communities); Flaherty, *supra* note 1, at 94 (noting that violent response by Protestant groups encouraged some Catholics to move away from non-violent tactics); Linn, *supra* note 36, at 168 (noting that victims of paramilitary violence included civilians and children); Molly Murphy, Note, *Northern Ireland Policing Reform and the Intimidation of Defense Lawyers*, 68 FORDHAM L. REV. 1877, 1882 (2000) (discussing violent unionist response to both peaceful and violent Catholic means of promoting civil rights).

40. *See* BALDY, *supra* note 3, at 50-53 (describing re-emergence of IRA in 1969, using violence in response to violent Protestant attacks on Catholics and in order to further political goals); *see also* McEvoy, *supra* note 3, at 217 (indicating that from 1973 to 2001, 2,300 people were victims of paramilitary punishment shootings, injuring knees, thighs, elbows and/or ankles, and from 1983 to 2001, 1,700 individuals victims of paramilitary punishment beatings, generally involving attacks with baseball bats, sticks with nails, iron bars, or other heavy objects); RYDER, *supra* note 22, at xiii (revealing that from 1969 to end of March 2000, average of one person was killed every three days, one person injured every six hours, shooting occurred every six hours, and explosion happened every fourteen hours in Northern Ireland); Flaherty, *supra* note 1, at 94 (explaining that British troops were sent to Northern Ireland in 1969 to respond to increased paramilitary violence and remain in Northern Ireland to current day); HUMAN RIGHTS AND LEGAL DEFENSE, *supra* note 3, at 15 (noting that violence peaked in 1972 with 467 political fatalities).

Northern Ireland, the RUC,[41] added a distinctive dimension to the Northern Irish conflict.[42] For the duration of its existence, the RUC was predominantly Protestant in composition.[43] Catholics and Nationalists were often disinclined to address their concerns to a force with so little representation on behalf of their community.[44] Further, experts agree that the RUC did not

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41. *See* Brice Dickson, *The Powers of the Police, in* CIVIL LIBERTIES IN NORTHERN IRELAND ch. 3 (1990) (indicating that RUC was police force in Northern Ireland and detailing powers of RUC in Northern Ireland). On November 4, 2001, the RUC officially changed to the Police Service of Northern Ireland. Police (Northern Ireland) Act, 2000, ch. 32, pt. 1, para. 1(1) (Eng.). The Police Act states: "The body of constables known as the Royal Ulster Constabulary shall continue in being as the Police Service of Northern Ireland (incorporating the Royal Ulster Constabulary)." *Id.*; *see Police Service of Northern Ireland, available at* http://www.psni.police.uk/welcome.shtml (noting date of changeover from RUC to Police Service of Northern Ireland ("PSNI")); *see also Britain: Strip 'Royal' From Ulster Police*, CHIC. TRIB., Jan. 20, 2000, § 1, at 16 (discussing that changes implemented in transforming predominantly Protestant RUC into Police Service of Northern Ireland will likely enjoy greater support from Catholics). *But see* Jim Dee, *Skeptics Skewer Policing Reform*, BOSTON HERALD, Apr. 6, 2002, at 3 [hereinafter *Skeptics Skewer Policing Reform*] (surveying critics, who note that PSNI will not be representative of Catholic population for at least 15 or more years and who believe PSNI to be substantially similar in composition to RUC).

42. *See* BALDY, *supra* note 3, at 47 (indicating that RUC was implicated in certain loyalist attacks on Catholics); *see also* Moore & O'Rawe, *supra* note 19, at 186 (stating that many nationalists/Catholics believed RUC to have unionist/Protestant sympathies); Flaherty, *supra* note 1, at 103-04 (discussing unequal treatment of Catholic and Protestant community members on behalf of RUC); *see also* Murphy, *supra* note 39, at 1898 (describing difficulty of RUC in addressing complaints of Catholic citizens in Northern Ireland); HUMAN RIGHTS WATCH/HELSINKI, TO SERVE WITHOUT FAVOR: POLICING, HUMAN RIGHTS AND ACCOUNTABILITY IN NORTHERN IRELAND 15 (1997) [hereinafter TO SERVE WITHOUT FAVOR] (alleging that policing system in Northern Ireland has allowed human rights abuses to occur). *See generally*, Moore, *supra* note 2, at 1578-82 (discussing history of RUC's inter-community role in Northern Ireland).

43. *See* Moore & O'Rawe, *supra* note 19, at 200 (reporting that RUC was eight percent Catholic, while Catholics account for over forty percent of population in Northern Ireland); *see also* RYDER, *supra* note 22, at 7-8 (explaining that Catholics historically viewed RUC as repressive device of Unionists); Moore, *supra* note 2, at 1599 (explaining that RUC was predominantly male and Protestant); *Skeptics Skewer Policing Reform*, *supra* note 41, at 3 (noting both RUC and PSNI to be 92 percent Protestant). *See generally* Moore & O'Rawe, *supra* note 19, at 186-88 (providing overview of history of RUC in Northern Ireland).

44. *See* Flaherty, *supra* note 1, at 104 (stating that Catholics and Nationalists generally went to RUC to voice complaints only as last resort); *see also* Moore, *supra* note 2, at 1578 (noting Catholics may have viewed RUC as partisan due to association with government counter-terrorist policy it carried out). *But see* Linn, *supra* note 36, at 167-68 (noting that Catholics initially welcomed security force involvement, deployed in order to protect Catholics from loyalist paramilitary violence). The results of a survey conducted in 1999 reveals the impact of Catholic and RUC antagonism on Catholic perceptions of the RUC. INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND, A NEW BEGINNING: POLICING IN NORTHERN IRELAND chs. 3-20 (1999). This survey found

have a history of effectively handling complaints made by members of the Catholic community.[45]

Throughout the conflict, security forces have been responsible for approximately 360 deaths.[46] The RUC alone was responsible for at least fifty of those deaths.[47] To date, however, no RUC officers have been successfully prosecuted for any alleged misconduct relating to these killings.[48]

2. A Case Study: The Murder of Patrick Finucane

Patrick Finucane was a successful and well-respected human rights and criminal defense attorney in Northern Ireland.[49] Representing a number of high-profile Republicans and IRA members, though, certain individuals associated Finucane with the politics of his clients.[50] Commentators note that Finucane was

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that more Catholic than Protestant respondents felt that the RUC treated the two communities on an unequal basis. *Id.* The same report also revealed that approximately 75% of Catholics believed that there were too few Catholics on the police force, where only 60% of Protestants shared that view. *Id.* On the basis of these, and other, findings, the report concluded that Protestant/Unionist perceptions and Catholic/Nationalist perceptions of the police are sharply different. *Id.*

45. *See* HUMAN RIGHTS AND LEGAL DEFENSE, *supra* note 3, at 40 (interviewing Northern Irish solicitors who brought complaints on behalf of Catholics and indicating that their clients' complaints were not addressed); *see also* Flaherty, *supra* note 1, at 103-04 (discussing ineffective handling of complaints made by defense lawyers of Catholics and Nationalists); Moore, *supra* note 2, at 1578 (noting that hostility toward RUC increased in Catholic community, due to day to day harassment by RUC, use of plastic bullets by RUC, accusations of security force collusion with paramilitaries and alleged "shoot to kill" policies); Murphy, *supra* note 39, at 1989 (noting that many defense lawyers in Northern Ireland are dubious about quality of investigation made into police complaints).

46. *See* Moore, *supra* note 2, at 1580 (explaining that British Army and RUC were responsible for 360 deaths during Northern Irish conflict).

47. *See id.* (noting proportion of deaths caused by RUC).

48. *See id.* (contending that security services seem to be immune from successful prosecution for alleged misconduct).

49. *See* Russell, *supra* note 1, at 202 (explaining that Finucane had prominent reputation as civil rights attorney in Northern Ireland); *see also* BEYOND COLLUSION, *supra* note 5, at 4-5 (detailing controversial cases Finucane successfully tried); DAVIES, *supra* note 2, at 155-56 (discussing successful legal challenges Finucane made to controversial RUC practices); Ryder, *supra* note 2, at 1 (noting that Finucane represented number of high-profile Republican and IRA members); OFFICIAL COLLUSION, *supra* note 1, at 1 (explaining that Finucane challenged UK government concerning human rights issues).

50. *See* Flaherty, *supra* note 1, at 100 (noting that government officials in UK have accused lawyers of sharing politics of the clients they represent); *see also* OFFICIAL COLLUSION, *supra* note 1, at 2 (discussing that RUC detectives identified Finucane with his Republican clients); Finucane, *supra* note 1, at 19 (contending that both RUC and

murdered after being wrongly accused of being an IRA member and republican activist by loyalist paramilitary groups and the RUC.[51] Evidence that certain covert government agents in both

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others associated Finucane with paramilitary activities some of his clients engaged in); Moloney, *supra* note 13, at 1 (explaining that UDA considered Finucane to be member of PIRA); BEYOND COLLUSION, *supra* note 5, at 7 (providing example of government official who publicly associated Northern Irish solicitors with the Republican affiliations of their clients).

Commentators note that the vulnerability of defense lawyers of Republicans and IRA members increased because of at least one government actor, Douglas Hogg MP, then Parlimentary Under-Secretary of State for the Home Office. *See* BEYOND COLLUSION, *supra* note 5, at 7 (discussing that Hogg's statements significantly increased vulnerability of Finucane); *see also* Sarah Schaefer, *Parliament: Northern Ireland: Unionist Anger at Finucane Inquiry*, INDEPENDENT (LONDON), May 6, 1999, at 8 (quoting Labour MP as believing Hogg's statement to be one of most dangerous statements ever spoken by government minister); Ryder, *supra* note 2, at 1 (reporting that lawyers and politicians accused Hogg of laying foundation for Finucane's murder with his comments); Harvey, *supra* note 2, at 7 (stating that both moral and political responsibility for Fincuane's murder lies with British government and, in particular, Douglas Hogg). In a Parliamentary debate over a bill on the floor, Hogg declared that "certain solicitors" in Northern Ireland were "unduly sympathetic" to the IRA's cause. *Hansard*, House of Commons, Standing Committee B., Jan. 17, 1989, at col. 508.
Hogg stated:

> I have to state as a fact, but with great regret, that there are in Northern Ireland a number of solicitors who are unduly sympathetic to the cause of the IRA.—[Interruption]. I repeat that there are in the Province a number of solicitors who are unduly sympathetic to the cause of the IRA. One has to bear that in mind.

Id. at col. 508. Hogg repeated the statement that "certain solicitors" were "unduly sympathetic" to the IRA 11 times in the course of the House of Commons Debate. Harvey, *supra* note 2, at 7. Hogg's statement immediately caused a public uproar in Northern Ireland, where people believed that Hogg's remarks supported claims by loyalist groups that defense solicitors were IRA members and, therefore, valid targets. *See* BEYOND COLLUSION, *supra* note 5, at 8 (noting that Hogg's statement caused immediate protest in Northern Ireland, in particular among Northern Ireland legal community); *see also* Harvey, *supra* note 2 (referring to Hogg's comments as "dangerous and unspecified allegation"); Ryder, *supra* note 2, at 1 (reporting that members of Northern Ireland Association of Socialist Lawyers called for Hogg's resignation after controversial statements). *See generally* Nick Hopkins & Richard Norton-Taylor, *Police Talk to Ex-Minister Hogg About Ulster Killing*, GUARDIAN, June 13, 2001, at 1 (reporting that Hogg conceded that he had been briefed by RUC regarding activities of lawyers in Belfast who had alleged republican sympathies).

Less than a month after Hogg made his remarks, Patrick Finucane was murdered. *See* BEYOND COLLUSION, *supra* note 5, at 7 (noting that Hogg's comments were made on January 17, 1989). Finucane was murdered on February 12, 1989. *See* Flaherty, *supra* note 1, at 87 (noting that Finucane was murdered at his home on February 12, 1989). Neither Hogg, nor the UK government, has ever issued an apology for the statements made by Hogg. BEYOND COLLUSION, *supra* note 5, at 9.

51. *See* BEYOND COLLUSION, *supra* note 5, at 7 (noting that RUC officers accused Finucane of being member of IRA); *see also* OFFICIAL COLLUSION, *supra* note 1, at 2 (explaining that RUC detectives informed loyalist suspects detained in interrogation

centers that Finucane was involved in IRA); Moloney, *supra* note 13, at 1 (discussing that Finucane was referred to as member of PIRA by UDA); HUMAN RIGHTS AND LEGAL DEFENSE, *supra* note 3, at 47 (providing examples of comments made by RUC to Finucane's clients, regarding Finucane's involvement in IRA).

