THE ELUSIVE PROMISE

Northern Ireland and the Quest for Peace

An Examination of the Peace Process

by

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On April 10, 1998, the Governments of Ireland, the United Kingdom, and Northern Ireland entered into the Good Friday Agreement (The Agreement) designed to end sectarian violence, bring lasting peace, and an established government acceptable to all parties to the ongoing sectarian violence in Northern Ireland. The agreement amounted to a sea change in the relationship for all of the parties concerned, in that it replaced the "Anglo-Irish Agreement"[2] which heretofore recognized the Republic of Ireland's claim to all of Ireland embodied in the Government of Ireland Act of 1920.[3] The Agreement further provided for the people of the entire

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[2]The Agreement, Constitutional Issues, para. 1.

[3]The Agreement, Draft Clauses/Schedules For Incorporation In British Legislation, para. 2.

island to take steps to determine the nature of their relationship between the two existing nations, and mandated the Parliaments of the Republic of Ireland and the United Kingdom pass such legislation necessary to effect that purpose.[4] Among other provisions of the Agreement, were those that would create legislative and executive bodies in Northern Ireland,[5] a Ministerial Council between Northern Ireland and the Republic of Ireland, made up of representatives of each.[6], and a British-Irish Council composed of members of the three governments, as well as others.[7] This article will examine the provisions of the Agreement, the legislation enacted by the Governments of Britain and Ireland to effectuate the Agreement, the institutions created to implement both the legislation and the Agreement, as well as the relevant court cases involving both. In particular it will focus on the issue of arms decommissioning by paramilitary groups, which appears to be the primary issue driving the peace process. In examining this issue it will be necessary to examine the public positions taken by the various interested groups, political

[4]The Agreement, Constitutional Issues, para. 1(iv).

[5]The Agreement, Strand One.

[6]The Agreement, Strand Two.

[7]The Agreement, Strand Three.

parties and their leaders to provide context in evaluating the successes and failures in the peace process.

The "Good Friday" Agreement

As noted above, The Agreement called for the repeal of the Anglo-Irish Agreement to be replaced with a new British- Irish Agreement[8], and in addition, recited that it would;

[8]Footnote 1.

(1) recognise the legitimacy of whatever choice is exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland,[9]

[9]The Agreement, Constitutional Issues 1(i).

In that regard, The Agreement took note of the fact that it was for the people of both the North and the South to work out their destiny without any outside interference[10], but also recognized that there was strong sentiment by a majority of people in Northern Ireland to maintain the status quo as part of the United Kingdom.[11].

As noted above, The Agreement repealed the Government of Ireland Act of 1920[12], but also specifically recited that;

[10]*Ibid*, 1(ii).

[11]*Ibid*, 1(iii).

[12]See footnote 2.

"It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1."[13]

[13]The Agreement, Draft Clauses/Schedules For Incorporation In British Legislation. Schedule 1 authorized the Secretary of State to "direct the holding of a poll for the purposes of section 1 on a date specified in the order." It also allowed for successive polls, but at intervals of not less than seven years.(Schedule 1, Para. 2 and 3.)

In furtherance of the goals of The Agreement, Strand One provided for the election of a 108 member Assembly from the existing Westminister Parliament districts, which would exercise both legislative and executive functions of the existing Northern Ireland government.[14] Executive authority would be discharged by a First Minister, deputy First Minister and up to ten other Ministers having departmental responsibilities, selected on a proportionate basis.[15] The First Minister and Deputy First Minister are selected by the members of the Assembly voting on a cross-community basis.[16]

One of the more important features of the Agreement involving the establishment of the "Democratic Institutions In Northern Ireland"[17], were the provisions to insure that the membership making up the institutions reflect all segments of the community.[18] To that end, the

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[14]The Agreement, Strand one, para. 2 and 3.

[15]*Ibid*, Executive Authority, para. 14-16.

[16]*Ibid*, Executive authority, para. 15.

[17]The Agreement, Strand One.

[18]*Ibid*., Safeguards, para. 5.

Agreement contains a section called “Safeguards” which provides two formulae for the resolution of key issues, including the election of the First Minister and Deputy First Minister.[19] The two formulae set forth in paragraph five (d) of Strand One of the agreement require;

> (i) either parallel consent, i.e. a majority of those present and voting, including a majority of the unionist and nationalist delegations present and voting;

[19]The Agreement, Safeguards, para. 5.

> (ii)or a weighted majority (60%) of members present and voting, including at least 40% of each of the nationalist and unionist designations present and voting.[20]

The agreement further provided that all Ministers were required to take a pledge of office in which they made a;

[20] *Ibid*.

"commitment to non-violence and exclusively peaceful and democratic means;"[21] Strand Three of the Agreement further established a British-Irish council comprised of representatives;

[21]The Agreement, Executive Authority, Para. 23 and Annex A Pledge of Office (b).

"...of the British and Irish Governments, devolved institutions in Northern Ireland, Scotland and Wales, when established, and if appropriate, elsewhere in the United Kingdom, together with representatives of the Isle of Mann and the Channel Islands."[22]

[22]The Agreement, Strand Three, British-Irish Council, para. 2.

The purpose of this Council was to further discussion and agreements between and among the various entities on a wide variety of issues.[23] It likewise called for the establishment of a British-Irish Intergovernmental Conference to deal with "the totality of relationships"[24] between the two governments. Representation in the Council contemplated the highest level of each government, specifying the Prime Minister and Taoiseach (Prime Minister of Ireland), respectively.[25] All decisions made by the Council required the agreement of both Governments.[26] Among the subjects to be discussed by the Council and quite critical to the peace process was;

[23]*Ibid*., para. 3-12.

[24]The Agreement, Strand Three, British-Irish Intergovernmental Conference, para. 1.

[25]*Ibid*, para. 3.

[26]*Ibid*, para. 4.

> "Co-operation within the framework of the Conference will include facilitation of co-operation in security matters. The Conference also will address, in particular, the areas of rights, justice, prisons, and policing in Northern Ireland (unless and until the responsibility is devolved to Northern Ireland administration) and will intensify co-operation between the two Governments on the all-island or cross-border aspects of these matters."[27]

Strand Three of the Agreement also set forth commitments by the three Governments in the area of Human Rights. It required the United Kingdom to;

[27] *Ibid*, para. 6.

> "...complete the incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR) with direct access to the courts, and remedies for the breach of the Convention, including power for the courts to overrule the Assembly legislation on the grounds of inconsitency."[28]

It likewise called for;

[28]The Agreement, Strand Three, Rights, Safeguards and Equality of Opportunity, United Kingdom Legislation, para.2.

