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Is It Time to De-proscribe Terrorist Organisations in Northern Ireland?

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ABSTRACT

In 2017 an application to de-proscribe The Red Hand Commando (RHC) loyalist paramilitary organisation was submitted by an organisation known as the Loyalist Communities Council (LCC) which has the backing of other proscribed loyalist groups including the Ulster Defence Association (UDA), the Ulster Volunteer Force (UVF) and RHC. The application was understandably considered negatively by some relatives of RHC victims as well as by Sinn Féin. The application was rejected for failing to comply with the necessary process of de-proscription which reinforces the criticism and difficulty for proscribed organisations that are no longer engaged in terrorism to de-proscribe. If the Northern Ireland Assembly and Commissions set up in Northern Ireland (NI) following the Good Friday Agreement (GFA) with support from the Police Service of Northern Ireland (PSNI) are to dismantle paramilitary groups, then they must take bold decisions and decide whether it is time to support the de-proscription of paramilitary groups that have relinquished political violence. This article recommends that agencies should set out a staged process which can be followed by proscribed organisations in NI interested in applying for de-proscription thereby enabling them to self-evaluate whether or not they are ready for de-proscription.

KEYWORDS

Terrorism; de-proscription;
Northern Ireland

Introduction

Proscription in the UK is a legal instrument which permits the Government to prohibit the presence of,¹ or support for, an identified organisation both within and outside its jurisdiction.² Once proscribed sections 11–13 of the Terrorism Act 2000 (TA 2000) provide a number of offences for an array of activity relating to the membership and the promotion of the proscribed organisation. Essentially, the legislation is sufficiently comprehensive to ensure that anyone with the slightest involvement with a proscribed organisation will be potentially liable for an offence. In the UK, the offence of proscription is synonymous with disruption and, if applied effectively, it can result in diminishing and dismantling the group as it did with the Neo-Nazi Far-Right group, National Action, which was proscribed in 2016. In Northern Ireland (NI), there are allegedly thousands of members of proscribed organisations, particularly in the Ulster Defence Association (UDA) and the Ulster Volunteer Force (UVF), but the majority of members are not actively pursued by the Police Service of Northern Ireland (PSNI) because the vast majority are not involved with any terrorist activity.³ It is a defence for a member to prove, “that he has not taken part in the activities of the organisation at any time while it was proscribed.”⁴

There are currently 14 proscribed terrorist organisations in NI because of the Troubles (1968–1998) and the Good Friday Agreement (GFA) signed in 1998 and accepted by the Provisional Irish Republican Army (PIRA) from the republicans and the main loyalist groups, the UDA and UVF.

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Only those linked to dissident republican groups who objected to the GFA by announcing their presence after the Omagh bombing in 1998⁵ can be now said to be actively “concerned in terrorism” as defined under the TA 2000.⁶ The remainder, particularly the UVF and the UDA, currently have some active criminal elements but offer no greater threat to peace and stability to NI than the organised crime gangs of London, Manchester or Glasgow do to their cities, indeed in some cases far less. Since the GFA there has been little progress in removing paramilitary structures. This is because the security services, politicians and government mandarins believe these structures will disappear or diminish significantly through tougher legislation, improvements to the criminal justice process, community projects as well as government and European Union aid to enhance individual prospects. However that has not been the case even though more than 20 years have elapsed since the GFA. The murals, flags, parades, bonfires and associated glorification, known as “memorialisation,” serve to recruit new members and retain old ones in a divided country and within segregated sectarian housing estates, reinforced through peace walls and more recently Brexit. The retention of these cultural and historic traditions ensures polarisation and division will persist for the time being.⁷

This article reviews whether it is time to start supporting the de-proscription of groups in NI that are no longer engaged with terrorist activities, either against each other or the State, and deal with the remanence of criminality within them through the criminal law. Paramilitary groups have shown in the past, particularly republicans, that they are willing to go to extreme measures to be labelled “political” rather than criminal.⁸ If there is a badge or flag of honour with association to a proscribed organisation then it must be removed and those committing crimes under that guise should be exposed and labelled as criminals in the courts.⁹ In doing so, there can be more open and constructive conversations with those who are genuinely committed to peace and can exert influence within their proscribed organisations and wider community. A doctrinal discourse of the current strategies to dismantle paramilitary groups in NI as well as the policy of maintaining proscription will be considered to establish whether it is time to de-proscribe proscribed organisations in NI.

The current terrorist threat level in NI, decided by the Joint Terrorism Analysis Centre and the Security Service (MI5), is Severe, which means an attack is highly likely. This level has been consistent since 2010 because of dissident republican groups.¹⁰ Dissident republican groups who have been actively involved since the GFA with terrorism against State institutions and killings such as that of journalist Lyra McKee, which caused public outrage, have been targeted by the PSNI and MI5.¹¹ In 2020, operation “Arbacia” resulted in 10 arrests of dissident republicans throughout the UK. They were charged with various terrorist related offences including membership of a proscribed organisation.¹² Proscription can be effective in disrupting dissident groups with the support of other terrorist offences. Many of the proscribed loyalist organisations in NI have been around for more than 45 years and are much larger than dissident republican groups. These are not going to be dismantled through the offences associated with proscription because most of their members were granted an amnesty under the GFA and are now inactive. Some of them have entered the political arena as elected representatives.