Commentators discuss that prior to his death, Patrick Finucane was the subject of frequent harassment and intimidation by the RUC, through the use of indirect threats. *See, e.g.*, Finucane, *supra* note 1, at 19 (discussing that threats began as insults about Finucane's legal ability). The threats received by Finucane escalated to threats on Finucane's life and in the weeks and months immediately preceding Finucane's death, the frequency and intensity of these threats increased. *Id.*; *see* Russell, *supra* note 1, at 202-03 (noting that United Nations ("U.N.") investigation found that Finucane was recipient of death threats by RUC); OFFICIAL COLLUSION, *supra* note 1, at 2 (stating that various Republican suspects represented by Finucane and detained in interrogation centers stated that detectives alluded to Finucane in derogatory ways and, on some occasions, communicated death threats to Finucane through his clients). One of Finucane's former clients reported that police asked him for details about Finucane, and remarked to him: "Finucane is an IRA man. He's a dead man. He'll be dead within three months." BEYOND COLLUSION, *supra* note 5, at 7. A week before Finucane's murder another of Finucane's clients was allegedly told by RUC officers: "Fucking Finucane's getting took out." BEYOND COLLUSION, *supra* note 5, at 7. *See generally* Flaherty, *supra* note 1, at 97-107 (providing overview of official harassment of defense lawyers in Northern Ireland); BEYOND COLLUSION, *supra* note 5, at 6-7 (providing additional examples of death threats communicated to Finucane through his clients). Experts note that such intimidation generally occurred once the defendant-detainee came into the custody of police. *See* Flaherty, *supra* note 1, at 99 (explaining that most indirect threats to defense lawyers in Northern Ireland occur in detention centers); *see also* BEYOND COLLUSION, *supra* note 5, at 5-7 (providing examples of threats communicated through Finucane's detained clients); Russell, *supra* note 1, at 205 (stating that threats made against defendants, isolation of suspects, and hostility toward defense lawyers were practices common within RUC); Murphy, *supra* note 39, at 1893-97 (discussing examples of alleged threats made by RUC to both Patrick Finucane and murdered defense solicitor Rosemary Nelson). In these situations, the detective would often bully and threaten the detainee, and then make various threatening comments about the detainee's solicitor. *See* Flaherty, *supra* note 1, at 99 (describing method by which indirect threats by RUC were issued to defense lawyers in Northern Ireland). These threatening remarks varied in degree. *Id.* Some threats served as attempts to intimidate defendants into changing their mind about their choice of solicitor. *Id.* Other, more dangerous threats threatened the lives of the solicitor representing the defendant. *Id.*; *see* Murphy, *supra* note 39, at 1893 (stating that threatening comments occur so frequently that many clients do not tell their solicitors about them). *See generally* Russell, *supra* note 1, at 205-08 (discussing abuses in techniques utilized in RUC's police interrogations); Murphy, *supra* note 39, at 1892-93 (discussing use of RUC threats to interfere with defendant's choice of counsel). Experts explain that this form of threatening was accomplished in a manner similar to that used against other defense lawyers of Nationalist and Republican individuals. *See* Flaherty, *supra* note 1, at 98-99 (explaining method by which RUC officers made indirect threats to defense lawyers of Catholic and Nationalist individuals in Northern Ireland); *see also* Russell, *supra* note 1, at 203 (discussing U.N. accusations of RUC intimidation and harassment of defense lawyers); Murphy, *supra* note 39, at 1893 (noting that threats against defense lawyers occur in detention centers, as well as via telephone or in writing). *See generally* Russell, *supra* note 1, at 203 (discussing similarities of threats aimed at both Finucane and murdered defense solicitor Rosemary Nelson); Murphy,

the British Army and the RUC targeted Finucane for political reasons have surfaced since his killing.[52] Commentators allege

supra note 39, at 1893-97 (discussing examples of alleged threats made by RUC to both Finucane and Rosemary Nelson).

52. *See* JUSTICE DELAYED, *supra* note 9, para. 1.2 (alleging that member of British Army participated in loyalist murder of Finucane); *see also* OFFICIAL COLLUSION, *supra* note 1, at 1-2 (contending that UDA and security forces colluded in murder of Finucane, whom loyalists claimed was member of IRA); Flaherty, *supra* note 1, at 99 (stating that Finucane was targeted because of successful legal challenges he undertook against security forces); BEYOND COLLUSION, *supra* note 5, at 7 (explaining that RUC detectives expressed animosity towards Finucane by derogatorily speaking of him as Catholic).

Since the beginning of the conflict in Northern Ireland, both the RUC and British Army created specialized units responsible for using different types of covert operations to fight paramilitary violence. *See* BEYOND COLLUSION, *supra* note 5, at 22 (describing creation of specialized covert intelligence units upon onset of Troubles); *see also* DAVIES, *supra* note 2, at 37-38 (discussing creation of FRU in response to growing terrorist threats in Northern Ireland); *see also* LEWIS, *supra* note 12, at xv (stating that when Troubles began, government hastily created number of military units to carry out "reactive" intelligence operation against terrorist groups). *See generally* BEYOND COLLUSION, *supra* note 5, at 22 (describing Tasking and Coordination Groups ("TCGs"), which functioned as means of integrating intelligence received from various specialized units in both British army and RUC). Two of these units include the RUC's Special Branch and the British Army's Force Research Unit ("FRU"). *See* BEYOND COLLUSION, *supra* note 5, at 30 (classifying FRU as example of one of units created under British army to handle covert operations at beginning of Troubles). Other specialized units that were created include the RUC's Special Support Units ("SSUs"), the Army's 14th Intelligence Company ("Reconnaissance Unit"), and Special Air Service ("SAS"). *Id.* at 22. Overlaying the responsibility of these groups is the MI5, the UK's intelligence service, responsible for domestic security. *Id.*

Both the Special Branch and the FRU use covert agents to infiltrate paramilitary organizations for the purposes of intelligence gathering. *See* BEYOND COLLUSION, *supra* note 5, at 21-22 (noting that both Special Branch and FRU had covert agents placed within UDA); *see also* IN RE THE MURDER OF PATRICK FINUCANE, *supra* note 10, para. 4 (noting that William Stobie worked as covert agent for Special Branch at time of Finucane's killing); *see also* JUSTICE DELAYED, *supra* note 10, para. 1.2 (explaining that Brian Nelson infiltrated UDA as covert agent by FRU). The objective of the Force Research Unit was to identify, recruit, and integrate covert agents in all aspects of the community, with an emphasis placed on gathering intelligence through informers placed within loyalist and republican paramilitary organizations. *See* LEWIS, *supra* note 12, at xv (defining objective of FRU and contending that FRU activities are most sensitive of covert operations in Northern Ireland); *see also* DAVIES, *supra* note 2, at 42 (emphasizing importance of informer intelligence to FRU's operations). The Special Branch's work focused on the use of informers and agents within both republican and loyalist paramilitary organizations. BEYOND COLLUSION, *supra* note 5, at 30. It is alleged that both the Special Branch and FRU double agents have colluded with paramilitary groups to target politically unpopular individuals, such as Patrick Finucane. *See* Russell, *supra* note 1, at 202-06 (discussing alleged role of RUC in murders of Finucane and Nelson); *see also* Norton-Taylor & Hopkins, *supra* note 14, at 11 (detailing claims that RUC and MI5 colluded with UDA in murdering Finucane); Finucane, *supra* note 1, at 19 (claiming that both FRU and RUC colluded with UDA in facilitating murder of Finucane); JUSTICE DELAYED, *supra* note 9, para. 10.2 (detailing extensive list of organi-

that covert security force agents illicitly colluded with paramilitary groups to facilitate Finucane's murder and many remained unaccountable for their actions.[53]

After the murder of Patrick Finucane, a former informer for the RUC's Special Branch,[54] William Stobie, came forward with evidence alleging RUC collusion in the murder of Patrick Finucane.[55] During the time of Finucane's murder, Stobie worked

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zations calling for independent judicial inquiry into murder of Finucane in light of evidence supporting collusion claims between UDA and UK security forces); Murphy, *supra* note 39, at 1893-97 (discussing alleged role of RUC in murder of Finucane and RUC's response thereto). At least one commentator alleges that this collusion has taken a variety of forms: directly conspiring with paramilitary groups, failing to prevent criminal acts for which there is reliable advance notice, or failing to pursue an investigation where a particular paramilitary group was allegedly involved. *See* TO SERVE WITHOUT FAVOR, *supra* note 42, at 140 (providing examples of alleged collusion by UK security forces and paramilitary organizations). In addition, experts contend that policies of the RUC allowed for a policing culture more interested in its intelligence gathering operations than the greater interests of justice. *See* BEYOND COLLUSION, *supra* note 5, at 57 (arguing that police force more concerned with getting intelligence than bringing agents or potential agents to justice for their possible wrongdoings); *see also* Norton-Taylor & Hopkins, *supra* note 14, at 11 (discussing report that RUC Special Branch had powers to give priority to recruiting informers over solving crimes); Dee, *supra* note 9, at 18 (noting that confessed murderer of Finucane was recruited as informer rather than prosecuted for crime); *Insight: Policing the Police*, *supra* note 14 (alleging RUC and British army cover-up of murders for purposes of protecting informants); Liam Clarke, *Police Informer Claims he Killed Lawyer in his Home*, SUNDAY TIMES (UK), Jan. 13, 2002, at 5 (revealing name of loyalist activist who confessed to murdering Finucane and who is now allegedly operating as police informer).

53. *See* BEYOND COLLUSION, *supra* note 5, at 25-29 (discussing alleged involvement of British army informer in murder of Finucane, and fact that informer has never been prosecuted for Finucane killing); *see also* JUSTICE DELAYED, *supra* note 9, paras. 7.1-7.5 (detailing involvement of RUC in murder of Finucane and noting lack of accountability of involved members); Russell, *supra* note 1, at 202 (explaining that ineffectiveness of RUC to hold accountable those accused of colluding with UDA in murder of Finucane); IN RE THE MURDER OF PATRICK FINUCANE, *supra* note 10, para. 1 (calling for establishment of public inquiry in light of collusion allegations by UK government); Hopkins, *supra* note 12, at 2 (alleging that full extent of British army's involvement in Finucane's murder has not yet been uncovered).

54. *See* BEYOND COLLUSION, *supra* note 5, at 30 (classifying Special Branch as intelligence unit created under RUC, handling covert operations).

55. *See* IN RE THE MURDER OF PATRICK FINUCANE, *supra* note 10, paras. 4, 5(a) (discussing admission of William Stobie regarding his role as Special Branch agent in murder of Patrick Finucane); *see also* Moloney, *supra* note 13, at 1 (explaining that Stobie was hired as informer for Special Branch after Special Branch became aware that Stobie had been involved in murder); Tran, *supra* note 1, at 15 (reporting that Stobie confessed to have telephoned his Special Branch handlers on night of shooting, warning them of imminent loyalist attack); Mullin, *supra* note 5, at 5 (reporting that William Stobie told RUC in 1990 that he supplied and disposed of two weapons used in Finucane murder). Stobie additionally claimed to have assisted in planning Finucane's mur-

both as a Special Branch informer, planted in the role of a quartermaster for the UDA.[56] In the week immediately preceding Finucane's murder, Stobie claims that he was ordered by his UDA commander to provide guns for an operation involving the imminent murder of a high profile republican target.[57] Stobie claims to have informed the Special Branch of this information, and information concerning the identity of the UDA commander in charge of the operation.[58] However, Stobie claims that the Special Branch chose not to follow up on the leads he had provided.[59] In some of his accounts, Stobie also claims that

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der. *See generally* Moloney, *supra* note 13, at 1 (detailing narrative provided by William Stobie regarding his role in RUC and UDA at time of Finucane's killing).

56. *See* Mullin, *supra* note 5, at 5 (explaining that Stobie had been Special Branch agent inflitrated into UDA for two years at time of Finucane's murder); *see also* Moloney, *supra* note 13, at 1 (providing extensive account of Stobie's role as Special Branch agent working undercover in UDA); IN RE THE MURDER OF PATRICK FINUCANE, *supra* note 10, para. 4 (noting that Stobie's role as Special Branch informant has been confirmed by Crown); BEYOND COLLUSION, *supra* note 5, at 30 (noting that Stobie was informer in UDA from approximately 1987 through 1990 and served as UDA quartermaster in West Belfast); Michael Posner, *The Patten Commission Report on Policing in Northern Ireland: Statement of Michael Posner: Before the United States House of Representatives Committee on International Relations: Subcommittee on International Operations and Human Rights*, Sept. 24, 1999, *available at* http://www.lchr.org/n.ireland/nitestimony0999.htm (recounting testimony of Stobie affirming that he was police informer for Special Branch).

57. *See* Moloney, *supra* note 13, at 1 (explaining that Stobie was told to provide guns by his UDA commander for an operation involving a high ranking PIRA member). One version of William Stobie's activities as an informant for the Special Branch comes from an article published by Ed Moloney in THE SUNDAY TRIBUNE (UK). BEYOND COLLUSION, *supra* note 5, at 31. However, there has been some dispute as to details Moloney presented in the article. BEYOND COLLUSION, *supra* note 5, chs. 3, 5 (providing further discussion of controversies surrounding Stobie's role in murder of Patrick Finucane). Presented here is Moloney's discussion of Stobie's role in the Finucane murder.

Moloney received his information regarding Stobie's role in the Finucane murder through a series of interviews he conducted with Stobie beginning in 1990. Moloney, *supra* note 13, at 1. Moloney conducted these interviews on the condition that Moloney would not publish the narrative until Stobie had granted him permission. *Id.* Stobie told Moloney of his involvement in Finucane's killing so that he could release the story publicly in the event he feared his life to be in danger. *Id.* The article was published on June 17, 1999. *Id.* Stobie was murdered on December 12, 2001 in a shooting claimed by the Red Hand Defenders, a cover name of the UDA. BEYOND COLLUSION, *supra* note 5, at 52.

58. *See* Moloney, *supra* note 13, at 1 (explaining that Stobie called his Special Branch handlers after learning about planned UDA killing, and provided Special Branch with all details he knew).

59. *See id.* (noting that Stobie believes he gave enough information to Special Branch about upcoming UDA killing that Special Branch could have put UDA commander and potential hit men under surveillance, and possibly prevented UDA operation from proceeding).

he was responsible for supplying the weapons the UDA used to murder Finucane, and that, after the murder took place, Stobie recovered the weapons the UDA had used carry out the killing.[60] Stobie asserted that he made the Special Branch aware of both his activities and the movement of Finucane's murder weapon.[61] According to Stobie, though, the Special Branch chose not to attach a bugging device to the guns, or monitor the weapons' movements, as would have been protocol in typical surveillance operations.[62]

Commentators also allege that errant agents in the British

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60. *See id.* (discussing that Stobie delivered guns to UDA on day of Finucane's killing and retrieved guns after murder to store in "safe house"). The primary responsibilities of a UDA quartermaster include supplying weapons for all UDA missions under his or her control. BEYOND COLLUSION, *supra* note 5, at 30. Martin Ingram, an FRU whistleblower, has noted that a double agent working as a quartermaster holds a very important role, because security forces can electronically tag weapons under his or her control, in order to track their movement. *Id.* at 41.