> "A new Northern Ireland Human Rights Commission with membership from Northern Ireland reflecting community balance...independent of Government, with an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human Rights,..."[29]

It similarly obligated the Government of Ireland to;

> "...take steps to further strengthen the protection of human rights in its jurisdiction"

and

[29] *Ibid*, New Institutions In Northern Ireland, para. 5

> "establish a Human Rights Commission with a mandate and remit equivalent to that within Northern Ireland."[30]

Once the two Irelands had each established their respective Human Rights Commissions, this Strand of the Agreement further contemplated that;

[30] *Ibid*, Comparable Steps By The Irish Government, para.9.

> "...there would be a joint committee of representatives of the Two Human Rights Commissions, North and South, as a forum for consideration of human rights issues in the island of Ireland. The joint committee will consider, among other matters, the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing measures for the protection of the fundamental rights of everyone living in the island of Ireland."[31]

Other subjects addressed under this portion of The Agreement were "DeCommissioning,"

[31] *Ibid*. A Joint Committee, para. 10.

"Security," and " Policing and Justice".[32]

In the Section covering "Decommissioning", the parties set forth a number of provisions that were particularly interesting in the light of future events. In Paragraph One, they declared;

> "Participants recall their agreement in the Procedural Motion adopted on 24 September 1997 '*that the resolution of the decommissioning issue is an indispensable part of the process of negotiation*', and also recall the provisions of paragraph 25 of strand 1 above."(emphasis added)

Paragraph 25 of Strand One provided that;

> "An individual may be removed from office following a decision of the Assembly taken on a cross-community basis, if (s)he loses the confidence of the assembly, voting on a cross-community basis, for failure to meet his or her responsibilities including ,inter alia, those set out in the Pledge of Office. *Those who hold office should use only democratic, non-violent means, and those who do not should be excluded or removed from office under these provisions.*"(emphasis added)

Paragraph Two of the DeCommissioning Section invoked the use of the existing "Independent International Commission on DeCommissioning" Furthermore, the Parties in Paragraph Three expressly noted that;

> "All participants accordingly reaffirm their commitment to the total disarmament of all paramilitary organisations. They also confirm their intention to continue to work constructively and in good faith with the Independent Commission, and to use any influence they may have, to achieve the decommissioning of all paramilitary arms within two years following endorsement of the referendums North and South of the agreement and in the context of the overall settlement."

In addition, the parties declared in paragraph Four of this Section that;

> "The Independent Commission will monitor, review and verify progress on decommissioning of illegal arms, and will report to both Governments at regular

[32] *Ibid*.

intervals."

The Section dealing with "Security" largely imposed obligations on the Government of Britain to undertake steps to ameliorate the rather harsh and stringent conditions it had imposed under direct rule. These were spelled out in paragraph Two of this section which recited;

> "The British Government will make progress toward the objective of as early a return as possible to normal security arrangements in Northern Ireland, consistent with the level of threat and with a published overall strategy, dealing with;
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> (i) the reduction of the numbers and role of the Armed Forces deployed in Northern Ireland to levels compatible with a normal peaceful society;
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> (ii) the removal of security installations;
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> (iii) the removal of emergency powers in Northern Ireland;
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> (iv) other measures appropriate to and compatible with a normal peaceful society."

This portion of the Agreement also contained a section dealing with "Policing And Justice". In the first paragraph of this Section, the parties acknowledged the historical wounds and scars inflicted by the policing institutions, noting that the signatories;

> "...equally recognise that Northern Ireland's history of deep divisions has made it highly emotive, with great hurt suffered and sacrifices made by many individuals and their families, including those in the RUC[33] and other public servants..."

In paragraph two, following this statement, the parties mapped out the future strategy

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[33]Royal Ulster Constabulary, the premiere police agency in Northern Ireland.

contemplated under the Agreement, to try to close the breach;

> "The participants believe it is essential that the policing structures and arrangements are such that the police service is professional, effective and efficient, fair and impartial, free from partisan control; accountable, both under the law for its actions and to the community it serves; representatives of the society it polices, and operates within a coherent and co-operative criminal justice system, which conforms with human rights norms..."

To achieve that goal, the Agreement provided in the third paragraph to this Section that;

> " An independent commission will be established to make recommendations for future policing arrangements in Northern Ireland including means of encouraging widespread community support for these arrangements within the agreed framework of principles reflected in the paragraphs above and in accordance with the terms of reference at Annex A. The Commission will be broadly representative with expert and international representation among its membership and will be asked to consult widely and to report no later than Summer 1999."

This Section, in paragraph five, further spelled out an intention to conduct a wider examination of

the criminal justice system as a whole; declaring,

> "There will be a parallel wide-ranging review of criminal justice (other than policing and those aspects of the system relating to the emergency legislation) to be carried out by the British Government through a mechanism with an element, in consultation with the political parties and others. The review will commence as soon as possible, will include wide consultation, and a report will be made to the Secretary of State no later than Autumn 1999. Terms of Reference are attached at Annex B."

The terms of Reference spelled out in both Annex A, involving the Commission on Policing, and

Annex B, relating to the review of the Criminal justice system, set forth general non-specific

issues and proposals for the contemplated overhaul of the two systems but no concrete steps

regarding either.

These Annexes were followed by a section dealing with "Prisoners" which provided that;

> "Both Governments will put in place mechanisms to provide for an accelerated programme for the release of prisoners, including transferred prisoners, convicted of scheduled offenses in Northern Ireland or, in the case of those sentenced outside Northern Ireland, similar offenses (referred hereafter as qualifying prisoners)..."[34]

This provision was followed by a very important limitation, which could be a real inducement for

all paramilitary groups to honor the terms and provisions of the Agreement. It set forth that;

[34]The Agreement, Strand Three, Prisoners, paragraph 1.

"Prisoners affiliated to organisations which have not established or are not maintaining a complete and unequivocal ceasefire *will not benefit* from the arrangements. The situation will be kept under review.[35]

[35] *Ibid*., para.2. (emphasis added)

The Agreement concluded with a Section setting forth objectives for "Validation, Implementation And Review," including the enactment of a "new British-Irish Agreement replacing the 1985 Anglo-Irish Agreement"[36] Validation procedures involved the holding of a referendum in Northern Ireland in May 1998 to determine whether there was majority support for the Agreement, and, if so, the enacting of legislation by the respective parliaments for the approval of Assembly elections in Northern Ireland as well as the establishment of the North-South Ministerial Council and the British-Irish Intergovernmental Conference.[37] Finally, each Government could review any problems that arose during the operation of The Agreement, separately or jointly, and take such remedial action, in consultation with the Northern Ireland Assembly, as required.[38]

It can hardly be gainsaid that a critical component of the Agreement and, indeed, the peace process, was the anticipated de-commissioning of both the unionist and republican paramilitary forces. As noted above, Section Seven of The Agreement not only declared this to be "an indispensable part of the process of negotiation,"[39] but further committed all parties to "work constructively and in good faith" with the Independent International Commission on Decommissioning.[40]

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[36]The Agreement, Strand Three, Validation, Implementation And Review, paragraph 1.