Jarvis and Legrand suggest that proscription is essentially “blacklisting.”¹³ Blacklisting paramilitary groups in Ireland and NI has been happening for more than 100 years. Blacklisting does not make these groups disappear or as Walker states “go away.”¹⁴ Victims play a part of the policy and politics of continuing proscription in NI because there are few rational legal grounds to maintain proscription of many organisations because of their lack of activity in planning or conducting terrorist attacks and their rejection of terrorism. The requirements for proscription are that the organisation must be first “concerned in terrorism” or as in the case of People’s Mojahadeen Organisation of Iran (POMI) “current, active steps are required,” often, but not necessarily, politically and or religiously motivated, as they were when originally proscribed.¹⁵ Secondly the Secretary of State’s discretion of applying proscription on policy grounds.

Today, most of the youth in NI have no interest in paramilitary organisations or conflict.¹⁶ Those that do join or remain in a proscribed group do so because it remains part of the fabric in their working-class area, either through their friends, family connections or through the glorification and

excitement of being a paramilitary member which is fuelled by the physical and psychological barriers that still exist between Protestant and Catholic communities. Social conditions in working class areas contribute heavily to these factors and offer a sense of belonging to, unemployed and bored youths who then become sucked in and unable to get out.¹⁷ In some cases, weaker individuals in the community are exploited and are coerced to join or remain in these paramilitary organisations.

Proscription in Northern Ireland (NI)

A scheme for proclaiming associations to be dangerous was established by the Criminal Law and Procedure (Ireland) Act 1887, and in 1918 five associations were proclaimed to be dangerous. After Partition similar provision was made. Regulation 24A of the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 criminalised membership of a number of organisations including the IRA. Over time, additions were made to the 1922 list, including (in 1966, by S R & O (NI) 1966/146):

The organisation at the date of this regulation, or at any time thereafter, misappropriating, or claiming to use, or using, or purporting to act under, the name 'the Ulster Volunteer Force' or any division or branch of such organisation howsoever described.¹⁸

In June 1939 the Government of the Irish Free State, which had earlier prohibited a number of bodies including the IRA under the Constitution (Declaration of Unlawful Associations) Order 1931,¹⁹ exercised a power conferred by section 18 of the Offences against the State Act 1939 to declare, "that the organisation styling itself the Irish Republican Army (also the IRA and Óglaigh na hÉireann) is an unlawful organisation and ought, in the public interest, to be suppressed."²⁰ In section 19(1) of the Northern Ireland (Emergency Provisions) Act 1973 Parliament legislated to make it a criminal offence to belong or profess to belong to "a proscribed organisation."²¹

The legislative formula adopted in 1973 and 1974 was repeated in a series of counter-terrorism statutes relating to NI including: The Prevention of Terrorism (Temporary Provisions) Act 1976, the Northern Ireland (Emergency Provisions) Act 1978, the Prevention of Terrorism (Temporary Provisions) Act 1984 and 1989 and The Northern Ireland (Emergency Provisions) Act 1991 and 1996. It is this series of legislation dealing with the Troubles that has proscribed terrorist organisations in NI. The TA 2000 Schedule 2 contains the list of all proscribed organisations nationally and internationally, including the 14 proscribed organisations of NI, none of which were proscribed using the TA 2000.²²

De-proscription

De-proscription is not new to NI. The UVF was formed in 1966 to combat what it saw as a rise in Irish nationalism centred on the 50th anniversary of the 1916 Easter Rising. In the same year it was proscribed. The group adopted the name and symbols of the original UVF, the movement founded in 1912 by Sir Edward Carson to fight against Home Rule. In April 1974, in the shadow of the Sunningdale Agreement on power sharing, Merlyn Rees, the then new Secretary of State for NI, de-proscribed the UVF and Sinn Féin.²³ Having no political voice at that time, it soon became apparent the UVF could not articulate the same juxtaposition as the PIRA and Sinn Féin, despite creating a political voice in June 1974 with the Volunteer Political Party.²⁴ The UVF, unable to maintain a ceasefire had signalled its own end to legality by creating a political wing if there was no political solution to the conflict. Rees had no alternative but to proscribe the UVF in October 1975.²⁵ The UDA was established in 1971 but remained a lawful organisation far longer than it should have given the frequency of crimes brought before the courts in the early 1970s linking the UDA to acts of terrorism.²⁶ The UDA created the Ulster Freedom Fighters (UFF) in 1973 to take responsibility for its crimes before it was finally proscribed in 1992.²⁷

De-proscription in NI has historically centred on trying to resolve the conflict through negotiation. De-proscription allows government officials to speak openly with organisations and influential individuals within them, rather than as proscribed organisation or a member of one, through secret talks, which if disclosed to the public cause embarrassment, particularly when their party line is, “we don’t talk to terrorists.”²⁸ The incentives today for de-proscription are politically less pressing given the GFA.