61. *See* Moloney, *supra* note 13, at 1 (explaining that Stobie informed his Special Branch handlers about movement of guns throughout entire UDA operation to kill Finucane).

62. *See id.* (noting that Stobie claims Special Branch made no attempt to monitor movement of weapons used in Finucane's murder, contrary to procedures employed in many Special Branch IRA operations). Martin Ingram stated that he could not contemplate a scenario in which the Special Branch would have failed to immediately tag any weapon that came under his control, and suggested that any failure to do so warrants a thorough investigation. BEYOND COLLUSION, *supra* note 5, at 41-42.

In 1989, Stobie was arrested for gun possession of weapons he claims were planted by the Special Branch. *See* Moloney, *supra* note 13, at 1 (reporting that Stobie claims gun was planted in order to silence him over role of Special Branch in Finucane killing). In the course of his 1990 trial for this charge, Stobie allegedly threatened to reveal that the Special Branch had enough information to prevent Finucane's murder. *See id.* (explaining that Stobie claims to have informed his lawyers during trial to inform Director of Public Prosecutions ("DPP") that Stobie would reveal role of Special Branch in murder of Finucane). Immediately after this threat, a RUC Detective testifying in the trial disclosed, while on the stand, that Stobie had a prior record. *See id.* (noting that immediately after Stobie claims to have made threat to Special Branch regarding going public information relating to Special Branch role in Finucane killing, police officer in witness box presented prejudicial evidence at trial). This action resulted in a mistrial. *See id.* When the trial finally went forward on January 31, 1991, the Director of Public Prosecutions ("DPP") offered no evidence against Stobie and Stobie was inevitably found not guilty. *Id.* One commentator noted that such an obvious mistake arouses suspicion that the government was merely taking steps to ensure that Stobie would not reveal information about the Finucane murder. *See* BEYOND COLLUSION, *supra* note 5, at 33 (noting that commentators believe mistake made by testifying detective at Stobie trial was so obvious that it appears government was actually attempting to prevent Stobie from releasing what he knew of Finucane murder). When a new trial was scheduled, the prosecution recommended a not guilty verdict, which commentators note is highly unusual in this type of case. *See id.* at 33-34 (contenting that prosecution's recommendation of not guilty verdict in favor of Stobie was highly out of ordinary, given

fact that, in Northern Ireland, when weapons are found on defendant's property, burden of proof shifts to defendant).

In 1999, Stobie was arrested and charged with the murder of Patrick Finucane. *See id.* at 48 (stating that Stobie's lawyer suggested at arraignment that RUC and DPP had possessed information on which charge was based for some time); *see also* IN RE THE MURDER OF PATRICK FINUCANE, *supra* note 10, para. 5(b) (noting that publication of Moloney's article directly led to initiation of civil proceedings against Stobie); Mullin, *supra* note 5, at 5 (discussing controversy over nine-year time period between Stobie confession to involvement in Finucane murder and charges brought against him). In August 2000, the charge of murder against Stobie was commuted from murder to aiding and abetting. BEYOND COLLUSION, *supra* note 5, at 50. However, the DPP offered no evidence against Stobie and the judge entered a formal verdict of not guilty. *See id.* at 50-51 (contending that British government used Stobie trial as mechanism for delaying public inquiry into Finucane murder); *see also* John Murray Brown, *Inquiry Call as Finucane Murder Trial Collapses*, FIN. TIMES (LONDON), Nov. 27, 2001, at 2 (discussing collapse of Stobie's trial after main prosecution witness, Neil Mulholland, was unable to be called after health warnings from his psychiatrist); David McKittrick, *New Calls for Inquiry as Finucane Trial Collapses*, INDEPENDENT (UK), Nov. 27, 2001, at 18 (reporting calls for independent inquiry by Finucane family, nationalist political parties, Sinn Fein and SDLP, and Stobie after collapse of case against Stobie).

After the case against Stobie was ended, Stobie went public to call for an independent inquiry into the murder of Patrick Finucane. BEYOND COLLUSION, *supra* note 5, at 51. Not long after Stobie began this public appeal, he was murdered in front of his home in an attack claimed by the Red Hand Defenders, a cover name of the UDA. *Id.* at 52. Commentators have suggested that the lack of police protection afforded Stobie, coupled with an interest in preventing a full public inquiry into Finucane's murder lends suspicion to the role of the RUC in Stobie's murder. *Id.* at 53; *see Loyalist Group Killed Ex-Informer in Belfast*, GUARDIAN (UK), Dec. 21, 2001, at 3 (quoting Finucane's family as saying that had Stobie been granted anonymity by the police he could still be alive). *See generally* David Sharrock, *Loyalist Killers Silence Informer*, DAILY TELEGRAPH (UK), Dec. 13, 2001, at 8 (reporting that Red Hand Defenders claim to have killed Stobie for "crimes against the loyalist community").

In May 2001, a confidential report was uncovered, commonly referred to as the Walker Report. *See* BEYOND COLLUSION, *supra* note 5, at 56 (discussing that Ulster Television ("UTV") revealed existence of Walker report); *see also Insight: Policing the Police*, *supra* note 14 (discussing effect of Walker Report in establishing primacy of Special Branch within RUC); Norton-Taylor, *supra* note 14, at 11 (noting that report was drawn up by Patrick Walker, senior MI5 officer in Northern Ireland and later head of agency). *Walker Report: Interchange of Intelligence Between Special Branch and CID*, Feb. 23, 1981, *available at* http://www.serve.com/pfc/policing/walker1.html [hereinafter *Walker Report*]. This Report governs the exchange of intelligence between the Special Branch and the RUC's Criminal Investigations Division ("CID"). *See* BEYOND COLLUSION, *supra* note 5, at 56 (explaining purpose of Walker Report); *see also Insight: Policing the Police*, *supra* note 14 (quoting Chief Superintendent in RUC as mandating that running of informants, arrests, raid operations, and surveillance require prior Special Branch approval); *Walker Report*, *supra* (stating that Walker Report was commissioned by Chief Constable on interchange of intelligence information between Special Branch and CID). *See generally Insight: Policing the Police*, *supra* note 14 (providing examples of Special Branch halting investigations carried out by CID officers). The Report emphasizes the primacy of the Special Branch over investigations pursued by the CID. *See* BEYOND COLLUSION, *supra* note 5, at 56 (explaining focus of Walker Report); *see also Insight: Policing the Police*, *supra* note 14 (discussing Special Branch primacy as out of control

system without clearly defined accountability). The system is shielded behind principles of national security. *Id.*; *see* Norton-Taylor & Hopkins, *supra* note 14, at 11 (stating that Special Branch primacy allowed RUC to give precedence to recruitment of terrorist informers rather than solving crime). *See generally Walker Report*, *supra* (discussing standards by which Special Branch has primacy over CID). According to the Report, a CID investigation may be pre-empted if it in any way puts a Special Branch agent at risk. *Id.* para. 4. The Walker Report states:

> CID Officers must be alert to the possibility of recruiting as agents the individuals whom they are interviewing. When the opportunity to recruit such a person arises, Special Branch must be involved at an early stage both in de-briefing and handling the agent. It is also important to ensure that information provided by the person so recruited is handled in such a way that his value as an agent is not put at risk at an early stage.

Id. CID officers are required to be cognizant of the potential of recruiting individuals they are interviewing as agents. *See Walker Report*, *supra*, para. 4 (emphasizing that CID officers try to recruit agents from interviewees). Additionally, if officers intend to charge someone who may have intelligence information potentially useful to the Special Branch, the CID must arrange for a "reasonable period" between the charge and court appearance so that the Special Branch may investigate the person in question. *Id.* para. 4(2)(c). The Walker Report provides:

> When a person in custody has made an admission or admissions to CID and the CID Officer feels that that person may have intelligence of value it is desirable that Special Branch be given an opportunity to question such person. In those circumstances CID, on completion of questioning, should prefer charges and, where possible, arrange the Court in such a way that a reasonable period will elapse between charging and appearance in Court to enable Special Branch to question the person concerned for intelligence purposes.

Id.; Commentators note that this emphasis on covert policing cultivated a police culture in which the quest for intelligence trumped concerns about bringing both agents and potential agents to justice. *See* BEYOND COLLUSION, *supra* note 5, ch. 6 (discussing creation of RUC culture wherein quest for intelligence gained through informers was deemed more important than bringing agents and potential agents to justice); *see also Insight: Policing the Police*, *supra* note 14 (explaining that RUC Special Branch officers tampered with evidence in order to prevent information on covert agents from coming to light); Norton-Taylor & Hopkins, *supra* note 14, at 11 (reporting that UK intelligence service, MI5, gave RUC Special Branch powers allowing force to give priority to recruiting terrorist informers over solving crime). *See generally* BEYOND COLLUSION, *supra* note 5 (providing extensive overview of allegations of UK security force collusion and cover-up of murder of Patrick Finucane).

In the fall of 2000, former CID officer, Johnston Brown, came forward with claims that the RUC Special Branch had blocked attempts by himself and other RUC officers to prosecute one of the gunmen in Finucane's murder. *See* BEYOND COLLUSION, *supra* note 5, at 56 (discussing claims that Special Branch blocked RUC investigation into alleged perpetrators of Finucane murder); *see also* Norton-Taylor & Hopkins, *supra* note 14, at 11 (noting that Brown first discussed blocked attempts at follow up on confession of Finucane killer on UTV Insight program); *Insight: Policing the Police*, *supra* note 14 (reporting that, after Brown elicited inadmissible confession from Finucane murderer, he was not allowed to proceed with investigation after Special Branch stepped in); Clarke, *supra* note 52, at 18 (reporting that tape recorded confession of Finucane killer is missing from RUC and has renewed calls for full public inquiry into Finucane murder). *See generally Insight: Policing the Police*, *supra* note 14 (providing account by Brown alleging Special Branch hampered operations, prevented release of information that

army facilitated Finucane's murder.[63] During the time of Finucane's murder, a man named Brian Nelson worked as an undercover agent for an elite segment of the British Army, the Force Research Unit ("FRU"),[64] hired to infiltrate the UDA as an in-

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could have solved crimes and prevented certain investigations from proceeding). In the course of one of Brown's investigations, he encountered a man who confessed with precise detail to the murder of Patrick Finucane, a confession that matched key details that had not been publicly released. *See* BEYOND COLLUSION, *supra* note 5, at 58 (explaining that Brown checked details of confession with details in Finucane murder files and found them to match up); *see also* Clarke, *supra* note 52, at 5 (noting that Ken Barrett, man who confessed to killing Finucane as Finucane was holding fork in hand, revealing information not in public domain at time of confession); *Insight: Policing the Police*, *supra* note 14 (reporting that Barrett confessed to Finucane's murder after Barrett requested meeting); Dee, *supra* note 9, at 18 (explaining that Brown claims Special Branch blocked his attempt to gain admissible confession, citing value of Barrett as informant); *RUC Held Back Finucane Murder Confession to Protect Informants*, SUNDAY TIMES (UK), Oct. 15, 2000 (reporting that Special Branch halted Brown's investigation in order to protect key informants). However, Brown claims that the Special Branch stepped in and recruited the man as an informer, choosing not to prosecute him. *See* BEYOND COLLUSION, *supra* note 5, at 59 (noting that Special Branch had tipped off Barrett about Brown's desire to prosecute him); *see also* Dee, *supra* note 9, at 18 (reporting that Brown believed Special Branch to be colluding with paramilitaries to kill him, in light of information he divulged); Norton-Taylor & Hopkins, *supra* note 14, at 11 (discussing Brown's allegation that Special Branch officers tampered with evidence relating to Finucane investigation and deliberately misled inquiry into Finucane murder).

63. *See* Finucane, *supra* note 1, at 19 (maintaining that FRU played role in murder of his father, Patrick); *see also* Hopkins, *supra* note 12, at 2 (alleging that FRU colluded with UDA in murder of Finucane); BEYOND COLLUSION, *supra* note 5, at 26 (noting that suspicions of Nelson's involvement in Finucane murder began as early as 1990 and urging independent inquiry into murder of Finucane in light of evidence of Nelson's involvement); *see also* Hopkins, *supra* note 12, at 2 (reporting that one of Nelson's FRU handlers believed Nelson to have perpetrated illegal acts at FRU's request); DAVIES, *supra* note 2, at 155-69 (alleging Nelson provided information to UDA in order to facilitate Finucane murder); OFFICIAL COLLUSION, *supra* note 1, at 3 (stating that Nelson alleged that he had directly assisted in targeting Finucane); Deadly Intelligence, *supra* note 27 (advocating independent public inquiry based on evidence of Nelson's active involvement in Finucane murder); Neil Mackay, *The Secret Wars of a Spymaster*, SUNDAY HERALD (UK), Nov. 26, 2000, at 11 (noting that FRU was involved in 15 murders as result of FRU collusion with loyalist groups). *See generally* DAVIES, *supra* note 2, at 155-69 (providing narrative of FRU's Brian Nelson in facilitating murder of Finucane); *Brits: Dark Side of War*, *supra* note 12 (detailing alleged role of FRU officer Brian Nelson in murder of Finucane and others).