[37]*Ibid*., paragraphs 2 and 3.

[38]*Ibid*., paragraphs 5-7.

[39]The Agreement, Section Seven, para. 1.

[40]*Ibid*, para 2-3.

Independent International Decommissioning Body

The Independent International Commission on Decommissioning had its origins in a joint "Communique" issued on November 25, 1995 by the Governments of Britain and Ireland establishing a "twin track" process for a political settlement to the disputes in Northern Ireland, one track of which would concern decommissioning.[41] In the Introduction to the Report, the members of that Body[42] described their purposes;

[41]Report of the International Body on Arms Decommissioning, 22 January 1996.

[42]The members were George J. Mitchell, former United States Senator from Maine. John de Chastelain, from Canada, and Harri Holkeri, former President of Finland.

> "...the two Governments will ask the Body to:- identify and advise on a suitable and acceptable method for full and verifiable decommissioning; and - report whether there is a clear commitment on the part of those in possession of such arms to work constructively to achieve that."[43]

Insofar as the means by which the Body would achieve its purposes was concerned, the members reserved to themselves the authority to define its procedures, noting;

[43]Report of the International Body on Arms Decommissioning, 22 January 1996, para. 7.

> "It will be for the International Body to determine its own procedures. The two Governments expect it to consult widely, to invite the relevant parties to submit their analysis of matters relevant to the decommissioning issue and, in reaching its conclusions within its remit, to consider such evidence on the merits."[44]

This report went on to spell out some further requirements that would have to be adhered to if the process were to be brought to a successful conclusion. In Section III of the Report, it declared;

[44] *Ibid*., para. 8.

> "To reach an agreed political settlement and to take the gun out of Irish politics, there must be a commitment and adherence to fundamental principles of democracy. and non-violence. Participants in all-party negotiations should affirm their commitment to such principles."[45]

In the next paragraph, they set forth concrete steps that had to be taken in this regard, writing;

[45] *Ibid*., para 19.

> "Accordingly, we recommend that the parties to such negotiations affirm their total and absolute commitment: a. To democratic and exclusively peaceful means of resolving political issues; b. To the total disarmament of all paramilitary issues; c. To agree that such disarmament must be verifiable to the satisfaction of an independent commission; d. to renounce for themselves, and to oppose any efforts by others, to use force, or threaten to use force, to influence the outcome of all-party negotiations; e. To agree to abide by the terms of any agreement reached in all party negotiations and to resort to democratic and exclusively peaceful methods in trying to alter any aspect of that outcome with which they may disagree; and f. To urge that 'punishment' killings and beatings stop and to take effective steps to prevent such action."[46]

Touching upon a concern that would ultimately become a sticking point as the process began to unfold, the members observed;

[46] *Ibid*., para.20.

> "Those who demand decommissioning prior to all-party negotiations do so out of concern that the paramilitaries will use force, threaten to use force, to influence the negotiations, or to change any aspect of the outcome of negotiations with which they disagree"[47]
> Given the history of Northern Ireland, it is not an unreasonable concern. The principles we recommend address those concerns directly."[48]

Responding to the second inquiry in the communique, concerning the genuineness of the parties commitment to decommissioning, the Body reported in Section IV of the Report, that;

[47] *Ibid*., para.22.

[48] *Ibid*., para. 22.

"We have concluded that there is a clear commitment on the part of those in possession of such arms to work constructively to achieve full and verifiable decommissioning on the part of the process of all-party negotiations; but that commitment does not include decommissioning prior to negotiation."[49]

[49] *Ibid*., at para. 25.

They went on to report in the next paragraph that their discussions with virtually everyone who had a stake in the negotiations revealed a unanimous consensus that the paramilitaries would not decommission prior to negotiations occurring despite the desire of all for it to happen[50].

Turning to the issue of decommissioning during the all-party negotiations, the Report observed;

[50] *Ibid*., at para 26.

> "One side has insisted that some decommissioning of arms must take place before all party negotiations can begin. The other has insisted that no decommissioning can take place until the end of the process, after an agreed settlement has been reached. This has resulted in the current impasse."[51]

Addressing this impasse, it recommended;

[51] *Ibid*., Section V. Decommissioning During All-Party Negotiations, para. 33.

> "The parties should consider an approach under which some decommissioning would take place during the process of all-party negotiations, rather than before or after as the parties now urge. Such an approach represents a compromise..."[52]

The Body then went on to recommend specific steps that should be undertaken in the decommissioning process, including that;

[52] *Ibid*., at para. 34.

"The decommissioning process should take place to the satisfaction of an independent commission."[53]

"The decommissioning process should take place to the satisfaction of an independent commission acceptable to all parties. The commission would be appointed by the British and Irish Governments on the basis of consultations with the other parties to the negotiating process."[54]

"The commission should be able to operate independently in both jurisdictions, and should enjoy appropriate legal status and immunity."[55]

"Parties should have the option of destroying their weapons themselves."[56]

"The decommissioning process should be fully verifiable."[57]

"Whatever the options chosen for the destruction of armaments, including the destruction of weapons by the parties themselves, verification must occur to the satisfaction of the commission."[58]

"Groups in possession of illegal armaments should be free to organise their participation in the decommissioning process as they judge appropriate, e.g. groups may designate particular individuals to deposit armaments on their behalf."[59]

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[53]*Ibid*, Section VI Recommendations: Guidelines On The Modalities Of Decommissioning, para. 39.

[54]*Ibid*., para. 40.

[55]*Ibid*., para. 41.

[56]*Ibid*., at para 44.

[57]*Ibid*., at para. 45.

[58]*Ibid*., para. 46.

[59]*Ibid*., para. 49.

"The decommissioning process should be mutual."[60]

Following this Report, the Governments of Ireland and the United Kingdom enacted the Decommissioning Act, 1997 and the Northern Ireland Arms Decommissioning Act 1997.