However, peace today in NI is at best described as fragile and proscription still stifles open conversations with influential individuals who are linked to proscribed organisations and restricts the work that could be done both within and outside communities if they were legitimate.²⁹ The motive for de-proscription by the Red Hand Commando (RHC) was described by the Loyalist Communities Council (LCC) as taking a step to transform loyalist groups. The application stated:

It is further hoped that this course being taken by the Red Hand Commando can lay out a road map for the transformation of loyalist groups in general and that this action might be followed in due course by the other two main loyalist groups.³⁰

The process of de-proscription has historically attracted criticism. In NI that may be a difficult obstacle to overcome, particularly when there are still criminal elements associated within some proscribed organisations due to a lack of complete control over the organisation, where unsanctioned activity exists fermenting behaviour that can be inconsistent with leaderships advice and strategy.³¹

Walker states:

... there must come a time when their indisputable past involvement with violence becomes historical and proscription becomes disproportionate on grounds of fairness and ineffectiveness (or even counter-productivity) as a strategic and political stance.³²

The Home Secretary will consider de-proscription on application only. Section 4 of the Terrorism Act 2000 provides that the organisation or any person affected by a proscription can submit a signed, written application to the Home Secretary requesting that they consider whether a specified organisation should be removed from the list of proscribed organisations. Proscription decisions in relation to NI are a matter for the Secretary of State for NI. The application must set out the grounds on which it is made. The precise requirements are contained in the Proscribed Organisations (Applications for De-proscription etc) Regulations 2006.³³ To-date there have been only four successful international organisations de-proscribed and none related to NI.

The Secretary of State notifies the applicant of their decision within 90 days. If the application is rejected, an appeal may be brought to the Proscribed Organisations Appeal Commission (POAC), a superior court of record whose chair must hold, or have held, high judicial office.³⁴ The POAC is tasked with determining appeals in accordance with judicial review principles. It can sit in closed session and appoint special advocates for the purposes of dealing with secret evidence.³⁵ From the POAC, a further appeal on questions of law lies, by permission, to the Court of Appeal or Court of Session.³⁶ The Court of Appeal rejected the Secretary of State’s Appeal from the POAC in *Lord Alton of Liverpool & others in the matter of People’s Mojahadeen Organisation of Iran (POMI) v Secretary of State for the Home Department*.³⁷

The POMI case sets out the most illuminating information by providing an analysis of the de-proscription process to-date and guidance for those groups seeking de-proscription. The process is first whether the Secretary of State reasonably believes the organisation is currently concerned in terrorism, within the meaning of section 3 (4) and (5) of the Terrorism Act 2000, and if so, in the light of any relevant considerations should he continue to exercise discretion in favour of proscription.

The POMI had been involved with serious acts of terrorism until June 2001. There was no question of incorrectly proscribing them at the time of their proscription. Thereafter, the POMI had made a number of declarations that they had renounced terrorism and subsequently started to pursue an action for de-proscription in 2001 and again in 2003, finally successfully appealing to the POAC in 2006.

The Secretary of State then appealed to the Court of Appeal against the POAC's decision to deproscribe the POMI. The Court of Appeal agreed with the POAC that an organisation that has no capacity to carry on terrorist activities and is taking no steps to acquire such capacity or otherwise to promote or encourage terrorist activities cannot be said to be "concerned in terrorism" simply because its leaders have the contingent intention to resort to terrorism in the future. The nexus between such an organisation and the commission of terrorist activities is too remote to fall within the description "concerned in terrorism." However, it disagreed with the POAC that if it retained its weapons this would still be the case. In addition, an organisation that has temporarily ceased from terrorist activities for tactical reasons is to be contrasted with an organisation that has decided to attempt to achieve its aims by other than violent means. The latter cannot be said to be "concerned in terrorism," even if the possibility exists that it might decide to revert to terrorism in the future.³⁸

The matter of NI and "concerned in terrorism" is focused on supporting the GFA and can be illustrated by reference to the provisions of section 3(8) of the Northern Ireland (Sentences) Act 1998 which required the Secretary of State to specify an organisation "which he believes- (a) is concerned in terrorism connected with the affairs of Northern Ireland, or in promoting or encouraging it, and (b) has not established or is not maintaining a complete and unequivocal ceasefire."

In applying subsection (8)(b) the Secretary of State shall in particular take into account whether an organisation—

- (a) is committed to the use now and in the future of only democratic and peaceful means to achieve its objectives;
- (b) has ceased to be involved in any acts of violence or of preparation for violence;
- (c) is directing or promoting acts of violence by other organisations;
- (d) is co-operating fully with any Commission of the kind referred to in section 7 of the Northern Ireland Arms Decommissioning Act 1997 in implementing the Decommissioning section of the agreement reached at multi-party talks on Northern Ireland set out in Command Paper 3883.