64. *See* BEYOND COLLUSION, *supra* note 5, at 22 (discussing creation of FRU in response to Troubles); *see also* Hopkins, *supra* note 12, at 2 (stating that FRU was created in 1980). The goal of the FRU was to target, recruit, and maintain human sources from all divisions of the community, but primarily within both republican and loyalist paramilitary organizations in Northern Ireland. *See* LEWIS, *supra* note 12, at xv (defining purpose of FRU); *see also* DAVIES, *supra* note 2, at 41 (providing description of FRU objectives); Hopkins, *supra* note 12, at 2 (explaining that FRU recruited and maintained agents in various paramilitary organizations in Northern Ireland). FRU officers working as informers were generally assigned to different FRU officers who worked as

former.[65] Nelson worked for a number of years as the UDA's senior intelligence officer, and regularly received information from his FRU handlers that allowed the UDA to better target its Catholic victims.[66] Commentators allege that in 1989 Brian Nelson used intelligence, provided by the FRU, to better target the UDA's next planned victim, Patrick Finucane.[67] Commentators note that in providing the UDA with certain key details about Finucane,[68] received from the FRU, both Nelson and his FRU

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handlers, debriefing and counseling the covert agents throughout their operations. *See* BEYOND COLLUSION, *supra* note 5, at 23 (characterizing interactions between FRU covert agents and their FRU handlers); *Colonel J Statement During Trial of Brian Nelson*, Jan. 29, 1992, *available at* http://www.serve.com/pfc/reginaVnelson/ntboalcol.html [hereinafter *Colonel J Transcript*] (noting that, according to head of FRU, no guidelines existed for undercover agents' activities).

65. *See* OFFICIAL COLLUSION, *supra* note 1, at 3 (noting time period when Brian Nelson worked for both UDA and FRU); *see also* BEYOND COLLUSION, *supra* note 5, at 24 (noting that Nelson joined UDA in 1972, and, in 1983, offered to help British army intelligence); Hopkins, *supra* note 12, at 2 (reporting that by time of Finucane's death, Nelson held position as UDA's senior intelligence officer). *See generally* DAVIES, *supra* note 2 (providing account of Brian Nelson's career in FRU).

66. *See* BEYOND COLLUSION, *supra* note 5, at 25 (noting that FRU purchased computer for Nelson in order to share intelligence information more easily); *see also* Jim Cusack, *Speculation FRU May Have Been Involved: The Theft of Files from Special Branch Offices in Belfast Could have Far Reaching Consequences for the North's Intelligence Agencies and Paramilitary Informants*, IRISH TIMES, Mar. 20, 2002, at 6 (reporting that FRU provided information to Brian Nelson on republican individuals); Finucane, *supra* note 1, at 19 (reporting that Nelson admitted to receiving British army documents and photographs in order to assist UDA in targeting killings); *Brits: Dark Side of War*, *supra* note 12 (reporting that Nelson sometimes did not pass on certain information to FRU about planned killings). *See generally*, DAVIES, *supra* note 2 (providing overview of Nelson's intelligence activities within FRU and UDA).

67. *See* DAVIES, *supra* note 2, at 161 (noting that Nelson obtained Finucane's address from FRU in order to provide it to UDA); *see also* BEYOND COLLUSION, *supra* note 5, at 26 (recounting Nelson's statement that he provided photograph of Finucane to UDA assassin on Thursday before killing); John Ware, *Time to Come Clean over the Army's Role in the 'Dirty War'*, NEW STATESMAN, Apr. 16, 1998, at 16 (alleging that Nelson failed to prevent Finucane murder due either to failure to inform FRU handlers or FRU failure to pass on information to RUC); JUSTICE DELAYED, *supra* note 9, para. 1.2 (alleging that Nelson summarized information about Finucane on card, referred by UDA as "P" (personality) card, in order to better target Finucane for potential attack).

68. *See* Ware, *supra* note 67, at 16 (alleging that Nelson provided UDA with photograph of Finucane before Finucane's murder was carried out); *see also* DAVIES, *supra* note 2, at 161-62 (claiming that FRU provided Nelson with Finucane's home address, which was passed onto UDA); Finucane, *supra* note 1, at 19 (contending that FRU provided Nelson with detailed intelligence information in order to assist Nelson in better targeting intended UDA victims); Mullin, *supra* note 5, at 5 (asserting that Nelson provided UDA details about Finucane and Finucane's daily movements three weeks before Finucane's killing); JUSTICE DELAYED, *supra* note 9, para. 1.2 (alleging that Nelson used

handlers, assisted in the murder of Finucane.[69] Brian Nelson has never faced charges in the murder of Patrick Finucane.[70]

B. *Regional Human Rights Obligations*

Traditionally, there was no formal legal framework regulating the use of informers in the UK.[71] Experts explain that the use of informers was an accepted practice and enjoyed unlimited discretion at the hands of law enforcement.[72] Informer regula-

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detailed intelligence provided to him by FRU in order to facilitate murder of Finucane).

69. *See* JUSTICE DELAYED, *supra* note 9, para. 1.2 (alleging that Nelson was actively involved in Finucane murder); OFFICIAL COLLUSION, *supra* note 1, at 2 (alleging Nelson's involvement in Finucane murder constitutes government collusion); BEYOND COLLUSION, *supra* note 5, at 29-30 (urging public inquiry into Finucane murder, to explore whether Nelson targeted Finucane and what information Nelson passed onto FRU handlers); Finucane, *supra* note 1, at 19 (alleging Nelson's involvement in Finucane murder and FRU cover-up of evidence relating to investigation); Jim Dwyer, *When Brit Gov't OKD Killing*, DAILY NEWS, Mar. 31, 1998, at 8 (reporting that Nelson helped plan killing of Finucane).

70. *See* BEYOND COLLUSION, *supra* note 5, at 29 (explaining that Nelson was informed by British government that he would not face charges stemming from his role in Finucane murder); *see also* Hopkins, *supra* note 12, at 2 (reporting that investigation team assured Nelson he would not be prosecuted for Finucane murder). Controversy has also arisen over alleged destruction of evidence in relation to Finucane's murder. *See* BEYOND COLLUSION, *supra* note 5, at 28 (discussing suspicious circumstances surrounding destruction of evidence in Stevens investigation of Finucane murder). After FRU documents were turned over to officials investigating Finucane's murder, a fire broke out under highly suspicious circumstances in the office holding the documents, burning everything stored there. *Id.* In 1989, the RUC recovered the pistol used to murder Patrick Finucane. *Id.* at 32. However, instead of remaining in the custody of the forensic laboratory, the gun was unusually transferred to the British Army. *Id.* News articles have reported that the Army replaced both the barrel and slide of the gun, the two gun parts that leave evidentiary marks on the slug and shell of bullets. *Id.* *See generally* JUSTICE DELAYED, *supra* note 9, para. 9 (discussing alleged suppression of information regarding Finucane murder).

71. *See* Neyroud & Beckley, *supra* note 15, at 164 (explaining that no legal framework existed prior to RIPA governing use of informers); *see also* Gillespie, *supra* note 15 (noting that no statutory framework regarding authorization of informers existed prior to RIPA's enactment); Madeleine Colvin, *A Legal Basis for Covert Policing*, 148 NEW L.J. 1133 (1998) (noting, in 1998, that both informers and undercover operations were governed solely by internal administrative guidelines); *Colonel J Transcript*, *supra* note 64 (noting that FRU possessed no guidelines for handling undercover agent activities).

72. *See* Gillespie, *supra* note 15 (explaining that use of informers was accepted practice and was not subject to outside scrutiny); *see also* Colvin, *supra* note 71, at 1133 (contending that use of informers prior to RIPA was unaccountable to independent, outside sources of scrutiny and failed to provide remedies for wrongful breaches of privacy stemming from use of informers); *Northern Ireland Human Rights Commission, New Developments in Human Rights and Policing, Address Delivered at the Garda Siochana Conference*, (Nov. 3-4, 2000), *available at* http://www.nihrc.org/files/speech17a.htm

tion was primarily drawn from Home Office circulars and through internal guidance.[73] Experts note that under this system, if, for example, an informer violated an individual's right to privacy, there were no statutory instruments in existence to address the wrong.[74] Experts also observe that judicial safeguards involving the use of informers, such as the substantive defense of entrapment, do not exist in the UK.[75] Prior to RIPA's enactment, the controlling non-statutory authority regarding the use

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[hereinafter *Garda Siochana Conference*] (noting that RIPA attempts to regulate activities previously within sole police discretion). *See generally* Neyroud & Beckley, *supra* note 15, at 164-65 (discussing evolution of push for statutory guidelines governing use of informers).

73. *See* Neyroud & Beckley, *supra* note 15, at 165 (describing informal, internal methods governing use of informers prior to RIPA's enactment); *see also* Colvin, *supra* note 71, at 1133 (explaining that prior to RIPA's enactment, informers in UK were subject to internal, administrative guidelines only). At least one commentator has suggested that with or without a legal framework, certain tests must be satisfied so that they do not infringe on an individual's right to privacy. *See, e.g.*, Colvin, *supra* note 71, at 1133. She believes that the interference must be shown to be both necessary and proportional. *See id.* Additionally, she suggests that other, less intrusive methods must either have failed or been unable to work. *See id.* Colvin also notes that there needs to be an independent and accountable system which can authorize and monitor the use of intrusive surveillance and can provide remedies for individuals whose rights have been breached. *See id.* Colvin contends that these principles were unable to be satisfied under a system regulated principally through internal administrative guidelines. *See id.*

74. *See* Colvin, *supra* note 71 (explaining that before RIPA was enacted, no mechanisms were in place to remedy breaches of rights under European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention")); *see also* Gillespie, *supra* note 15 (noting that before RIPA's enactment, breaches of Article 8(1) of European Convention, protecting right to privacy, were without statutory remedy).

75. *See* Stephen Uglow, *The Human Rights Act 1998: Part 4: Covert Surveillance and the European Convention on Human Rights*, CRIM. L.R. 287, 290 (1999) (noting that, according to UK law, there is no substantive defense of entrapment). *But see* Police and Criminal Evidence Act, 1984, ch. 60, § 78 (Eng.) [hereinafter PACE] (holding that trial court may exclude evidence obtained by undercover agent where evidence would detrimentally affect fairness of proceedings).

Section 78 of the PACE provides:

> 1. In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
> 2. Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.
> 3. This section shall not apply in the case of proceedings before a magistrates' court inquiring into offences as examining justices.

Id.

of informers came from decisions of the European Court of Human Rights ("European Court"), a judicial enforcement mechanism created under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").[76]

1. The European Convention

The United Kingdom ("UK") signed the European Convention in 1950.[77] The European Convention, a regional human rights treaty, functions to establish and enforce human rights norms within signatory nations.[78] The European Convention provides that all signatories to the treaty subject themselves to its jurisdiction, implicitly agreeing to enforce the rights and freedoms protected under the European Convention.[79] Protected rights under the European Convention include the right to privacy[80] and the right to an effective remedy.[81]

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76. European Convention For the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, art. 19 [hereinafter European Convention]. Article 19 states: "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as 'the Court.' It shall function on a permanent basis." *Id.*

77. *See* Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms, Treaty Open for Signature by the Member States, available at* http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm (noting date UK signed European Convention).

78. *See* HUMAN RIGHTS 551-52 (Louis Henkin et al. eds., 1999) [hereinafter HUMAN RIGHTS] (explaining that European Convention provides international remedy for violations of European Convention rights, in situations where domestic remedy is inadequate); *see also* Chris Brown, *Universal Human Rights: A Critique, in* HUMAN RIGHTS IN GLOBAL POLITICS 114 (Tim Dunne & Nicholas J. Wheeler eds., 1999) (discussing European Convention's effectiveness in comparison to other international human rights legislation); HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 808 (2d ed. 2000) (discussing effectiveness of European Court of Human Rights in enforcing human rights norms within Europe).

79. European Convention, *supra* note 76, art. 1. Article 1 of the European Convention provides that, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." *Id.*

80. *Id.* art. 8. Article 8 of the European Convention provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

As a signatory to the European Convention, the UK acknowledged the rights protected under the European Convention, even without a domestic statutory basis for its enforcement.[82] Commentators note, therefore, that though the incorporation of the European Convention into UK domestic law did not occur until the passage of the Human Rights Act 1998,[83] the UK could still be held in violation of European Convention standards, even without its own domestic enforcement mechanism.[84]

2. The European Court of Human Rights

The European Convention provides that the primary means of interpreting European Convention rights lay within decisions of the European Court.[85] In reviewing cases of covert surveillance, European Court decisions have focused on potential threats to both the right to privacy and the right to an effective

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Id.

81. *Id.* art. 13. Article 13 of the European Convention provides:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Id.

82. *See* Steiner & Alston, *supra* note 78, at 797 (stating that primary responsibility for implementation of European Convention lies with member States); *see also* HUMAN RIGHTS, *supra* note 78, at 552 (stating that European system is designed to ensure effective protection of Convention rights through national law and procedures, while providing international remedy in circumstances where internal law falls short).

83. Human Rights Act, 1998, ch. 42 (Eng.).

84. European Convention, *supra* note 76, art. 19. Article 19 of the European Convention provides:

> To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as 'the Court.' It shall function on a permanent basis.

Id.; *see also* Uglow, *supra* note 75, at 297 (noting that system of covert surveillance prior to passage of Human Rights Act in likely violation of Convention); *see also Garda Siochana Conference*, *supra* note 72 (discussing that RIPA passed partly as response to UK losing case in European Court of Human Rights).

85. European Convention, *supra* note 76, art. 32. Article 32 of the European Convention provides:

> 1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.
> 2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Id.

remedy.[86] Through a series of decisions, the European Court established standards and guidelines regarding the use of covert surveillance, aimed at protecting each of these rights.[87]

a. The Right to Privacy

Article 8 of the European Convention protects the individual's right to privacy.[88] The European Court has provided a number of standards aimed at protecting Article 8's guarantees during the course of covert surveillance operations.[89] European Court opinions have held that a system of positive laws must be instituted, providing statutory guidelines for a covert surveillance authorization.[90] Those guidelines must be reasonably clear in their language as to both the circumstances and conditions

86. *See, e.g.*, Halford v. United Kingdom, 24 Eur. H.R. Rep. 523 (1997), paras. 44-70 (taking into account whether violations of either Article 8 or Article 13 occurred in instance of covert wiretapping); Malone v. United Kingdom, 7 Eur. H.R. Rep. 14 (1985), paras. 63-91 (determining whether violations of Article 8 or Article 13 occurred in covert surveillance case); Kruslin v. France, 12 Eur. H.R. Rep. 547 (1990), paras. 26-35 (considering whether violation of Article 8 occurred in relation to practice of covert surveillance).