The Decommissioning Act of Ireland,1997 and the Northern Ireland Arms Decommissioning Act of 1997

Despite the ostensible partnership between the Republic of Ireland and the United Kingdom in the quest to bring peace to Northern Ireland, perhaps nothing exemplifies the different burdens that each country bears than is illustrated by a comparison of the provisions of the decommissioning Acts enacted by these two governments to create a mechanism to achieve decommissioning.

[60] *Ibid*.

The statute passed by the Republic of Ireland merely authorizes the establishment of the Independent International Commission on Decommissioning pursuant to the Agreement entered into between itself and the United Kingdom on August 26, 1997.[61] In addition to establishing the Commission, it does no more than provide for the membership on the Commission,[62] authorize the Commission to have staff,[63] provides for financing and payment of the expenses of the Commission,[64] and sets forth the objectives of the Commission in only the most general way. On this latter subject, the Act provides;

[61]Republic Of Ireland, "Decommissioning Act, 1997(Independent International Commission On Decommissioning)Regulations, 1997", Preamble and para.3.

[62]*Ibid*., para. 4-5.

[63]*Ibid*., para. 6-7.

[64]*Ibid*., para.8-9.

"The objective of the Commission shall be to facilitate the decommissioning of arms."[65]

It further provides;

"In particular, but without prejudice to the generality of paragraph (1) of this Regulation, the Commission shall

(a) consult with the participants in political negotiations in Northern Ireland, including the two Governments, and other persons whom it deems relevant, in relation to the type of scheme or schemes for the decommissioning of arms that should be made and the role it might play under and in respect of the scheme or each scheme,

(b)present to the two Governments proposals for such schemes having due regard to the views expressed by those it has consulted pursuant to paragraph (a) of this Regulation,

(c) undertake, in accordance with regulations or arrangements and with any decommissioning scheme (within the meaning of the corresponding law), such tasks that may be required of it to facilitate the decommissioning of arms , including observing, monitoring and verifying such decommissioning and receiving and auditing arms, and

[65] *Ibid*., para.15(1).

(d) report periodically to the two Governments and, through whatever mechanism they may establish for the purpose, to the other participants in political negotiations in Northern Ireland."[66]

[66] *Ibid*., para. 15.

In contrast, the Northern Ireland Arms Decommissioning Act 1997, passed by the United Kingdom, not only authorizes the establishment of a Commission,[67] but defines a decommissioning scheme,[68] its duration,[69] methods of decommissioning,[70] testing of decommissioning articles,[71] and sets forth provisions for amnesty,[72] as well as the rules governing the fruits of decommissioning as evidence in any subsequent proceeding[73].

The "decommissioning scheme" defined in paragraph one of the Act is quite general in that it defines it as

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[67]Northern Ireland Decommissioning Act 1997, para.7.

[68]*Ibid*., para. 1.

[69]*Ibid*., para2.

[70]*Ibid*., para.3.

[71]*Ibid*., para. 6.

[72]*Ibid*., para. 4.

[73]*Ibid*., para. 5.

"...any scheme which-

(a) is made by the Secretary of State to facilitate the decommissioning of firearms, ammunition and explosives in Northern Ireland..."

The "duration of the decommissioning scheme is set forth at paragraph two which provides in pertinent part;

"2.-(1) A decommissioning scheme must identify a period during which firearms, ammunition, and explosives may be dealt with in accordance with the scheme ('the amnesty period')

(2) The amnesty period must end before-

(a) the first anniversary of the day on which this Act is passed, or
(b) such later day as the Secretary of State may order from time to time appoint.

(3) A day appointed by an order under subsection (2)(b) must not be-

(a) more than twelve months after the day on which the order is made, or
(b) more than five years after the day on which this Act is passed."

The "methods of decommissioning" set forth in paragraph 3 of the Act are quite specific, as the Act requires that;

"A decommissioning scheme must make provision for one or more of the following ways of dealing with firearms, ammunition and explosives (and may make provision for others)-

(a) transfer to the Commission mentioned in section 7, or to a designated person, for destruction;

(b)depositing for collection and destruction by the Commission or a designated person;

(c) provision of information for the purpose of collection and destruction by the Commission or a designated person;

(d) destruction by persons in lawful possession.

Subsection (2) of this particular section defines a "designated person" as;

> "...a person designated by the Secretary of State or, in the case of firearms, ammunition or explosives transferred or collected in the Republic of Ireland, a person designated by the Minister of Justice of the Republic."

This last definition allows for cross-border decommissioning of arms, ammunition or explosives kept in the Republic of Ireland, in addition to Northern Ireland.

The "testing of decommissioned articles" provided for in Section 6 of the Act supplements the provisions governing "amnesty" and the restrictions on their receipt into evidence set forth in Sections 4 and 5 of the Act to fulfill the objective of encouraging disclosure and decommissioning of firearms, ammunition and explosives by paramilitary groups on both sides of the conflict. Indeed the "testing of decommissioning of articles" is more appropriately described as a restriction on such testing in that the section provides;

> "...(1) A person who has received a decommissioned article shall not carry out, or cause or permit anyone else to carry out, a test or procedure in relation to the article the purpose of which is-
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> (a) to discover information about anything done with or in relation to any decommissioned article,
>
> (b) to discover who has been in contact with, or near to, any decommissioned article,
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> (c) to discover where any decommissioned article was at any time (including the condition under which it was kept),
>
> (d) to discover where any decommissioned article was in contact with, or near to, a particular person or when it was in a particular place or kept under particular conditions,
>
> (e) to discover where any decommissioned article was made, or
>
> (f) to discover the composition of any decommissioned article."

These limitations did not, however, preclude testing to determine whether an article contained an explosive or ammunition, the quantity of such explosive or ammunition, and whether it could be safely moved.[74] Nor did it preclude testing to discover such information during the investigation for any offense in which the article was used after it had been decommissioned in accordance with this Act.[75]

As noted above, the Act additionally provided for "amnesty" for a wide variety of offenses set forth in a schedule to the Act.[76] Similarly there were restrictions on the use or receipt of such articles or evidence concerning their use or possession in any criminal proceedings.[77] These restrictions, however, had two exceptions. Such evidence could be offered in a criminal proceeding *by the accused*.[78] Similar to Section 6(3)(a), such evidence was not restricted in ;

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[74]*Ibid*., Section 6(2).

[75]*Ibid*., Section 6(3)(a) and (b).

[76]*Ibid*., Section 4 and Schedule.

[77]*Ibid*., Section 5(1) and (2).

[78]*Ibid*., Section 5(3) emphasis added.

"... proceedings for an offense alleged to have been committed by the use of, or in relation to, something which was a decommissioned article at the time when the offense is alleged to have been committed."[79]

The Independent International Commission on Decommissioning

[79] *Ibid*., Section 5(4).