Jonathan Hall, the Independent Reviewer of Terrorism, suggests that in NI proscribed organisations can be classified and categorised, which is a positive and yet novel step in separating those proscribed organisations which are a threat to the State from those that have organised crime within them.³⁹ According to his review, the third category, which are groups, he says, such as the UVF who have more in common with organised crime groups but may from time to time engage with "intimidation and attacks on their own community" often unsanctioned by its leadership, and by this may meet the definition of terrorism set out in S1 TA 2000 to maintain proscription. This suggests the possibility of proscribing criminal gangs and reinforces Walker's point that proscription can be symbolic.⁴⁰

The question of whether proscribed organisations in the third category are still "concerned in terrorism" within the meaning of the TA 2000 S1, but more importantly Northern Ireland (Sentences) Act 1998 section 8, is questionable. There is sufficient evidence to suggest they are not because many crimes linked to such organisations that have occurred recently cannot be said to be "terrorism." For example, in February 2021 dozens of masked men allegedly linked to the UVF were pictured gathering in Pitt Park East Belfast in a 'display of sinister force' resulted in several arrests under Public Order legislation.⁴¹ The former PSNI Chief Constable, Sir George Hamilton, described some loyalist paramilitary groups as nothing more than organised crime gangs.⁴²

In response to criminality within proscribed organisations a Paramilitary Crime Task Force (PCTF) was proposed in 2016 and established in 2020 which reinforces the point that the main concerns regarding proscribed organisations relate to organised crime such as, drugs, counterfeit goods, intimidation, and money laundering.⁴³ A number of civil recovery orders have already been granted to the PCTF for unaccounted cash and property as a result of suspected criminal activity by paramilitary organisations.⁴⁴ However, many of these offences were ongoing when such groups

were actively concerned in terrorism in order to fund them. This illustrates the grey area in drawing a distinction between organised crime gangs and paramilitary terrorist organisations. There are no organised crime gangs in Great Britain that are established under military lines with chains of command such as Brigadier, Commander etc. The proscribed organisations in NI and their modelling on military lines make them more likely to be “paramilitary” as well as particularly difficult to penetrate to extract the criminal element. There is also an argument to suggest that if the violence and intimidation associated with this third category are excessive, it will be sufficient to maintain or trigger S1 of the TA 2000 as well as S8 of the Northern Ireland (Sentences) Act 1998.

The decision for the Secretary of State for NI to de-proscribe is not a simple choice when exercising their discretion given the unique situation of NI. The existence of proscribed organisations on both sides means that the decision to de-proscribe may be seen to be rewarding or favouring a particular side or that one side has won. Nevertheless, once it is established that the group is not concerned in terrorism the second stage is for the Secretary of State to apply their discretion using the Wednesbury principles of unreasonableness, and in doing so they must consider relevant, rather than irrelevant, matters such as upsetting one side or that the existence of organised crime in an organisation should be an overriding matter not to de-proscribe it.⁴⁵

The de-proscription of proscribed republican organisations, particularly the PIRA, would be difficult due to the current activity of dissident republican groups such as the Real IRA and the rationale in the case of *Z (Appellant) (On Appeal from the Court of Appeal in Northern Ireland)*.⁴⁶ This case centred around whether the Real IRA is a proscribed organisation even though it is not listed as one under Schedule 2 of the TA 2000. The Irish Republican Army (IRA) is however listed as a proscribed organisation so the question that arises is whether the groups all operate within the same rubric and manifestation despite the Real IRA claiming they are different.

Lord Bingham was persuaded to suggest they are as one, referring to the Special Criminal Court sitting in Dublin on 10 October 2001, reaching a somewhat similar conclusion, quoted by the Court of Criminal Appeal McGuinness, O'Donovan and Herbert JJ (see *Director of Public Prosecutions v Campbell (unreported)*, 19 December 2003):

... the labels such as ‘official’, ‘provisional’, ‘continuity’ or ‘real’ are irrelevant in considering whether a particular person or group of persons are within the ambit of the Suppression Order i.e. that he or they belong to an organisation which styles itself the Irish Republican Army or the IRA or Óglaigh na hÉireann. The so called ‘Real IRA’ are on all fours with the original IRA as it existed in 1939 in terms of the philosophy, objectives and structure and members of that group are within the ambit of the Suppression Order of 1939.⁴⁷

The Appeal was dismissed and the Real IRA was declared a proscribed organisation. This would present a conundrum to the Secretary of State for NI if they were asked to consider an application, albeit unlikely, to de-proscribe the PIRA whilst republican dissident groups are still actively concerned in terrorism. Republican groups, such as the Irish National Liberation Army (INLA), have recently been subject to a major police operation because of their engagement in criminality.⁴⁸ The INLA claim to be the protectors of their community but the reality is that some elements within them use violence and intimidation to control and exploit those communities.⁴⁹ They should therefore be treated on the same footing as proscribed loyalist organisations, which share similar issues of organised crime, wanting to de-proscribe.

Former members of proscribed organisations

Over 400 prisoners were released under the terms of the GFA. Hundreds of others, in the first generation of conflict, had already served long sentences before the GFA. Many of those released had committed the most notorious acts of terrorism of the Troubles.⁵⁰ For the victims’ families, one can only imagine what impact it had on them seeing individuals released, having only served a fraction of their sentences.⁵¹ The Northern Ireland (Sentences) Act 1998 was enacted to give partial effect to the GFA. It provides for the accelerated release of prisoners, serving sentences of imprisonment for

terrorist offences, who meet four conditions. These conditions require the prisoner in effect to renounce violence. The second condition is that the prisoner is not a supporter of a specified organisation.⁵² The third condition is that, if the prisoner were released immediately, they would not be likely:

(a) to become a supporter of a specified organisation, or (b) to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of NI.⁵³

The fourth condition is that, if the prisoner were released immediately, they would not be a danger to the public.