87. *See, e.g.*, Kopp v. Switzerland, 27 Eur. H.R. Rep. 91 (1999), para. 64 (holding that domestic law governing use of covert surveillance must be clearly written so as to provide citizens indications of when and how covert surveillance may be used); Smith and Grady v. United Kingdom, 29 Eur. H.R. Rep. 493 (2000), para. 135 (explaining that national authorities must provide for substantive review of European Convention violations to meet requirements of Article 13); *see also* JUSTICE, REGULATION OF INVESTIGATORY POWERS BILL: PART II: SURVEILLANCE AND COVERT HUMAN INTELLIGENCE SOURCES: HOUSE OF COMMONS STANDING COMMITTEE STAGE, Mar. 2000, at 2.4, *available at* http://www.justice.org.uk/images/pdfs/pow.PDF [hereinafter JUSTICE II] (noting that because covert surveillance has potential for intrusion, it must be regulated in order to comply with Article 8 of European Convention). *See generally* Madeleine Colvin, *Covert Policing and the Convention*, 147 NEW L.J. 1821 (1997) (providing overview of relation of European Convention rights to issues raised in covert policing).

88. *See* European Convention, *supra* note 76, art. 8.

89. *See, e.g.*, *Halford*, 24 Eur. H.R. Rep. at para. 49 (indicating that laws governing covert surveillance must be lucid enough in their language so as to allow individuals to anticipate when such measures may be used); *Kopp*, 27 Eur. H.R. Rep. at para. 55 (explaining that in European Court, substance of law regulating use of covert surveillance is important factor in determining whether Article 8 violation exists); *Kruslin*, 12 Eur. H.R. Rep. at paras. 33-34 (holding that system of "piecemeal" judgments regulating use of covert surveillance is insufficient system of governance for Article 8 purposes).

90. *See Kruslin*, 12 Eur. H.R. Rep. at para. 36 (holding that clear laws governing use of covert surveillance must be installed in order to protect guarantees of Article 8); *see also Kopp*, 27 Eur. H.R. Rep. at paras. 71-72 (indicating that rules covering covert surveillance must be both clear and comprehensive); *Malone*, 7 Eur. H.R. Rep. at para. 68 (stating that authorities must create laws regarding use of covert surveillance that are sufficiently clear and have legitimate aims so as to prevent Article 8 violations).

upon which an authorization may be issued.[91] Statements of general principles and guidelines or piecemeal statements are not sufficient under the European Court's standards.[92]

The European Court has suggested a number of times that safeguards must be installed in order to guard against systemic abuse.[93] In both *Kopp v. Switzerland* and *Klass v. Germany*, the European Court emphasized the desirability of independent judicial control over the covert surveillance authorization process for this particular purpose.[94] In *Kopp*, the European Court harshly criticized the practice of internal, executive authorization of covert surveillance operations in Switzerland, without overview of an independent judge.[95] In *Klass*, the European Court stressed that independent judicial supervision of covert surveillance is advantageous, given the effects of potential abuse on both the individual and society.[96]

b. Right to an Effective Remedy

Article 13 of the European Convention requires that domestic authorities provide an "effective remedy" against all violations of European Convention rights.[97] The European Court has held domestic human rights remedies to be inadequate where the substance of an individual's European Convention claim is not considered.[98] Judicial review proceedings, insofar as they pre-

91. *See Malone*, 7 Eur. H.R. Rep. at para. 79 (holding that domestic law regulating use of covert surveillance must be lucid enough in its language in order to allow citizens to be aware of how and when such surveillance may occur).

92. *See Kruslin*, 12 Eur. H.R. Rep. at para. 34 (holding that "piecemeal" judgments comprising system of covert surveillance governance in France was insufficient in meeting requirements of Article 8).

93. *See, e.g., id.* at para. 35 (indicating that system of safeguards against possible Article 8 abuses is factor in deciding whether such violation occurred); *Kopp*, 27 Eur. H.R. Rep. at para. 4 (suggesting that supervision of independent judge may be adequate safeguard against possible Article 8 abuses).

94. *See Kopp*, 27 Eur. H.R. Rep. at para. 4 (emphasizing that safeguards, such as review by independent judge, are important in protecting domestic covert surveillance systems from abuse); *see also* Klass v. Germany, 2 Eur. H.R. Rep. 214 (1979-80), para. 3 (considering that, given potential for abuse in covert surveillance authorization system, independent review by impartial judge is recommended).

95. *See Kopp*, 27 Eur. H.R. Rep. at para. 4 (suggesting that use of independent judge is good method of preventing abuses of covert surveillance system).

96. *See Klass*, 2 Eur. H.R. Rep. at para. 3 (stating that employment of independent judiciary body for overview purposes may help guarantee Article 8 protection on domestic front).

97. *See* European Convention, *supra* note 76, art. 13.

98. *See, e.g.*, Chahal v. United Kingdom, 23 Eur. H.R. Rep. 413 (1997), para. 7

vent such a substantive assessment, have been deemed inadequate by the European Court.[99]

In *Smith and Grady v. United Kingdom*, the European Court considered the judicial review of an Article 8 claim by an administrative body in the United Kingdom.[100] It found judicial review to be inadequate in that the standards applied in assessing the Article 8 claim prevented a substantive analysis of the basic Article 8 principles.[101] Judicial review has similarly been found to be inadequate in cases involving Article 3[102] and Article 6 complaints.[103]

3. The Human Rights Act 1998: Incorporating the European Convention into Domestic Law

The Human Rights Act, which came into force in October 2000, incorporates the European Convention into British domestic law.[104] As a result of this incorporation, British citizens

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(holding that judicial review of UK asylum proceeding was inadequate in that it was unable to provide substantive review of potential Article 3 violation, due to importance Court places on Article 3 violations and irreparable harm which may have been caused); Smith and Grady v. United Kingdom, 29 Eur. H.R. Rep. 493 (2000), para. 5 (holding that judicial review of Article 8 claim insufficient because it prevented a proper substantive review of important Article 8 principles). *But see* Vilvarajah and Others v. United Kingdom, 14 Eur. H.R. Rep. 248 (1992), para. 2 (holding that judicial review procedures employed in reviewing asylum procedures in UK were sufficient because of degree of scrutiny employed in lower courts).

99. *See, e.g., Chahal*, 23 Eur. H.R. Rep. at para. 7 (finding violation of Article 13, given inability of judicial review to provide substantive assessment of potential Article 3 violation); *Smith and Grady*, 29 Eur. H.R. Rep. at para. 5 (finding violation of Article 13, where judicial review proceedings were unable to assess merits of potential Article 8 violation).

100. *See Smith and Grady*, 29 Eur. H.R. Rep. at paras. 11-43 (reviewing decision by British Royal Navy administrative body to discharge individuals based on grounds of homosexuality).

101. *See id.* para. 5 (holding violation of Article 13 based on inability of judicial review to reach substance of Article 8 claim).

102. *See, e.g., Chahal*, 23 Eur. H.R. Rep. at para. 7 (holding violation of Article 13 because of inability of judicial review to reach substance of Article 3 claim).

103. *See* Tinnelly & Sons Lts. & Others and McElduff & Others v. United Kingdom, 27 Eur. H.R. Rep. 249 (1999), paras. 1-3 (holding that inability of judicial review to evaluate substance of Article 6 claim was violation of Article 13).

104. *See* Kevin Dooley Kent, *Basic Rights and Anti-Terrorism Legislation: Can Britain's Criminal Justice (Terrorism and Conspiracy) Act 1998 be Reconciled with its Human Rights Act?*, 33 VAND. J. TRANSNAT'L L. 221, 230 (2000) (noting date when Human Rights Act takes legal effect in UK). The introduction to the Human Rights Act states that it is "an Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices

may now enforce European Convention rights in the British domestic legal system.[105] In order to bring suit for the breach of a right under the European Convention, the breach must have been caused by a public authority.[106] Prior to the passage of the

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who become judges of the European Court of Human Rights; and for connected purposes." Human Rights Act, 1998, ch. 42, § 3, intro. (Eng.).

105. *See* Kent, *supra* note 104, at 230 (explaining that after incorporation of Human Rights Act, British citizens may enforce European Convention rights in both European Court and in UK domestic legal system). Section 3(1) of the Human Rights Act states that: "So far as it is possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." Human Rights Act, 1998, ch. 42, § 3, para. 1 (Eng.).

106. Human Rights Act, 1998, ch. 42, § 7 (Eng.). The Human Rights Act states in section 7:

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may:
  (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
  (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.
(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.
(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.
(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.
(5) Proceedings under subsection (1)(a) must be brought before the end of—
  (a) the period of one year beginning with the date on which the act complained of took place; or
  (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances, but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.
(6) In subsection (1)(b) "legal proceedings" includes—
  (a) proceedings brought by or at the instigation of a public authority; and
  (b) an appeal against the decision of a court or tribunal.
(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.
(8) Nothing in this Act creates a criminal offence.
(9) In this section "rules" means—
  (a) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,

Human Rights Act, British citizens were able to seek redress from the European Court for a violation of a European Convention right.[107] In order to have standing in the European Court, a complainant had to have exhausted all domestic remedies.[108] However, following the implementation of the Human Rights Act, British citizens can now enforce these rights in both the European Court and in the British domestic legal system.[109]

II. *RIPA: Regulating Covert Informers*

After passage of the Human Rights Act, and in light of the European Court holdings described earlier, the UK came under

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(b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,
(c) in relation to proceedings before a tribunal in Northern Ireland—
(i) which deals with transferred matters; and
(ii) for which no rules made under paragraph (a) are in force, rules made by a Northern Ireland department for those purposes, and includes provision made by order under section 1 of the Courts and Legal Services Act 1990.
(10) In making rules, regard must be had to section 9.
(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to—
(a) the relief or remedies which the tribunal may grant; or
(b) the grounds on which it may grant any of them.
(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.
(13) "The Minister" includes the Northern Ireland department concerned.

Id.

107. *See* Kent, *supra* note 104, at 232 (noting that British citizens had ability to enforce European Convention rights in European Court prior to passage of Human Rights Act); *see also* STEINER & ALSTON, *supra* note 78, at 797 (indicating that all member States to European Convention may seek redress for violations of Convention rights in European Court, irrespective of whether European Convention has been incorporated into particular legal system); HENKIN, *supra* note 78, at 552 (noting that purpose of European Convention is to provide international remedies for human rights violations that have not been properly remedied under domestic legal systems).

108. *See* European Convention, *supra* note 76, art. 35(1). The European Convention states in article 35(1): "This Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken." *Id.*

109. *See* Kent, *supra* note 104, at 232-33 (explaining that incorporation of European Convention through Human Rights Act allows British citizens to enforce European Convention rights in UK domestic courts).

increased pressure to create a formal legal instrument governing the use of informers.[110] In 2000, the British government responded by creating and enacting RIPA.[111] The stated goal of RIPA is to ensure that human rights are protected in governmental investigatory pursuits.[112] RIPA further proclaims the desire to operate in conjunction with existing UK domestic law.[113] RIPA attempts to deal with the use of covert informers in two ways: it creates statutory guidelines governing the use of covert informers[114] and establishes a tribunal to investigate possible abuses within the covert agent system.[115]

A. *Authorizing the Use of Informers*

RIPA categorizes the use of surveillance into three types of

110. *See* Neyroud & Beckley, *supra* note 15, at 163, 173 (stating that UK government was forced to enact RIPA to meet requirements of Human Rights Act and to preempt contentious issues that could arise regarding unregulated covert policing); *see also* Gillespie, *supra* note 15 (discussing that European Court decisions adverse to UK compelled British government to enact RIPA); Yaman Akdeniz, *Regulation of Investigatory Powers Act 2000: Part I: BigBrother.gov.uk: State Surveillance in the Age of Information and Rights,* 74 CRIM. L. REV. 73, 74 (2001) (stating that RIPA attempts to meet challenges of regulating State surveillance in information age). In 1998, JUSTICE, a UK human rights organization, published a study analyzing the existing common law framework governing the use of informers in light of the UK's human rights obligations. Neyroud & Beckley, *supra* note 15, at 168. As a result of this study, JUSTICE made a number of recommendations to the UK government that would enable it to function in a more human rights compliant manner. *Id.* The study concluded that there should be clearer rules on granting immunity to informers, that there should be a primary legislative framework setting out the principles of police use of informers and that this framework should be supported by detailed Codes that pay greater mind to the ethical issues in all areas. *Id.*

111. *See* Neyroud & Beckley, *supra* note 15, at 165 (noting that UK passed RIPA to comply with adverse European Court decisions regarding UK's lack of statutory framework regarding use of informers); *see also* Akdeniz, *supra* note 110, at 74 (contending that RIPA represents attempt by UK government to meet demands of Human Rights Act); Gillespie, *supra* note 15 (indicating that RIPA was passed in order to comply with standards set by European Court regarding authorization of informers).

112. *See* RIPA Explanatory Notes, *supra* note 16, para. 5 (stating that RIPA aims to work with existing legislation, including Human Rights Act, Intelligence Services Act 1994, and Police Services Act 1997).

113. *Id.* RIPA's Explanatory Notes provide that "The Act will work in conjunction with existing legislation, in particular the Intelligence Services Act 1994, the Police Act 1997 and the Human Rights Act 1998." *Id.*

114. *See* Regulation of Investigatory Powers Act 2000, ch. 23, pt. II (Eng.) (developing statutory framework governing authorization of informers in UK).