With the Report of the International Body, and the passage of the Decommissioning Acts by the Republic of Ireland and the United Kingdom, the Independent International Commission on Decommissioning was born by Agreement of the two Governments on August 26, 1997.[80]

Article Three of the Agreement provided that;

> "The objective of the Commission is to facilitate the decommissioning of firearms, ammunition, explosives and explosive substances (hereinafter referred to as 'arms') in accordance with the Report of the International Body, and the regulations or arrangements made under the Decommissioning Act, 1997 and any decommissioning schemes within the meaning of section 1 of the Northern Ireland Decommissioning Act 1997."

Article Four of the Agreement, fleshed out the means by which the objectives of the Commission might be met, charging it ;

> (a) to consult with the participants in political negotiations in Northern Ireland, including both Governments, and others whom it deems relevant on the type of scheme or schemes for decommissioning including the role it might play in respect of each scheme;
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> (b) to present the two Governments proposals for schemes for decommissioning having due regard to the views expressed by those it consulted;
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> (c) to undertake, in accordance with any regulations or arrangements made under the Decommissioning Act, 1997, and any decommissioning schemes within the meaning of Section 1, and in accordance with section 3, of the Northern Ireland Arms decommissioning Act 1997, such tasks that may require it to facilitate the decommissioning of arms, including observing, monitoring and verifying decommissioning and receiving auditing arms; and

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[80]Agreement on Independent International Commissioning on Decommissioning, 26 August, 1997.

> (d) to report periodically to both Governments and through whatever mechanism they may establish for that purpose, the other participants in political negotiations in Northern Ireland."

Article Five of the Agreement provided that;

> "The Commission shall consist of not less than two members. The members shall be appointed jointly by the two Governments who may also appoint additional members from time to time. The two Governments may jointly appoint one of the members as chairperson..."

Finally, in connection with its operation, Article Eight provided;

> "Members of the Commission, members of the staff of the Commission, persons carrying out work for or giving advice to the Commission and agents of the Commission shall be bound not to disclose any information obtained in the course of the performance of their functions as such members or persons unless such disclosure is authorised by or on behalf of the Commission."

On July 2, 1999, the Independent International Commission on Decommissioning (IICD) made its initial report to the Governments of Ireland and the United Kingdom. In paragraph 3 of the Report, the IICD declared;

> "Since its inception in September 1997, the Commission has sought to put in place the measures necessary to facilitate the decommissioning of paramilitary arms and then to execute that task."[81]

In the next section entitled "Efforts To Bring About Progress," it summarized its contacts with the various parties which led to a decommissioning scheme being adopted in regulations by the

[81]It annexed a summary of the "...mandate of the Commission, legislation governing its role, and actions taken to carry out its task."

two Governments in June, 1999 ; noting,

> "Working with parties that have actual or alleged links with paramilitary groups, the Commission assessed that two decommissioning methods would be acceptable to the paramilitary groups and the two Governments. These were information leading to discovery of arms and destruction by the paramilitary groups concerned, with verification provided to the Commission."[82]

It went on to spell out the names of the various parties and groups that had appointed

[82] Report of the Independent International Commission on Decommissioning, 2 July 1999,para.4.

representatives to work with it.[83] The Commission reported that among the loyalist/unionist paramilitary groups, the Ulster Volunteer Force(UVF) nominated a member of the Progressive Union Party(PUP) to be its "points of contact".[84] The Loyalist Volunteer Force(LVF) nominated a Protestant clergyman for this role but he resigned after a year.[85] The views of the Ulster Defence Association were sought through a member of the Ulster Democratic Party (UDP) but that the UDA had not nominated him as its point of contact.[86] On the republican/nationalist side of the conflict, Sinn Fein nominated a representative but the Irish Republican Army(IRA) had

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[83]*Ibid*., para.5.

[84]*Ibid*., para. 5

[85]*Ibid*. In the Annex to the Report, the Commission reported that "Contact with the LVF through their intermediary led to a decommissioning event on 18 December 1998. That paramilitary group decommissioned four sub-machine guns, two rifles, two pistols, a sawed-off shotgun, 348 rounds of ball ammunition, 31 shotgun shells, five electrical detonators, two pipe bombs, two weapons stocks and five assorted magazines. The items described were destroyed in accordance with Commission procedures the day they were received and the residue was disposed -of the same day also. At the LVFs request the event was covered by the media."Para. 20.

[86]*Ibid*. In the Annex to the Report the Commission amplified this assertion noting; "While the UDA/UFF have not named a point of contact, the leader of the Ulster Democratic Party (UDP), Mr. Gary McMichael, and his colleagues, have met several times with the Commission."Para.19.

not.[87] This observation is of considerable interest since all of the loyalist/unionist groups and parties, along with the two Governments and the Independent Monitoring Commission, would later claim that Sinn Fein was an alter ego of the IRA, if not one and the same. Indeed, the IICD further noted that it had not had

[87] *Ibid*.

> "...any contact with acknowledged representatives of the IRA, Irish Nationalist Liberation Army (INLA), the Real Irish Republican Army (RIRA) or the UDA."[88]

The impasse concerning the timing of decommissioning predicted by the International Body on Arms Decommissioning in its report almost three years earlier was reflected in more concrete and detailed fashion, as this Report recounted;

[88] *Ibid*., para.6.

"During this period, public statements have been made by paramilitary groups regarding their intentions on decommissioning. The IRA said it would not decommission its arms, and loyalist groups said that they would not do so until they were clear about the IRA's intentions....No proposal to start actual decommissioning had been accepted by any paramilitary group except the LVF. However the Sinn Fein statement of 1 July offers promise that decommissioning by all paramilitary groups may now begin. The commission expects that Sinn Fein's proposal will be indorsed by the IRA and reciprocated by loyalist and other republican military groups."[89]

[89]*Ibid*., para. 12.

In the next section of its Report, in which the Commission detailed meetings it had with ten political parties during an eight day period in June 1999, it reported the responses to various questions it had put to the parties concerning several aspects of decommissioning.[90] Of particular interest was whether decommissioning of,

[90] *Ibid*., Meetings with the Parties-June 1999, para. 11-14.

"...all paramilitary arms should take place by 22 May 2000 as set forth in the Good Friday Agreement, and in the context of the implementation of the overall agreement ?"[91]

In response to that inquiry, the Commission reported that;

[91]*Ibid*., para. 11.