Consequently large numbers of former paramilitary prisoners, who had committed to tearing up their membership from their proscribed organisation, returned to society. Many of them had renounced violence and were only too aware of the price they and their families had endured; some committed suicide, incapable of coming to terms with what they had done to their victims.⁵⁴

The European Union Peace and Reconciliation Fund made £1.25 million available to support prisoner reintegration in 1998.⁵⁵ Both sides generated many programmes with a view to engaging with former prisoners to help them adapt to their new surroundings and prevent them from re-engaging with the conflict. The Open Doors Project is one of those programmes and looks at ex-prisoners from all communities in NI that have a useful contribution to make to rebuilding its future.⁵⁶ Funding was hardly a way to sustainable living nor was it always the motivation for those with a political outlook or wanting to share their experiences.⁵⁷ The projects, mainly voluntary, were never designed to be permanent solutions or to provide careers. They have been criticised for too often only focusing on their own communities and part funding individuals and proscribed organisations rather than projects that might bridge the psychological barriers between the Catholic and Protestant communities.⁵⁸

Some former prisoners are respected in their communities because they are seen as having played their part in the conflict and sacrificed their freedom for that cause. The continuation of proscription limits their ability to engage with legal institutions from all quarters. They are often treated as social pariahs, thereby stifling their contribution to the peace process. For individuals who had and continue to have connections with proscribed organisations and who are committed to peace and progressing change their freedom of expression and association with proscribed organisations are largely suppressed because they are not necessary on the ground of national security to maintain proscription on them, consequently it is an infringement of their human rights.⁵⁹ To advance de-proscription and the infringement of human rights of convicted terrorists who were members of an organisation that committed murder is controversial and offensive to their victims. Nevertheless, the continued persistence of proscription on individuals that are now committed to peace does run the risk of disproportionately affecting their human rights.⁶⁰

Not all prisoners who were released adapted to their new life or the terms of their licence. The charismatic UDA Brigadier, Johnny Adair, was recalled to prison when it was decided his presence in the loyalist community would fuel division between the UDA and the UVF in the short-term, following a loyalist community festival which descended into chaos, and that in the long term he would be counterproductive to the peace process.⁶¹ Many republican prisoners joined Sinn Féin which was prepared to offer positions on merit rather than disregard individuals because of their previous convictions. Less can be said for loyalist prisoners, some unsympathetic towards the mainstream unionist political parties and their policies, some wanting to contribute to the new political landscape with unionist politics that would not exploit their fears but rather resonate with the wider loyalist community.⁶² Their only options were to establish new parties or revive and help build existing ones like the Progressive Unionist Party (PUP) in a left of centre unionist direction.⁶³ Nevertheless, following the GFA, former members of proscribed republican organisations, such as the PIRA, have had more political opportunities than their loyalist counterparts and that may mean there is less desire to de-proscribe the PIRA.

Not all members of proscribed organisations, particularly those that are engaged in criminality, are admired or wanted by their communities. There have been punishment beatings for anti-social behaviour, intimidation, forced membership to maintain subscriptions and, in extreme cases, murder, for example ex-RHC member, Bobby Moffett, who was lured to his death in 2010, allegedly by the UVF, because of a dispute with a senior UVF figure.⁶⁴ The incident triggered PUP leader, Dawn Purvis, to resign and, despite intimidation towards the community not to attend his funeral, large crowds came out in force and defiance to pay their respects. Following the murder of Robert McCartney in 2005, individuals with links to the PIRA silenced the community into not giving evidence to support the investigation into his murder.⁶⁵ McCartney's sisters defied this threat and began a public campaign openly criticising and implicating PIRA involvement as well as expressing criticism towards the Sinn Féin leadership who initially remained silent.⁶⁶ Despite denials from Sinn Féin that the PIRA were involved with the murder, the incident raised the matter of the existence and growing threat of organised crime within the PIRA with the Northern Bank robbery occurring a few months earlier and suggested links of PIRA participation and responsibility.

Policing proscribed organisations and victims

Survivors, and families of those that did not, as well as the wider community want transparency as well as holding to account the system that had produced so many injustices in the Troubles.⁶⁷ The devolution of policing and the criminal justice system were finally completed in 2010.⁶⁸ The challenge and expectations for the PSNI to achieve public confidence are ambitious, following the Historical Enquiries Team (HET), set up in 2005, as well as a system that appeared to be at times unwilling and in some cases unable to release historical evidence from previous investigations for legal reasons, whether due to republican concerns of shoot to kill or collusion policies or loyalists concerns of letters of comfort for PIRA “on the run” suspects.⁶⁹ It has so far fallen short of expectations for victims and failed to provide effective support systems for families of those victims who were murdered.⁷⁰ The Haass Initiative formed in 2013 to contend with the past and to deal with parades, flags and the legacy issues of the Troubles ended without a deal. An investigation in 2017⁷¹ into the workings of the HET found they were deeply unsatisfactory.⁷² One might suggest in an ideal process of working toward peace in NI, de-proscription should be its final stage.