115. *See id.* pt. IV (creating tribunal to address violations of RIPA provisions).

activity: directed surveillance,[116] intrusive surveillance,[117] and the conduct and use of covert human intelligence sources ("CHIS").[118] According to RIPA's definition, the use of informers falls under the CHIS category.[119] Section 29 of the Act, RIPA sets out an authorization scheme governing the conduct and use of CHIS.[120]

To be authorized by a government agent,[121] CHIS must be

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116. *See id.*, § 26, para. 2. RIPA defines directed surveillance in Part II, Section 26 of the Act, stating:

> Surveillance is directed for the purposes of this Part if it is covert but not intrusive and is undertaken—
> (a) for the purposes of a specific investigation or a specific operation
> (b) in such a manner as is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation); and
> (c) otherwise than by way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation under this Part to be sought for the carrying out of the surveillance.

Id.

117. *See id.* para. 3. RIPA defines intrusive surveillance in Part II, Section 26 of the Act, stating:

> Surveillance is intrusive for the purposes of this Part if, and only if, it is covert surveillance that—
> (a) is carried out by means only of a surveillance device designed or adapted principally for the purpose of providing information about the location of a vehicle; or
> (b) it is surveillance consisting in any such interception of a communication as falls within section 48(4).

Id.

118. *See id.* para. 8. RIPA defines covert human intelligence sources in Part II, Section 26 of the Act, stating:

> For the purposes of this Part a person is a covert human intelligence source if—
> (a) he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);
> (b) he covertly uses such a relationship to obtain information or to provide access to any information to another person; or
> (c) he covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.

Id.

119. *See id.* pt. II, § 29.

120. *See id.*

121. Home Office, Public Consultation on Draft Code of Practice on the Use of Covert Human Intelligence Sources: The Use of Covert Human Intelligence Sources: Code of Practice, para. 2.1, *available at* http://www.homeoffice.gov.uk/ripa/covhis.htm [hereinafter Draft Code of Practice]. Paragraph 2.1 of the Draft Code of Practice states that "responsibility for authorising the use or conduct of a source rests with the

shown to be necessary on grounds of: national security; prevention or detection of crime or disorder; the economic well-being of the United Kingdom; public safety; protection of public health; evaluation or collection of taxes, duties, levies or other impositions, contributions or charges payable to a government department; or for any purpose (other than those previously listed) that is specified for the purposes of an order made by the Secretary of State.[122] In addition, RIPA mandates that arrangements exist to safeguard the CHIS activity.[123] Accordingly, there must be a person who holds the relevant investigative authority

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authorising officer. Authorizations require the personal authority of the authorising officer." *Id.*

122. Regulation of Investigatory Powers Act 2000, ch. 23, pt. II, § 29 (1)-(3) (Eng.). RIPA provides in Section 29, paragraphs 2 and 3 that:

> (2) A person shall not grant an authorisation for the conduct or the use of a covert human intelligence source unless he believes—
>
> (a) that the authorisation is necessary on grounds falling within subsection (3);
>
> (b) that the authorised conduct or use is proportionate to what is sought to be achieved by that conduct or use; and
>
> (c) that arrangements exist for the source's case that satisfy the requirements of subsection (5) and such other requirements as may be imposed by order by the Secretary of State.
>
> (3) An authorisation is necessary on grounds falling within this subsection if it is necessary—
>
> (a) in the interest of national security;
>
> (b) for the purpose of preventing or detecting crime or of preventing disorder;
>
> (c) in the interests of the economic well-being of the United Kingdom;
>
> (d) in the interests of public safety
>
> (e) for the purpose of protecting public health
>
> (f) for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; or
>
> (g) for any purpose (not falling within paragraphs (a) to (f)) which is specified for the purposes of this subsection by an order made by the Secretary of State.

Id. According to RIPA, part II, section 29(6), the Secretary of State must lay a draft of the order before Parliament and have it approved by a resolution of each House before enacting an order. *See* Regulation of Investigatory Powers Act 2000, ch. 23, pt. II, § 29(6).

123. Regulation of Investigatory Powers Act 2000, ch. 23, pt. II, § 29, para. 5 (Eng.). RIPA provides in Part II, Section 29, paragraph 5 the arrangements that are to be made regarding the maintenance of the surveillance, stating:

> (5) For the purposes of this Part there are arrangements for the source's case that satisfy the requirements of this subsection if such arrangements are in force as are necessary for ensuring—
>
> (a) that there will at all times be a person holding an office, rank or position with the relevant investigating authority who will have day-to-day

responsibility for dealing with the source on behalf of that authority, and for the source's security and welfare;

(b) that there will at all times be another person holding an office, rank or position with the relevant investigating authority who will have general oversight of the use made of the source;

(c) that there will at all times be a person holding an office, rank or position with the relevant investigating authority who will have responsibility for maintaining a record of the use made of the source;

(d) that the records relating to the source that are maintained by the relevant investigating authority will always contain particulars of all such matters (if any) as may be specified for the purposes of this paragraph in regulations made by the Secretary of State; and

(e) that records are maintained by the relevant investigating authority that disclose the identity of the source will not be available to persons except to the extent that there is a need for access to them to be made available to those persons.

Id.; *see also* Draft Codes of Practice, *supra* note 108, para. 2.35. Paragraph 2.35 of the Draft Codes of Practice states:

An application for authorisation for the use or conduct of a source should record:

- details of the purpose for which the source will be tasked or deployed (e.g. in relation to an organized serious crime, espionage, a series of racially motivated crimes, etc.);
- the grounds on which authorisation is sought (e.g. for the detection of crime, or the protection of public health);
- where a specific investigation or operation is involved, details of that investigation or operation;
- details of what the source will be tasked to do;
- details of the level of authority required (or recommended, where that is different);
- details of potential collateral intrusion;
- details of any confidential material that might be obtained as a consequence of the authorisation

Id. Paragraphs 3.11-3.15 of the Draft Codes of Practice state:

3.11: The records maintained by the public authorities should be maintained in such a way as to preserve the confidentiality of the source and the information provided by that source. There should, at all times, be a designated person within the relevant public authority who will have responsibility for maintaining a record of the use made of the source.

3.12: The 2000 Act provides that an authorizing officer must not grant an authorisation for the conduct or use of a source unless he believes that there are arrangements in place for ensuring that there is at all times a person with the responsibility for maintaining a record of the use made of the source.

3.13: The records should contain particulars of:

(a) the identity of the source;

(b) the identity or identities used by the source, where known;

(c) the means used within the authority of referring to the source;

(d) any significant information connected with the security and welfare of the source;

(e) any confirmation made by a person granting or renewing an authorisation for the conduct or use of a source that the informa-

who will have daily responsibilities for dealing with the source and the source's security and welfare;[124] will have general over-

tion in (d) has been considered and that any identified risks to the security and welfare of the source have been properly explained to and understood by the source.

(f) the date when and circumstances in which, the source was recruited;

(g) the relevant investigating authority in relation to the source (other than the authority that is maintaining the records);

(h) the identities of the persons in the relevant investigating authority who, in relation to the source, are discharging or have discharged the responsibilities mentioned in section 29(5)(a) to (c) of the 2000 Act and paragraph 2.28 of this code where relevant;

(i) the period for which those responsibilities have been discharged by those persons;

(j) the tasks that are given to the source and the demands made of him in relation to his activities as a source;

(k) all contacts or communications between the source and a person acting on behalf of the relevant investigating authority;

(l) the information obtained by the relevant investigating authority by the conduct or use of the source;

(m) the information so obtained which is disseminated by the relevant investigating authority;

(n) in the case of a source who is not an undercover operative, every payment, benefit or reward or every offer of a payment, benefit or reward that is made or provided by or on behalf of the relevant investigating authority in respect of the source's activites for the benefit of any such authority.

3.14: In addition, it is recommended that records/copies of the following, as appropriate, should be kept by the relevant authority:

(a) any authorisation granted and, where relevant, renewed;

(b) any authorization which was granted or renewed orally (in an urgent case) and the reason why the case was considered urgent;

(c) any risk assessment made in relation to the source;

(d) the circumstances in which tasks were given to the source;

(e) the value of the source to the investigating authority;

(f) the reason why the person renewing an authorisation considered it necessary to do so;

(g) the results of any reviews of the authorisation

(h) the reasons, if any, for not renewing an authorisation

(i) the reasons for cancelling an authorisation.

3.15: In the event that a source is specifically tasked in a way which is intended or likely to interfere with the ECHR Article 8 rights of any person or persons not previously considered as coming within the remit of the original authorisation, or to a degree significantly greater than previously identified, the handler or controller must refer to the proposed tasking to the authorising officer, who should consider whether a separate authorisation is required. This should be done in advance of any tasking and the details of such referrals must be recorded.

Id.

124. Regulation of Investigatory Powers Act 2000, ch. 23, pt. II, § 29, para. 5(a) (Eng.).

sight of the use made of the source;[125] and will have responsibility for maintaining a record of the use of the source.[126] RIPA further maintains that records must be maintained to account for the particulars of the activity[127] and protect the identity of the source, subject to necessity.[128] Once these conditions are met, the use of covert human surveillance may be authorized on an entirely internal basis.[129] Experts note that there is neither an obligation nor statutory device by which prior and external judicial approval may be sought.[130]

Two Commissioners provide broad oversight of the CHIS authorization process.[131] The Intelligence Services Commissioner ("ICS") operates outside of Northern Ireland, reviewing

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125. *See id.* para. 5(b).

126. *See id.* para 5(c).

127. *See id.* para. 5(d).

128. *See id.* para. 5(e).

129. *See id.* pt. II, § 29.

130. *See* Gillespie, *supra* note 15 (noting that judicial approval is not factor in CHIS authorizations under RIPA).

131. Regulation of Investigatory Powers Act 2000, ch. 23, pt. IV, §§ 59-61 (Eng.). Sections 59-61 of RIPA state:

> 59.(1) The Prime Minister shall appoint a Commissioner to be known as the Intelligence Services Commissioner.
>
> (2) Subject to subsection (4), the Intelligence Services Commissioner shall keep under review, so far as they are not required to be kept under review by the Interception of Communications Commissioner—
>
> (a) the exercise by the Secretary of State of his powers under sections 5 to 7 of the Intelligence Services Act 1994 (warrants for interference with wireless telegraphy, entry and interference with property etc.);
>
> (b) the exercise and performance by the Secretary of State, in connection with or in relation to—
>
> (i) the activities of the intelligence services, and
>
> (ii) the activities in places other than Northern Ireland of the officials of the Ministry of Defence and of members of Her Majesty's forces, of the powers and duties conferred or imposed on him by Parts II and III of this Act;
>
> (c) the exercise and performance by members of the intelligence services of the powers and duties conferred or imposed on them by or under Parts II and III of this Act;
>
> (d) the exercise and performance in places other than Northern Ireland, by officials of the Ministry of Defence and by members of Her Majesty's forces, of the powers and duties conferred or imposed on such officials or members of Her Majesty's forces by or under Parts II and III; and
>
> (e) the adequacy of the arrangements by virtue of which the duty imposed by section 55 is sought to be discharged—
>
> (i) in relation to the members of the intelligence services; and
>
> (ii) in connection with any of their activities in places other than

Northern Ireland, in relation to officials of the Ministry of Defence and members of Her Majesty's forces.

(3) The Intelligence Services Commissioner shall give the Tribunal all such assistance (including his opinion as to any issue failing to be determined by the Tribunal) as the Tribunal may require—
  (a) in connection with the investigation of any matter by the Tribunal; or
  (b) otherwise for the purposes of the Tribunal's consideration or determination of any matter.

(4) It shall not be the function of the Intelligence Services Commissioner to keep under review the exercise of any power of the Secretary of State to make, amend or revoke any subordinate legislation.

(5) A person shall not be appointed under this section as the Intelligence Services Commissioner unless he holds or has held a high judicial office (within the meaning of the Appellate Jurisdiction Act 1876).

(6) The Intelligence Services Commissioner shall hold office in accordance with the terms of his appointment; and there shall be paid to him out of money provided by Parliament such allowances as the Treasury may determine.

(7) The Secretary of State shall, after consultation with the Intelligence Services Commissioner and subject to the approval of the Treasury as to numbers, provide him with such staff as the Secretary of State considers necessary for the carrying out of the Commissioner's functions.

(8) Section 4 of the Security Service Act 1989 and section 8 of the Intelligence Services Act 1994 (Commissioners for the purposes of those Acts) shall cease to have effect.

(9) On the coming into force of this section the Commissioner holding office as the Commissioner under section 8 of the Intelligence Services Act 1994 shall take and hold office as the Intelligence Services Commissioner as if appointed under this Act—
  (a) for the unexpired period of his term of office under that Act; and
  (b) otherwise, on the terms of his appointment under that Act.

(10) Subsection (7) of section 41 shall apply for the purposes of this section as it applies for the purposes of that section.

60. (1) It shall be the duty of—
  (a) every member of an intelligence service,
  (b) every official of the department of the Secretary of State, and
  (c) every member of Her Majesty's forces, to disclose or provide to the Intelligence Services Commissioner all such documents and information as he may require for the purpose of enabling him to carry out his functions under section 59.

(2) As soon as practicable after the end of each calendar year, the Intelligence Services Commissioner shall make a report to the Prime Minister with respect to the carrying out of that Commissioner's functions.

(3) The Intelligence Services Commissioner may also, at any time, make any such other report to the Prime Minister on any matter relating to the carrying out of the Commissioner's functions as the Commissioner thinks fit.

(4) The Prime Minister shall lay before each House of Parliament a copy of every annual report made by the Intelligence Services Commissioner under subsection (2), together with a statement as to whether any matter has been excluded from that copy in pursuance of subsection (5).

(5) If it appears to the Prime Minister, after consultation with the Intelligence Services Commissioner, that the publication of any matter in an annual report would be contrary to the public interest or prejudicial to-
(a) national security,
(b) the prevention or detection of serious crime,
(c) the economic well-being of the United Kingdom, or
(d) the continued discharge of the functions of any public authority whose activities include activities that are subject to review by that Commissioner,
the Prime Minister may exclude that matter from the copy of the report as laid before each House of Parliament.