"...the responses were generally supportive of the goal of decommissioning but varied significantly in their emphasis. Some parties argued strongly for immediate and unconditional decommissioning, while others made clear that they adhered strictly to the wording of the Good Friday Agreement, or spoke more broadly of their support for decommissioning in the context of the demilitarisation of Northern Ireland. No party suggested that decommissioning ought not to happen by 22 May 2000."[92]

[92] *Ibid*., para.12.

In response to a more detailed two-part question seeking a firmer commitment to the time table set forth in the Good Friday Agreement and specific schemes to be used for decommissioning.[93] It noted that;

[93] *Ibid*., para. 11.

"There were no responses to Questions (3)(a) or (3)(b) form either the IRA or the UVF by the 28 June deadline[94]. The UVF provided a response which emphasized the need for the Good Friday Agreement to be implemented in full and acceptance by republicans that the Agreement is 'the final settlement of the constitutional conflict.'"[95]

[94]June 28, 1999 was the date this Report was scheduled for release.

[95]*Ibid*., para.14

The Commission concluded its Report with an assessment of the recent developments and its proposed formula for implementing decommissioning. It began by quoting the Sinn Fein proposal which had been issued the day before and had occasioned the brief delay in the issuance of the Report;[96]

[96] *Ibid*., Assessing Recent Developments, para15-21; see also, para.1.

"...we believe that all of us, as participants acting in good faith, could succeed in persuading those with arms to decommission them in accordance with the Agreement. We agree that this should be in the manner set down by the Independent Commission on Decommissioning within the terms of the Good Friday Agreement..."[97]

Evidently encouraged by this development, the Commission;

"...foresees the process of decommissioning following a reasonably predictable agenda. We therefore envision the following steps:

(1) The designation of a point of contact who can speak authoritatively for the paramilitary group;

(2)Discussions with the designated point of contact regarding;

a. The scheme to be used (i.e. self-destruction with Commission verification, or information leading to the discovery of arms by the Commission); Modalities (i.e. types and amounts of arms, location of the decommissioning event, timing, etc.);

(3) Agreement to proceed with a specific event or events;

(4) Execution of the decommissioning event(s);

(5) Destruction of any residue; and

[97] *Ibid*., para.15.

(6) Reporting to the Governments.[98]

The Commission concluded with the optimistic hope that;

[98] *Ibid*., para.19.

> "The developments of 1 July give the basis for believing that decommissioning can be completed in the time prescribed by the Good Friday Agreement."[99]

The Commission issued its second report on November 15, 1999 in which it provided an assessment of the progress relating to decommissioning based on three of the principles agreed to on June 25, 1999 and set forth in the initial report of July 2, 1999. These principles enumerated at the outset of the report were;

> "An exclusive executive exercising devolved powers;
> Decommissioning of all paramilitaries by May 2000;

[99] *Ibid*.,para. 20.

> Decommissioning to be carried out in a manner determined by the Independent International Commission on Decommissioning."[100]

The Report paid particular attention to the two principles involving decommissioning and the deadline of May 2000 contemplated by the Agreement. Addressing the participation of the paramilitaries, the Commission noted;

[100]Report of the International Independent Commission on Decommissioning (IICD) 15, November 1999

> "While there are difficulties and challenges posed by those paramilitary groups which are not observing a cease-fire, the contribution of those on cease-fire over what is now a protracted period is significant."[101]

It went on to note that;

[101] *Ibid*.

> "The time is now very short to achieve decommissioning within the time-scale intended by the Agreement. Bearing in mind the practical arrangements the Commission will need to make, urgent progress is now needed. Having made all possible preparations, including numerous meetings with the parties and others, we will now play a more active role."[102]

The Commission concluded the Report by laying out a number of steps that needed to be taken to bring about decommissioning, observing;

> "The process of decommissioning involves a number of steps. To achieve our objective it is now urgent that the appointment by paramilitary organisations of authorized representatives and the holding of discussions about modalities with the Commission take place. Such appointments would represent a significant confidence building measure and would demonstrate each organisations desire to make further contribution to the process.

[102] *Ibid.*

> We call on the paramilitary organisations to respond positively by appointing authorised representatives, following which we would set a date for a first meeting with each of them as soon as possible after their appointment. We would issue a report within days of those meetings."[103]

Several weeks later, the Commission reported that the Irish Republican Army (IRA) had appointed a representative;

[103] *Ibid*.

> "...to enter into discussions with the Commission. We have held an initial meeting with that individual. The meeting was frank and useful and a further meeting has been agreed."[104]

The Commission further reported that it had held a similar meeting with the Ulster Volunteer Force/Red Hand Commando (UVF/RHC). In that meeting the representative of that paramilitary group restated their position that;

[104]Report of the Independent International Commission on Decommissioning 10 December 1999, para. 3.

> "...the implementation of the Good Friday Agreement in full, coupled with the acceptance from Republicans that the agreement is the final settlement to end the constitutional conflict, are the only conditions which will facilitate the process of decommissioning weapons."[105]

The Commission also described a meeting with the representative chosen and appointed by the

[105] *Ibid*., para 4.

Ulster Freedom Fighters (UFF), earlier that same day, which it characterized as "helpful".[106] It further reported that;

[106]*Ibid*., para. 5.

> "The representative impressed on us a point they made public recently, to the effect that 'disarmament will only be considered in the context of the IRA having already begun to decommission its arsenal of weaponry.'"[107]

The Commission ended its report on a note of caution tempered by optimism, noting;

> " We have noted elsewhere our belief that decommissioning cannot be imposed. But we believe that the above mentioned achievements provide the context for the voluntary decommissioning of arms. In our 2 July report to the Governments we noted that a timetable for decommissioning is best agreed with the representatives of the paramilitary groups. We believe that still to be the case. Nonetheless, the Commission is prepared, if necessary, to state that actual decommissioning is to start within a specified period.

[107] *Ibid.*

> The naming of new representatives and the initial meetings we have held with them demonstrate some progress. We expect more to follow. As noted in the opening paragraph, we will report to the governments in January, and as necessary thereafter."[108]

On January 31, 2000, the Commission reported again on its discussions with the IRA, the UVF, and the UFF. On its contact with the IRA, the Commission noted;

[108] *Ibid*., paragraphs 6-7.

> "The IRA has assured us of the unequivocal continued support of his organisation of the current political process. We have been made aware of, and recognise, the difficulties facing the IRA leadership in moving on decommissioning at this time. We are also conscious that the maintenance of their ceasefire, and those of the UVF and UFF, have played and continue to play, an important part in the political advances that have been achieved to date and that are progressing. Further our contact has very recently emphasized that there is no threat to the peace process from the IRA. All of these factors are significant. But our sole task is decommissioning and to date we have received no information as to when decommissioning will start."[109]

Its contacts with the UVF, the Commission met with similar results, being told by its representative he;

[109]Report of the Independent International Commission on Decommissioning (IICD), 31 January 2000, para. 3.