The persistence of policing proscribed organisations appears to be impervious to its overwhelming record of failure to “work,” in the normal sense. Citizens, particularly victims, are often perplexed at the hypocrisy of policing proscribed organisations where individuals who are known to the PSNI who promote or are members of proscribed organisations using them for criminal purposes, for example intimidation.⁷³ This has resulted in members of the public making applications for freedom of information (FOI) requests to the PSNI in an attempt to establish if there is an agreed policy or strategy within the PSNI with certain proscribed organisations.⁷⁴ The response to those questions raised in FOI requests is that no information is held. The PSNI have confirmed they are not in “cahoots with the UVF despite inferences” and are not directly responsible for the maintenance of proscription.⁷⁵

Between 19th February 2001 and 31st March 2019, of the 355 persons detained under Section 41 TA 2000, a total of 468 terrorist offences were brought against them. Of these, 21 related to s12 TA 2000 for supporting a proscribed organisation; 119 under s 11 for membership of a proscribed organisation; and from April 2019 to October a further four people were charged with membership. There are no details of which proscribed organisations make up these statistics but it is important to note, when reviewing data of persons convicted of an offence under Terrorism Legislation from 2007 to 2020, that a substantial number of these charges did not result in a conviction. The total number of convicted persons under the TA 2000, TA 2006 and Counter Terrorism Act 2008 during this period for all offences was 120 but there is no data as to the nature of these offences.⁷⁶ The numbers referred to in relation to support and membership from 2001 to 2019 is remarkably low given there are allegedly

thousands of members of proscribed organisations, particularly loyalist groups, which suggests the maintenance of proscription on many proscribed organisations is ineffective and does little to build public confidence in the PSNI and the furthering of the peace process.

The maintenance of proscription on proscribed organisations can be seen as useful. One benefit is when an accused is charged on indictment for membership or support, both he and his associates, can be subject to a non-jury Diplock trial⁷⁷ if the Director of Public Prosecutions so wishes.⁷⁸ So whilst many proscribed organisation in NI are currently inactive, the legislation appears pre-emptive, occasionally being used, but is often counter-productive to progressing peace by creating a perpetual state of fear and expectation of returning to the past. A total of 245 non-jury certificates were issued between 2007 and 2019. This includes any trial on indictment; it is not limited to those that are terrorist related.⁷⁹ In essence, it supports the continuation of the over securitisation of NI and, by doing so, has made certain individuals and groups within particular housing estates a suspect community.⁸⁰

The application for de-proscription by the RHC resulted in the media seeking a variety of responses from politicians, victim support groups and victims' relatives whose family members had directly suffered at the hands of the RHC. Many appeared perplexed about the application of the RHC wondering why they don't just disappear or go away rather than de-proscribe. Kenny Donaldson of Innocent Victims United said "We do not believe that terror names IRA, UVF/RHC, INLA, UDA etc . . . should ever become legalised, they must be remembered in history for what they were—organisations of oppression with ideologies which encouraged and indeed demanded one neighbour to murder another"⁸¹ Generally, RHC's application received negative responses but this was intensified when a prominent loyalist community worker, a member of the LCC and ex RHC member, Jim Wilson, suggested that loyalists wanted a "place in the sun,"⁸² a phrase previously used to suggest everyone had a right to a future in NI.⁸³ Wilson suggested that the vast majority of loyalists are not involved with criminality, of which, he estimated, those that are, only represent approximately 5 percent of the main proscribed loyalist organisation groups.⁸⁴

De-proscription should never condone an organisation's previous actions and an organisation that is de-proscribed should never glorify its previous crimes. This raises the moral and possibly legal issue of glorifying certain individuals and organisations on both sides through murals and at funerals. Unsolved crimes by individuals linked to proscribed organisations should always be investigated and the government's recent proposal to end prosecutions for crimes linked to the Troubles committed before 1998 appears to be an affront to victims where there is sufficient evidence to warrant an investigation.⁸⁵ The words of Kenny Donaldson are sobering and a reminder of the human cost carried out by proscribed organisations.

Independent commissions of paramilitary activity

Following the GFA, an Independent Commission was established under the NI (Monitoring Commission etc.) Act 2003 to review paramilitary activity and security normalisation. Its reporting started in 2004 and was completed in 2011.⁸⁶ Its final report included a reflection on its time in office, where it presided over decommissioning, statements renouncing violence and the challenges of an increase in criminal activity within paramilitary organisations, particularly loyalist groups. It received mixed reviews and despite the good intentions of its members, most of the information it published could have been accessed elsewhere or was already known to the security services. In that sense, its purpose and reporting were more for general public consumption as well as allowing a forum for individuals to express their concerns and let off steam. One example of its claimed success was publishing the linkage of the Northern Bank robbery in 2005 to the PIRA and highlighting to Sinn Féin the difficulty in pursuing its political path whilst this activity continued.⁸⁷ The Sinn Féin leadership always denied involvement but others have suggested that the monies provided support to discontinue PIRA's criminality by providing a pension to many volunteers.⁸⁸ There is little evidence

that the Commission advanced any removal or reduction in loyalist paramilitary structures and activity. De-proscription was never mentioned and, given the turbulent period in which the Commission operated, it was appropriate it did not.