(6) Subsection (7) of section 41 shall apply for the purposes of this section as it applies for the purposes of that section.

61.(1) The Prime Minister, after consultation with the First Minister and deputy First Minister in Northern Ireland, shall appoint a Commissioner to be known as the Investigatory Powers Commissioner for Northern Ireland.

(2) The Investigatory Powers Commissioner for Northern Ireland shall keep under review the exercise and performance in Northern Ireland, by the persons on whom they are conferred or imposed, of any powers or duties under Part II which are conferred or imposed by virtue of an order under section 30 made by the Office of the First Minister and deputy First Minister in Northern Ireland.

(3) The Investigatory Powers Commissioner for Northern Ireland shall give the Tribunal all such assistance (including his opinion as to any issue failing to be determined by the Tribunal) as the Tribunal may require—
(a) in connection with the investigation of any matter by the Tribunal; or
(b) otherwise for the purposes of the Tribunal's consideration or determination of any matter.

(4) It shall be the duty of—
(a) every person by whom, or on whose application, there has been given or granted any authorisation the function of giving or granting which is subject to review by the Investigatory Powers Commissioner for Northern Ireland,
(b) every person who has engaged in conduct with the authority of such an authorisation,
(c) every person who holds or has held any office, rank or position with the same public authority as a person falling within paragraph (a), and
(d) every person who holds or has held any office, rank or position with any public authority for whose benefit (within the meaning of Part II) activities which are or may be subject to any such review have been or may be carried out,
to disclose or provide to that Commissioner all such documents and information as he may require for the purpose of enabling him to carry out his functions.

(5) As soon as practicable after the end of each calendar year, the Investigatory Powers Commissioner for Northern Ireland shall make a report to the First Minister and deputy First Minister in Northern Ireland with respect to the carrying out of that Commissioner's functions.

(6) The First Minister and deputy First Minister in Northern Ireland shall lay

the performance and implementation of CHIS authorization activities by the intelligence service, and the Secretary of State.[132] At the end of each year, the ICS must submit a report to the Prime Minister, regarding the fulfillment of his or her functions.[133] A duty is placed on all members of the intelligence forces, as well as on the Secretary of State, to disclose any and all information that the ICS may require in the process of creating these reports.[134] After a report is submitted to the Prime Minister by the ICS, both the ICS and Prime Minister have the power to exclude publication of any material that they determine is not within the public interest or may negatively impact national security, hamper the discovery or prevention of significant crimes, harm the UK's economic interests or impair the abilities of any individual whose CHIS authorization activities are under the

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before the Northern Ireland Assembly a copy of every annual report made by the Investigatory Powers Commissioner for Northern Ireland under subsection (5), together with a statement as to whether any matter has been excluded from that copy in pursuance of subsection (7).

(7) If it appears to the First Minister and deputy First Minister in Northern Ireland, after consultation with the Investigatory Powers Commissioner for Northern Ireland, that the publication of any matter in an annual report would be contrary to the public interest or prejudicial to—
(a) the prevention or detection of serious crime, or
(b) the continued discharge of the functions of any public authority whose activities include activities that are subject to review by that Commissioner,
they may exclude that matter from the copy of the report as laid before the Northern Ireland Assembly.

(8) A person shall not be appointed under this section as the Investigatory Powers Commissioner for Northern Ireland unless he holds or has held office in Northern Ireland—
(a) in any capacity in which he is or was the holder of a high judicial office (within the meaning of the Appellate Jurisdiction Act 1876); or
(b) as a county court judge.

(9) The Investigatory Powers Commissioner for Northern Ireland shall hold office in accordance with the terms of his appointment; and there shall be paid to him out of the Consolidated Fund of Northern Ireland such allowances as the Department of Finance and Personnel may determine.

(10) The First Minister and deputy First Minister in Northern Ireland shall, after consultation with the Investigatory Powers Commissioner for Northern Ireland, provide him with such staff as they consider necessary for the carrying out of his functions.

Id.

132. Regulation of Investigatory Powers Act 2000, ch. 23, pt. IV, § 59(2) (Eng.).

133. *See id.* § 60(2).

134. *See id.* § 60(1).

ICS's review.[135] The finalized review is then submitted to each House of Parliament.[136]

In Northern Ireland, a Commissioner known as the Investigatory Powers Commissioner for Northern Ireland ("IPC") is also appointed, responsible for duties analogous to the ICS's.[137] The IPC reviews the application and execution of all duties associated with the CHIS authorization process, within the context of Northern Ireland.[138] Similar to the ICS, the IPC must make a report concerning the implementation of the IPC's duties, and submit that report to the First Minister and deputy First Minister of Northern Ireland.[139] The grounds for exclusion of matters within that report are more restricted than are afforded the ICS.[140] Upon consultation with the First Minister and deputy First Minister, the IPC may only exclude matters that are not within the public interest, may hamper the prevention or discovery of significant crimes, or may impair the ability of any individual whose CHIS authorization activities are under the IPC's review.[141] The final version of this report must then be submitted to the Northern Ireland Assembly.[142]

B. *The RIPA Tribunal*

Part IV of RIPA establishes an independent Tribunal ("RIPA Tribunal") to consider violations of human rights protected under both RIPA and the Human Rights Act.[143] Under sections 68(2) and (3), the RIPA Tribunal must apply the princi-

135. *See id.* § 60(5).
136. *See id.* § 60(5).
137. *See id.* § 61.
138. *See id.* § 61(2).
139. *See id.* § 61(6).
140. *See id.* §§ 60(5), 61(7).
141. *See id.* § 61(7).
142. *See id.* § 61(7).
143. *See id.* § 65, paras. (1)-(3). RIPA provides in Section 65 of the Act:

(1) There shall, for the purpose of exercising the jurisdiction conferred on them by this section, be a tribunal consisting of such number of members as Her Majesty may by Letters Patent appoint.
(2) The jurisdiction of the Tribunal shall be—
  (a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section;
  (b) to consider and determine any complaints made to them which, in

ples of judicial review with respect to proceedings considering a surveillance complaint.[144] In accordance with this system, the RIPA Tribunal may only decide whether the authorization for the conduct was manifestly unreasonable in the circumstances or was based on procedural irregularity.[145] In addition, the RIPA Tribunal does not have to consider or determine any complaint made more than one year after the conduct to which it relates occurred.[146]

Under RIPA, an individual may have standing to bring an action for the misuse of covert human intelligence if the action in question took place in relation to him, specifically, and was carried out by intelligence services.[147] However, if the CHIS authorization was authorized by, or takes place with the permission

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accordance with subsection (4), are complaints for which the Tribunal is the appropriate forum;

(c) to consider and determine any reference to them by any person that he has suffered detriment as a consequence of any prohibition or restriction, by virtue of section 17, on his relying in, or for the purposes of, any civil proceedings on any matter; and

(d) to hear and determine any other such proceedings falling within subsection (3) as may be allocated to them in accordance with provision made by the Secretary of State by order.

(3) Proceedings fall within this subsection if —

(a) they are proceedings against any of the intelligence services;

(b) they are proceedings against any other person in respect of any conduct, or proposed conduct, by or on behalf of any of those services;

(c) they are proceedings brought by virtue of section 55(4); or

(d) they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5).

Id.

144. *See id.* § 67, para. 2. RIPA states in Section 67(2) of the Act:

Where the Tribunal hears any proceedings by virtue of section 65(2)(a), they shall apply the same principles for making their determination in those proceedings as would be applied by a court on an application for judicial review.

Id.

145. *See* JUSTICE, REGULATION OF INVESTIGATORY POWERS BILL: PART IV: SCRUTINY OF INVESTIGATORY POWERS: HOUSE OF COMMONS STANDING COMMITTEE STAGE, Apr. 2000, para. 1.9, *available at* http://www.fipr.org/rip/JRP4BRF.doc [hereinafter JUSTICE IV] (explaining that RIPA Tribunal cannot consider, for example, either accuracy or merits of evidence put forward in support of authorization).

146. Regulation of Investigatory Powers Act 2000, ch. 23, pt. IV, § 67(5) (Eng.). RIPA provides in Section 67(5):

Except where the Tribunal, having regard to all the circumstances, are satisfied that it is equitable to do so, they shall not consider or determine any complaint made by virtue of section 65(2)(b) if it is made more than one year after the taking place of the conduct to which it relates.

Id.

147. *See id.* § 67(3). RIPA provides in Section 6(3):

of, a judicial authority, it may not be brought as a complaint in the RIPA Tribunal.[148] The RIPA Tribunal also has sole jurisdiction as to the cases that may be brought before it.[149] The Secretary of State oversees the RIPA Tribunal proceedings.[150]

The right to appeal within the RIPA Tribunal is also limited.[151] The determinations, awards, orders, and other decisions

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(3) Where the Tribunal considers a complaint made to them by virtue of section 65(2)(b), it shall be the duty of the Tribunal—
  (a) to investigate whether the persons against whom any allegations are made in the complaint have engaged in relation to—
    (i) the complainant,
    (ii) any of his property,
    (iii) any communications sent by or to him, or intended for him, or
    (iv) his use of any postal service, telecommunications service or telecommunication system, in any conduct falling within section 65(5);
  (b) to investigate the authority (if any) for any conduct falling within section 65(5) which they find has been so engaged in; and
  (c) in relation to the Tribunals' findings from their investigations, to determine the complaint by applying the same principles as would be applied by a court on application for judicial review.

Id. Section 65(5) of RIPA provides:

Subject to subsection (6), conduct falls within this subsection if (whenever it occurred) it is—
  (a) conduct by or on behalf of any of the intelligence services;
  (b) conduct for or in connection with the interception of communications in the course of their transmission by means of a postal service or telecommunication system;
  (c) conduct to which Chapter II of Part I applies;
  (d) conduct to which Part II applies;
  (e) the giving of a notice under section 49 or any disclosure or use of a key to protected information;
  (f) any entry or interference with property or any interference with wireless telegraphy.

Id.

148. *See id.* § 65(7). RIPA provides:

For the purposes of this section conduct takes place in challengeable circumstances if—
  (a) it takes place with the authority, or purported authority, or anything falling within subsection (8); or
  (b) the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought; but conduct does not take place in challengeable circumstances to the extent that it is authorised by, or takes place with the permission of, a judicial authority.

Id.

149. *See id.* § 65(1)-(3).

150. *See id.* § 65(2)(d).

151. *See id.* § 67(8)-(11). RIPA provides in Section 67(8)-(11):

of the RIPA Tribunal (including decisions as to whether they have jurisdiction) are not subject to appeal in any court.[152] The Secretary of State, however, has authority to amend these provisions.[153]

C. *Criticisms of RIPA*

Despite RIPA's attempts to guarantee that the use of covert human surveillance will be used in accordance with human rights obligations, a number of commentators believe that the framework established by RIPA is inadequate in protecting those rights.[154] Some major criticism of RIPA include: the broad

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(8) Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decision of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.

(9) It shall be the duty of the Secretary of State to secure that there is at all times an order under subsection (8) in force allowing for an appeal to a court against any exercise by the Tribunal of their jurisdiction under section 65(2)(c) or (d).

(10) The provision that may be contained in an order under subsection (8) may include—

(a) provision for the establishment and membership of a tribunal or body to hear appeals;

(b) the appointment of persons to that tribunal or body and provision about the remuneration and allowances to be payable to such persons and the expense of the tribunal;

(c) the conferring of jurisdiction to hear appeals on any existing court or tribunal; and

(d) any such provision in relation to any appeal under the order as corresponds to provision that may be made by rules under section 69 in relation to proceedings before the Tribunal, or to complaints or references made to the Tribunal.

(11) The Secretary of State shall not make an order under subsection (8) unless a draft of the order has been laid before Parliament and approved by a resolution of each House.

Id.

152. *See id.* § 65(1)-(3).

153. *See id.* § 65(2)(d).

154. *See* Gillespie, *supra* note 15 (stating that RIPA will likely not meet "quality of law" test inherent in Article 8(2) of European Convention); *see also* Akdeniz, *supra* note 110, at 11 (stating that RIPA is weak in responding to privacy issues); Open Letter by Amnesty International to Members of the House of Lords on The Regulation of Investigatory Powers Bill, (June 13, 2000), *available at* www.fipr.org/rip/AmnestyRIPletter.htm [hereinafter Amnesty Int'l Open Letter] (stating that RIPA fails to provide sufficient safeguards ensuring accountability and protection of human rights). *See generally* JUSTICE, SUBMISSIONS ON THE DRAFT CODES OF PRACTICE UNDER THE REGULATION OF INVESTIGATORY POWERS ACT 2000: THE COVERT HUMAN INTELLIGENCE SOURCES DRAFT CODE OF PRACTICE UNDER RIPA (2000) [hereinafter JUSTICE DRAFT CODES] (detailing areas

grounds upon which a CHIS authorization may be issued; RIPA's internal, executive authorizations; the standards of review within the RIPA Tribunal; and the degree to which the RIPA Tribunal can provide an effective remedy, given the secretive nature of covert human surveillance activities.[155]

1. Human Rights Concerns Regarding Informer Authorizations

RIPA provides for substantive approval of a CHIS activity for a wide range of purposes, varying from protection of national security to collection of taxes or other duties.[156] Critics expressed concern over the wide latitude of surveillance authorization justifications under RIPA.[157] Unease over the clarity of the definition led at least one commentator to question whether RIPA's standards meet the requirements under *Kruslin v. France* to provide "clear and detailed rules" in the statutory CHIS authorization.[158]

Commentators also criticized RIPA's almost entirely inter-

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that may lead to human rights violations in RIPA Codes of Practice); Liberty, *Regulation of Investigatory Powers Bill: Second Reading Briefing, House of Lords*, May 2000, *available at* http://www.liberty-human-rights.org.uk/mlobby2h.html (listing potential human rights deficiencies in RIPA).