> "...reiterated the UVF stance that while it was prepared to consider moving on decommissioning, it will not do so until it has received an unequivocal statement from the IRA that the war is over."[110]

The UFF took an identical stance as the UVF, in which its representatives;

[110] *Ibid*., para. 4.

> ...confirmed their position stated during our earlier meeting, to the effect that while that group too is prepared to consider moving on decommissioning, it will not do so until it is clear that the IRA will also decommission."[111]

Notwithstanding this apparent stalemate, the Commission vowed to continue its mission but sounded a warning to the parties;

[111] *Ibid*., para. 5.

> "We will continue our efforts to carry out the Commission's role in the manner and within the same time frame approved by the political parties and the two governments. However, given our understanding of the quantity of arms held by the paramilitary groups, and the dispersed nature of their locations, we believe a time will soon be reached beyond which it will be logistically impossible for us to complete our task by 22 May."[112]

Less than two weeks later, on February 10, 2000, the Commission reported again . After noting the IRA's commitment to the peace process, it reported on the IRA's raising of a converse issue, namely;

> "We note the IRA assessment that the question of British forces and loyalist paramilitaries in Northern Ireland must be addressed. While the future of British troops is outside of our remit, the elimination of the threat posed by the loyalist paramilitary arms is clearly within the Commission's remit.
>
> We have been advised by loyalist representatives of their commitment to address the issue of their arms in the context of similar action taken by the IRA.

[112] *Ibid*., para. 6.

> In our discussions this week with the UVF and the UFF representatives, each confirmed their positions as stated in our 31 January report and the UFF representatives further engaged with us on methods of decommissioning and related support issues."[113]

The Commission went on to state that;

[113]Report of the Independent International Commission on Decommissioning (IICD), 11 February 2000, para. 4.

"We find particularly significant and view as valuable progress the assertion made to us by the IRA representative that the IRA will consider how to put arms and explosives beyond use, in the context of the full implementation of the Good Friday Agreement, and in the context of the removal of the causes of the conflict."[114]

[114] *Ibid*., para. 5.

The assurances of the IRA notwithstanding, the following day, Peter Mandelson, the Secretary of State for Northern Ireland signed an Order suspending the Northern Ireland Assembly.[115] In the ensuing period, blame is largely laid on the IRA for this crisis although no decommissioning had been undertaken by the loyalist/unionist paramilitaries. On February 15, 2000 the IRA, in response to the suspension of the Assembly announced;

[115]CAIN Web Service, Chronology, 11 February, 2000. According to the Service, the CAIN Web Service is a web site "devoted to providing a wide range of information and source material on the Northern Ireland conflict and politics in the region from 1968 to the present." CAIN stands for "Conflict Archive on the Internet. It is based within the University of Ulster and is located at the Magee Campus." "CAIN is also associated with ARK (Northern Ireland Social and Political Archive) ARK is comprised of a number of associated web sites including CAIN, NILT (Northern Ireland Life and Times) and ORB (Online Research Bank)."

> "In light of these changed circumstances the leadership of the IRA have decided to end our engagement with the IICD. We are also withdrawing all propositions put to us by the IICD by our representative since November."[116]

This crisis is averted when the IRA released a statement on May 6, 2000 vowing to put its

[116]Report of the Independent International Commission on Decommissioning (IICD) 26 October 2000, para.4.

weapons beyond its reach in a verifiable manner.[117] This declaration is linked to both further decommissioning and restoration of the Northern Ireland Assembly . On May 27, 2000, the Ulster Unionist Party agreed to re-enter the Assembly and two days later the devolved Assembly was restored.[118]

Less than a month later, on June 25, 2000, the Commission released a statement in which it reported that the IRA was true to their word, reporting;

> "President Martti Ahtisaari and Mr. Cyril Ramaphosa informed the Commission today that they have successfully completed an initial inspection of several IRA weapons dumps. The two inspectors report that they were shown a substantial quantity of IRA arms, including explosives.

[117]Report of the Independent International Commission on Decommissioning (IICD) 26 October 2000 para.8.

[118]CAIN Web Service, Chronology 30 May 2000.

> Moreover, the inspectors have ensured that th weapons are secure and cannot be used without their becoming aware that this happened."[119]

This statement was immediately followed by a report on June 26, 2000, by the inspectors concerning the inspection of the dumps in greater detail. In it, Messrs. Ahtisaari and Ramaphosa declared;

[119]Statement of the Independent International Commission on Decommissioning (IICD), 25 January 2000.

"We see our mandate as being the inspection of the contents of a number of IRA arms dumps, reporting to the IICD that we have done so, and re-inspecting these dumps regularly to ensure that the weapons remain secure."[120]

Turning to the inspection itself, they reported;

"We have now carried out our first inspection. We inspected a number of arms dumps. The arms dumps held a substantial amount of military equipment as well as other weapons and other materials.

We observed that the weapons and explosives were safely and adequately stored. We have ensured that the weapons and explosives cannot be used without our detection.

We are satisfied with the co-operation extended to us by the IRA to ensure a credible and verifiable inspection. All our requests were satisfactorily met.

We plan to re-inspect the arms dumps on a regular basis to ensure that the weapons have remained secure.

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[120]Report on the First Inspection of IRA weapons dumps by President Martii Ahitsaari and Mr. Cyril Ramaphosa, 26 June 2000.

> The process that led to the inspection visit and the way in which it was carried out makes us believe that this is a genuine effort by the IRA to advance the peace process."[121]

On October 26, 2000, Messrs. Ahtisaari and Ramaphosa issued a second report concerning the

[121] *Ibid.*

re-inspection of the IRA weapons dumps and their continued security[122]. In it they noted;

> "...The arms dumps have not been tampered with and we confirm that they have remained secured.
>
> We observed that the weapons and explosives continued to be safely and adequately stored. We remain confident that the weapons and explosives cannot be used without our detection.
>
> The IRA has fully honoured their commitments and complied with the terms of our engagement and we are convinced that we will receive the same co-operation in future inspections.

[122]Report on the Second Inspection of IRA weapons dumps by President Martti Ahtisaari and Mr. Cyril Ramphosa, 26 October 2000.