After two PIRA paramilitary related murders in 2015, sparking a crisis in the political process as well as disagreements in welfare funding and the stability and sustainability of NI's budget and governing institutions, the Fresh Start Agreement was produced.⁸⁹ *"The Fresh Start Agreement sets out a range of measures by which paramilitarism was to be ended including the establishment of the Independent Reporting Commission."*⁹⁰ At the same time the Secretary of State for NI commissioned a report from the PSNI and MI5 on the structure, role and purpose of paramilitary groups focusing on those which declared ceasefires in order to support and facilitate the political process.⁹¹ The Independent Reporting Commission (IRC) has so far produced three reports and is due to conclude in 2021. The IRC's role is to report and make recommendations.

The IRC has adopted a two-fold strategy in its attempt to end paramilitary organisations: first to tackle them through the criminal justice process and secondly through systemic changes to transfer the prospects of communities in which they recruit and operate. The strategy which runs through all their reports is daunting given the limitation of the IRC, both politically and legislatively. In their 2018 report, the RHC's failure to be de-proscribed was given little attention. Given the task of the IRC and the significance of the RHC's application, it is surprising that it was not reviewed or discussed in any detail. The report and recommendations are substantial. They would not look out of place in tackling knife crime in London or drugs in Manchester if the word "paramilitary" was removed from the report. However, the references to paramilitary appear excessive and a nuance of NI terrorism description. Indeed "paramilitary" or as Walker states "Paramilitarism" is not defined in a statute but appears in the NI (Stormont Agreement and Implementation Plan) Act 2016 that oaths for office holders must renounce paramilitarism.⁹² The report confirms from its recommendations that the issue at hand is dealing with criminality within a proscribed organisation rather than a terrorist matter per se, with the exception of dissident republican groups.

Its 2019 report, acknowledges the complexity of the problem as well as the daunting task in resolving the matter saying:

... It is our view that there is a spectrum of people involved in paramilitarism, at one end of which are those who we believe are sincerely engaged in supporting transition to peaceful, democratic politics, and those at the other those who use paramilitarism as a cloak for criminality.⁹³

The IRC's 2019 report calls for "speeding up justice" which could be construed to be countering justice if defendants are not given the proper means and time for preparing their defences. The criminal justice system during the Troubles had an history of abusing the rights of defendants through internment, super-grass un-corroborated statements, which have later turned out to be unreliable, as well as the use of Diplock trials. These were all in the name of producing higher conviction rates but had the result of speeding up injustice. Given the disintegration of the Rule of Law throughout the Troubles, speeding up any judicial process should be avoided if it could be construed as affecting a defendant's right to a fair trial as well as the impact this may have on the rebuilding of trust and confidence in the NI criminal justice system.

The Covid pandemic crisis has impacted on many legal processes in NI as well as the rest of the UK, resulting in significant backlogs and delays, slowing down the judicial system which may take years to return to its pre-Covid rate of progressing Crown Court cases.⁹⁴ The IRC's proposed changes to the criminal justice system do not make recommendations to the existing terrorist legislation or the absence of terrorist legislation to deal with the NI paramilitary problem. Indeed, giving examples of bonfires, although tremendously symbolic, can hardly be said to be "concerned in terrorism," which is essentially what a paramilitary organisation is supposed to be engaged in.

According to the IRC's 2019 report Brexit and the continuing absence of the Northern Executive and Assembly since 2017 have hampered the ability to end paramilitary activity.⁹⁵ Their November 2020 report acknowledged the restoration of the Northern Executive and Assembly in January 2020,

which should support the ability of the Assembly to resolve matters and have a better oversight of paramilitary concerns.⁹⁶ Brexit has already proved to be contentious since the coming into effect of the Trade Agreement in December 2020 with the NI protocol. The protocol was a resolution to the contentious Irish border question and was designed to avoid a return of checkpoints along the politically sensitive frontier and minimise potential disruption of cross-border trade. However, the border is now at the ports in NI with checks being implemented on goods travelling from Great Britain to NI.⁹⁷ Amid the Covid crisis and a row over vaccine delivery shortfalls, the EU on January 29th 2021 invoked Article 16 of the NI protocol which allows the EU or UK to unilaterally suspend aspects of its operations if either side considers that aspect to be causing, “economic, societal or environmental difficulties.”⁹⁸ The European Commission reversed the move shortly afterwards in the face of growing opposition, including Ireland, which had not been consulted as well as the threat to peace in NI. The Trade Agreement and Article 16 have already caused some friction with the temporary suspension of border checks at Larne and Belfast due to threatening anti-protocol graffiti paint sprayed onto walls at the ports.⁹⁹ The LCC, representing the main loyalist paramilitary groups, have written to Prime Minister Boris Johnson withdrawing their support for the GFA if there is to be a border in the Irish sea.¹⁰⁰