155. *See* Amnesty Int'l Open Letter, *supra* note 154 (expressing concern over broad means upon which CHIS authorization may be issued); *see also* Akdeniz, *supra* note 110, at 82 (criticizing lack of independent judicial review accorded to CHIS authorization system under RIPA); JUSTICE IV, *supra* note 145, para. 1.10 (questioning whether application of judicial review principles in RIPA Tribunal are sufficient for purposes of providing adequate remedy).

156. *See* Regulation of Investigatory Powers Act 2000, pt. II, § 29, paras. 2-3 (Eng.) (providing that CHIS activity can be approved if it is within interest of national security, is for purpose of preventing or detecting crime, is in interests of UK's economic well-being, is in interest of public safety, is for purpose of protecting public health, is for purpose of assessing or collecting any tax, duty, levy or other imposition payable to government department or for any purpose specified by Secretary of State).

157. *See* Amnesty Int'l Open Letter, *supra* note 154 (expressing apprehension that broad provisions of RIPA's authorizations could leave it open to wide abuses). Amnesty International articulated concerns that RIPA's provisions could lead to targeting individuals wrongly for political purposes *Id. See* JUSTICE II, *supra* note 87, para. 3.9, (criticizing broad grounds upon which CHIS authorization may be issued, given the power this would provide authorizing authority); Liberty, *supra* note 154 (considering broad set of grounds for CHIS authorization under RIPA to be concerning because of its potential for intrusiveness).

158. *See* Kruslin v. France, 12 Eur. H.R. Rep. 547 (1990), para. 1 (holding that having clear and detailed positive rules is essential for governing covert surveillance, given contemporary advances in technology).

nal authorizations.[159] Experts noted that there is no duty or statutory procedure under which police may seek prior judicial approval for a CHIS authorization.[160] Judicial oversight, when implemented, only occurs retrospectively.[161] At least one organization noted that this practice stands in contrast with the standards set by the European Court in *Kopp v. Switzerland*.[162]

2. Human Rights Concerns Regarding the RIPA Tribunal

The provisions of RIPA allow individuals to file a complaint with the RIPA Tribunal when the individual has been the subject of surveillance via the use of a CHIS.[163] In reviewing these complaints the Tribunal will apply principles of judicial review,[164] only deciding whether the authorization for the conduct was strikingly irrational or based on procedural abnormalities.[165]

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159. *See* Akdeniz, *supra* note 110, at 82 (noting that lack of independent judicial authorization for informers in RIPA renders it challengeable under Human Rights Act); *see also* Gillespie, *supra* note 15 (noting that lack of independent judicial overview of RIPA CHIS authorizations leaves system open to abuse); JUSTICE II, *supra* note 87, para. 4.10 (questioning whether internal self-authorization of RIPA would meet *Kopp* standard); Neyroud & Beckley, *supra* note 15, at 171 (questioning whether RIPA's lack of prior judicial oversight will meet human rights standards); JUSTICE DRAFT CODES, *supra* note 154, para. 11 (contending that internal authorization is unnecessary in organization as large as police force).

160. *See* Gillespie, *supra* note 15 (noting that lack of opportunity for prior judicial approval in CHIS authorizations is different from system implemented in RIPA when authorizing other forms of surveillance); *see also* JUSTICE II, *supra* note 87, para. 4.10 (contending that lack of independent judicial approval for CHIS authorizations is contrary to standards set by European Court); Neyroud & Beckley, *supra* note 15, at 171 (questioning whether RIPA's lack of prior judicial oversight in granting CHIS authorizations would be acceptable in other European and international contexts); Amnesty International Open Letter, *supra* note 154 (expressing concern that judicial authorization not necessary to grant CHIS authorization under RIPA).

161. *See* Gillespie, *supra* note 15 (noting that no concurrent judicial oversight exists in CHIS authorization process); *see also* JUSTICE II, *supra* note 87, para. 4.10 (contending that lack of supervision of covert surveillance by independent judicial body may contradict European Court requirements); Amnesty International Open Letter, *supra* note 154 (arguing that lack of independent judicial supervision in CHIS authorization process does not address past problems with controlling officers who may attempt to violate law).

162. *See* JUSTICE II, *supra* note 87, at 4.10 (questioning whether internal executive authorizations allowed for under RIPA constitute necessary precaution in protecting right to privacy, as defined under *Kopp* holding, given lack of supervision by independent judicial authority).

163. *See* Regulation of Investigatory Powers Act 2000, ch. 23, pt. IV, § 65 (Eng.).

164. *See id.* pt. IV, § 59 (2)-(3).

165. *See* JUSTICE IV, *supra* note 145, para. 1.9 (defining judicial review in terms of its inability to address case merits).

Commentators question whether the standards of review used by the RIPA Tribunal are truly compatible with the holdings in both *Chahal*[166] and *Tinnelly*,[167] and, implicitly, Article 13 of the European Convention.[168]

Other critics of RIPA question how effective a complaints tribunal can be, given that the subject is likely unaware that he or she is under surveillance.[169] Critics argue that such complaints procedures may violate Article 13 of the European Convention, given its limited possibilities of providing an effective remedy.[170] A number of commentators have also expressed concern that the RIPA Tribunal will function solely as a human rights "smoke-screen."[171] The RIPA Tribunal was modeled on already existing complaints tribunals that are harshly criticized as ineffective in providing adequate remedies.[172]

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166. *See* Chahal v. United Kingdom, 23 Eur. Ct. H.R. 413 (1996) (finding that mere application of judicial review principles in asylum case, where judicial review fails to allow Tribunal to assess factual basis of case, inadequate remedy for purposes of Article 13).

167. *See* Tinnelly & Sons Ltd. v. United Kingdom, 27 Eur. Ct. H.R. 249 (1999) (holding that inability to consider merits of case involving civil right is violative of Article 13 of European Convention).

168. *See* JUSTICE IV, *supra* note 145, para. 1.10 (questioning whether merely applying judicial review principles to cases involving CHIS would provide adequate remedy, given holdings in *Chahal* and *Tinnelly*); *see also* Liberty, *supra* note 154 (maintaining that application of mere judicial review principles in RIPA Tribunal violate Article 6 European Convention requirements).

169. *See* Amnesty Int'l Open Letter, *supra* note 154 (contending that complaints tribunal regarding CHIS is ineffective, given that individual is likely unaware that covert monitoring is taking place); JUSTICE IV, *supra* note 145, para. 2.1 (discussing difficulty of discovering one's surveillance, given nature of CHIS activity).

170. *See* JUSTICE IV, *supra* note 145, para. 2.1 (stating that RIPA Tribunal does not meet Article 8 requirement of providing effective remedy for breach of right to privacy, given inability for majority of individuals under surveillance to become aware of monitoring); *see also* Amnesty Int'l Open Letter, *supra* note 154 (urging UK to adopt type of notification procedure, similar to procedures employed by other countries, that allows individual to be put on notice regarding surveillance after fact).

171. *See* JUSTICE IV, *supra* note 145, para. 1.6 (stating concern about RIPA Tribunal's effectiveness in providing adequate remedy for possible European Convention rights); *see also* Akdeniz, *supra* note 110, at 90 (questioning whether judicial review standards employed by RIPA Tribunal will provide effective remedy).

172. *See* Norton-Taylor & Hopkins, *supra* note 14 (explaining that RIPA Tribunal patterned after tribunal covering complaints of MI5 activities, which, has never upheld complaint, after receiving hundreds of cases); *see also* Akdeniz, *supra* note 110, at 90 (explaining that RIPA was modelled on previously existing complaints tribunals in which no complaint brought have ever been upheld); JUSTICE IV, *supra* note 145, para. 1.6 (contending that failure of surveillance tribunals that RIPA was modeled on,

III. *THE FINUCANE CASE IN LIGHT OF RIPA*

The murder of Patrick Finucane and the surrounding allegations of official collusion into his killing present a dramatic example of how systemic corruption may take place within a structure of unaccountable entities.[173] In light of RIPA, then, the question becomes: Will RIPA correct the pervasive systemic problems evident during the time of Finucane's killing? Will RIPA protect others, like Finucane, against future human rights abuses? The answer is partially yes, and partially no.

A. *CHIS Authorizations*

RIPA is an Act that purports to incorporate the principles of the European Convention into a domestic framework governing the use of informers.[174] The intention is a good one, and efforts at creating such a system of accountability are apparent. RIPA creates a number of structural safeguards on both the higher and lower levels of the CHIS authorization process.[175] On the more basic level, RIPA guarantees maintenance of the CHIS activity by assigning to an authority daily responsibilities for dealing with the source and the source's security and welfare,[176] by installing general oversight of the use of a source,[177] and by creating a system of record maintenance regarding the activities of the source.[178] In addition, RIPA creates criteria upon which a CHIS authorization may be issued.[179]

RIPA also provides a broader system of overview by creating

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reveals gravity of concern that RIPA Tribunal will also be ineffective in proving adequate remedies).

173. *See supra* note 53 and accompanying text (discussing that many individuals allegedly involved in murder of Patrick Finucane have remained unaccountable for their actions).

174. *See supra* note 112 and accompanying text (stating RIPA's goal).

175. *See supra* notes 120-42 and accompanying text (describing system of safeguards installed in course of CHIS activity).

176. *See supra* note 124 and accompanying text (detailing responsibilities of authority holding daily responsibilities of CHIS).

177. *See supra* note 125 and accompanying text (describing responsibilities of authority maintaining general oversight of CHIS).

178. *See supra* notes 127-28 and accompanying text (describing RIPA's standards of record keeping).

179. *See supra* notes 121-22 and accompanying text (stating list of criteria upon which CHIS authorization may be issued).

positions like the IPC and ICS.[180] Both of these positions ensure that the use of surveillance is accomplished in accordance with stated procedures.[181] The annual reports that each of these authorities must submit to either Parliament or the Northern Ireland Assembly provides an even further check on the CHIS system.[182]

However, the sort of internal, executive authorization that was practiced during the time of Patrick Finucane's murder remains.[183] The European Court, in cases like *Kopp*, harshly criticized the use of internal, executive authorization because such a lack of external monitoring could lead to corruption[184]—Finucane's case being the worst example of such corruption. By allowing for internal, executive authorization, RIPA violates the *Kopp* standard, thereby violating the European Convention, as well.

The potential for corruption left open through RIPA's internal, executive authorizations, is further heightened by the broad language upon which CHIS authorizations may be issued.[185] As previously noted, a number of human rights observers have been justifiably concerned that the broad discretion that RIPA provides authorizing authorities could leave such authorizations open to abuse.[186] Looking at RIPA's substantive standard for CHIS authorizations, it is difficult to imagine any but the most extreme of circumstances that would not meet RIPA's requirements.[187] The vagueness of RIPA's standard for authorization seems also to be in violation of the European Court's requirement to have "clear and detailed" rules gov-

180. *See supra* note 131 and accompanying text (discussing creation of posts of IPC and ICS under RIPA).

181. *See supra* notes 132, 138 and accompanying text (describing responsiblities of IPC and ICS under RIPA).

182. *See supra* notes 133, 139 and accompanying text (stating responsibiliy of IPC and ICS to create annual reports on CHIS activities).

183. *See supra* note 129 and accompanying text (noting that informer authorization under RIPA almost entirely internal).

184. *See supra* note 94 and accompanying text (discussing holding of *Kopp*).

185. *See supra* note 122 and accompanying text (listing criteria upon which CHIS authorization may be issued).

186. *See supra* note 157 and accompanying text (noting human rights criticisms of practice of internal, executive authorization).

187. *See supra* note 122 and accompanying text (detailing grounds upon which CHIS authorization may be issued).

erning authorization of covert activities.[188]

Though RIPA makes some effort at the authorization level to create a system of accountability, several of its provisions leave RIPA open to types of systemic abuses evident before the passage of RIPA.[189] RIPA's practices of internal, executive authorization and the unclear standards set for the authorizations further fail to pass the tests established by European Court decisions.[190]

B. *RIPA Tribunal*

RIPA additionally tries to create a system of accountability to address possible abuses within the CHIS authorization system by creating a tribunal to handle possible wrongdoings.[191] The RIPA Tribunal is notable as an institutional safeguard serving as a retrospective check on CHIS procedures. However, the potential for abuses left open at the authorization level may be perpetuated through the low standard of judicial review that the RIPA Tribunal uses to address cases.[192] Because the RIPA Tribunal may only decide whether an authorization for the conduct was manifestly unreasonable or based on procedural irregularity,[193] it is difficult for the RIPA Tribunal to adequately address the potential corruptions at the authorization level. The holdings in cases like *Smith and Grady* and *Chahal* seem to support the idea that the RIPA Tribunal's standard of review would fail to meet the effective remedy requirements of Article 13.[194]

While it is clear that the corruption that characterized the CHIS system at the time of Finucane's murder is improved through RIPA, the potential for abuses and corruption in the system remains. Until these concerns are met, it is questionable

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188. *See supra* note 91 and accompanying text (discussing requirement of European Court to use clear language in informer authorization process).

189. *See supra* notes 49-70 and accompanying text (providing example of abuses that occurred in use of covert surveillance in time before RIPA's passage).

190. *See supra* notes 85-96 and accompanying text (detailing standards created by European Court regarding authorization of covert surveillance activities).

191. *See supra* note 143 and accompanying text (discussing creation of RIPA Tribunal as way to consider human rights violations).

192. *See supra* note 145 and accompanying text (describing judicial review standards).

193. *See id.*

194. *See supra* notes 100-03 and accompanying text (discussing holdings of *Smith and Grady* and *Chahal*).

whether RIPA can accurately claim to be the guarantor of human rights it purports to be.

CONCLUSION

RIPA is a law with good intentions. Working to promote the values expressed in the UK's Human Rights Act, RIPA's goal is to better promote human rights in the UK's domestic legal system. RIPA does, however, have a number of shortcomings. These shortcomings must be corrected in order to avoid the circumstances that allowed Patrick Finucane to be murdered.