In relation to the IRC’s strategy of transforming paramilitary membership through educational programmes and employment prospects in communities is currently ambitious in the current climate of Brexit and Covid. Before the IRC was established, the Fresh start Agreement in 2015 had already identified UK welfare reforms and pressure on the NI Assembly to reduce its spending by reducing the size of the Assembly and other institutional spending reforms.¹⁰¹ Brexit, particularly the impact of the Protocol on trade, and the Covid debt to support its furlough scheme (Coronavirus Job Retention Scheme) will only impact further on the public purse making spending on schemes to reduce deprivation in NI less likely. The IRC’s 2019 report highlights whether the time has come for considering the possibility of de-proscription as one formal process of transition for paramilitary groups and to work with individuals within them to achieve this because of the challenges individuals and organisations have to deal with the legal and political challenges that would be associated with this sensitive process.¹⁰² The Justice Minister for NI appears committed to this and will bring a paper forward, although there is little detail of what this might entail.

Conclusion and recommendations

Sinn Féin has described the application by the RHC to de-proscribe as abhorrent to victims and ludicrous.¹⁰³ De-proscription should move beyond political point scoring and recognise that peace requires compromise as it did during the GFA talks and the early release of prisoners that followed. De-proscription is not morally anaesthetised towards victims. It is simply accepting that the status of some groups today is no longer grounded in their past. The de-proscription of the RHC, if successful, would have provided an opportunity to review what impact, if any, de-proscription could have made to the peace process. Although the reality appears that given the relative small size of the RHC the LCC were dipping their toes with the RHC application rather than making a full commitment of the main loyalist groups, the UDA and UVF, who supported the RHC application.

The majority of the 14 NI proscribed organisations are unlikely to pursue de-proscription Groups such as the Red Hand Defenders and Orange Volunteers are unlikely to exist as an organisation or the Loyalist Volunteer Force (LVF), which reportedly, since the death of their leader Billy Wright, only use the name by a small group of individuals for criminal purposes.¹⁰⁴ Organisations may be reluctant to apply for de-proscription if they have a self-interest in maintaining criminality within their group such as the INLA or LVF. In the case of the Ulster Freedom Fighters (UFF) they are likely to fall in line with their leadership, the UDA, except for the dissident Real UFF, a splinter group founded in 2007.

The persistence of maintaining proscription serves as an impediment to conflict transformation. It impedes the space for peace facilitation by criminalising mediation and peace talks. The IRC has previously raised concerns in talking to those that represent proscribed organisations in NI.¹⁰⁵ Once the “old guard” (those influential individuals from the past) have gone, who will replace them?

The organisations that are interested in de-proscription could be shown a pathway supervised by either a committee or an individual role, with the approval of the PSNI, to meet with groups or individuals representing those proscribed organisations. This might mean:

- Mapping the group’s activities post GFA with the Northern Ireland (Sentences) Act 1998 section 8 criteria.
- Ensuring a public statement has been made to renounce violence, terrorism and an apology to victims for the group’s previous actions.
- Receiving assurances to the cessation of any more memorialisation relating to that organisation (except for murals dedicated solely to peace) and review existing material that may be deemed offensive or designed to intimidate the public.
- That no future marches or campaigns will be dedicated to the glorification of their organisation.
- Commit to removing indefinitely (publicly) anyone from their membership who is convicted of an indictable offence relating to their organisation (e.g. using the organisations as a means of intimidation).

Whilst these provisions would have no legal bearing on whether an application of de-proscription could be made under the De-proscription Regulations 2006 or that the application would be successful even if it did comply with such a process compliance with the process could form part of the considerations taken into account by the Secretary of State for NI is exercising his discretion once he is satisfied that a particular group is no longer concerned with terrorism. Any such process would need to be reviewed in light of groups that had de-proscribed and their subsequent behaviour.

This process would help individuals and groups decide whether an application for de-proscription is appropriate or whether more work needs to be done before submitting an application for de-proscription. For loyalist groups, Brexit, the Irish Sea border question and the violent riots in April 2021 are likely to be stumbling blocks for both themselves and the Secretary of State for NI in considering de-proscription. It could be suggested these issues reinforce the need to de-proscribe loyalist organisations so that such disagreements and incidents can be discussed openly with all those concerned.

There is clearly a need for change in the de-proscription process in NI when the Independent Reviewer is attempting to categorise the seriousness of proscribed organisations and has acknowledged a particular organisation is more akin to a criminal organisation than a terrorist one. As the previous Independent Reviewer of Terrorism stated, there is a need for reform to provide more effective oversight from all institutions of the State and particularly, the matter of the discretionary powers based on the second test to de-proscribe if a group is no longer concerned with terrorism.¹⁰⁶ There are suggestions that proscribed organisations should be periodically reviewed and removed rather than waiting for an application.¹⁰⁷ The current situation of proscribed organisations in NI is no longer fit for purpose and a clear pathway is required for organisations that are committed to peace whilst at the same time ensuring the new Paramilitary Crime Task Force is sufficiently resourced to actively pursue those individuals who seek to exploit such organisations for their own personal gain. De-proscription in NI is worth trying because if an organisation successfully de-proscribes and re-engages in terrorism or intensifies its violence within its community the organisation can be proscribed again as the UVF were in 1975.

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