We plan to re-inspect the arms dumps on a regular basis and to ensure that the weapons remain secure."[123]

On that same date, the Independent International Commission issued a Report describing its

[123] *Ibid*.

efforts since February 2000[124]. In addition to the foregoing events, it noted that following the inspection of the IRA arms dump on June 25, 2000, the IRA's representative contacted the Commission to formally resume its contacts and publicly announced the same.[125] However immediate progress would be impeded because;

[124]Report of the Independent International commission on Decommissioning (IICD) 26 October 2000.

[125]*Ibid*., para. 10.

> "...it was suggested to the Commission that the circumstances surrounding the marching season made it unlikely that progress would be made on decommissioning during the months of July and August..."[126]

It went on to report that in the months following the "marching season" the Commission attempted to meet with paramilitary groups to further discussions of decommissioning by all groups but was unsuccessful in achieving anything concrete, as it noted;

[126] *Ibid*., para. 11.

> "Over a period of six weeks, the Commission was unable to arrange meetings with the paramilitary representatives. Meetings with political parties elicited reasons as to why they believed the meetings had not occurred. On the republican side these were attributed in part to concerns over the implementation of the Patten Report on policing, to the slow pace of demilitarisation, and to the concerns over republicans wanted for questioning by the authorities. On the loyalist side they were attributed in part to the failure of the IRA to respond to the+ Commission in practical terms on decommissioning, as well as to internal problems associated with the ongoing loyalist feud."[127]

Turning to its discussions with the loyalist paramilitary group the Ulster Freedom Fighters (UFF), it reported;

[127] *Ibid*., para. 13.

> "On October 17, the Commission met with representatives of the UFF. During the discussion they re-iterated their adherence to the terms of the Agreement, including to decommissioning. They re-affirmed their decision not to begin decommissioning their arms until the IRA started to decommission theirs, although they stood by their earlier commitment to the Commission on the methods of decommissioning and supporting arrangements. They also pointed out that at the present, the ongoing feud between the UFF and the UVF made decommissioning both difficult and unlikely in the short term..."[128]

What is incredible about the events described in the Report, is that it recounts the history of the loyalist paramilitary groups and political parties refusal to engage in any complementary decommissioning as that undertaken by the republican paramilitary (IRA) as described in the June 26 Report and, at the same time, demanding additional unilateral decommissioning by the IRA, while invoking their need to keep their weapons to further their own loyalist feud.

[128] *Ibid*., para.16.

Almost simultaneously with the October Report, First Minister of the devolved government, David Trimble, refused to execute documents nominating Bairbre de Brun, Minister for Health, Social services and Public Safety, and Martin McGuinness, Minister for Education as Ministers to the North-South Ministerial Council to be held on November 3, 2000.[129] Trimble was a member of the Ulster Unionist Party and both de Brun and McGuinness were members of Sinn Fein.[130] The ostensible reason for Trimble's refusal to make the nominations was;

[129]*In The Matter Of An Application By Bairbe de Brun And Martin McGuinness For Judicial Review*, High Court of Justice In Northern Ireland, [Queens Bench Division (Crown Side)(January 30, 2001)](Kerr, J.).

[130]*Ibid*,

"to persuade Sinn Fein to use any influence it may have to secure decommissioning of paramilitary arms in accordance with the Belfast agreement."[131]

Both Ministers sought judicial review of Trimble's decision.

[131] *Ibid.*

On December 22, 2000, the Commission reported that no additional progress had been made since its October 2000 report.[132] In this report the Commission noted that in its meetings with the loyalist/unionist groups that;

> "The UVF representatives have met with us and confirmed the commitment to decommissioning they previously gave us. They have warned that in their opinion dissident activity has made decommissioning harder to achieve..."[133]

It further reported that the IRA had also renewed its commitment to decommissioning made in

[132]Report of the Independent International Commission on Decommissioning (IICD) 22 December 2000.

[133]*Ibid*., para. 3.

previous meetings,[134] and that the UVF and UFF had reached "agreement in principle"[135] on schemes to decommission.

In The Matter Of An Application By Bairbe de Brun and Martin McGuinness For Judicial Review[136]

On January 30, 2001, The High Court of Justice In Northern Ireland, Queen's Bench Division (Crown Side) held that David Trimble's decision to refuse to nominate the two Ministers from Sinn Fein to attend a meeting of the North-South Ministerial Council meeting in November, 2000, violated the Northen Ireland Act of 1998, enacted to implement the Good Friday Agreement. In an opinion by Justice Kerr, the Court found that the Agreement prized cross-community representation to such a degree that the failure to make the nominations overrode

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[134]*Ibid*., para. 5.

[135]*Ibid*.

[136]See Fn. 127 for official citation.

Trimble's objective to pressure the IRA into decommissioning.[137] At the outset of his opinion, Justice Kerr noted that pursuant to Section 52 (1) of the Northern Ireland Act of 1998;

[137]*In The Matter Of An Application By Bairbe De Brun and Martin McGuinness For Judicial Review*, [2001] NIQB 3, High Court of Justice In Northern Ireland, Queen's Bench (Crown Side) KERF3332 30.01.2001.

"...the First Minister and the deputy First Minister are required to make nominations to the North-South Ministerial Council." [138]

[138] *Ibid*.

In addressing the "legislative framework"[139], Justice Kerr cited Section 52(1)(a) of the Act which
empowered the First Minister and deputy First Minister to make such nominations ;

[139]*Ibid*.

"...as they consider necessary to ensure-(a) such cross-community participation in the North-South Council as is required by the Belfast Agreement."[140]

He went on to observe further that;

[140]*Ibid*. This is apparently a non-sectarian reference to the "Good Friday" Agreement.

"Strand Two of the Belfast Agreement does not itself contain any explicit requirement for cross community participation in the Council and one must therefore look elsewhere to ascertain what is meant by the expression. Strand One (Which deals with Democratic Institutions in Northern Ireland) provided in paragraph 5 that there could be safeguards to ensure that all sections of the community could participate and work together in the operation of institutions of government, Paragraph 6 required that there should be a register of designation of members of the Assembly for the purpose of measuring cross-community support in Assembly votes. The designation of identity was to be nationalist, unionist or other. For the First Minister, Mr. Morgan[141] argued that, in effect, the cross-community dimension intended by section 52 (1) (a) was representation of the unionist and nationalist communities. No contrary submission was made and, although the provisions of strand one cited above do not deal directly with the North-South Ministerial Council, I have concluded that this is what indeed was intended. I am reinforced in that view by the provisions of paragraph 30 of Strand One. It provided:-

> 'Arrangements to represent the assembly as a whole, at Summit level and in dealings with other in institutions...will be such as to ensure cross-community involvement.'

[141]Counsel representing First Minister David Trimble.

> It is to be noted that the nomination of the Ministers under section 52 (1) must be made by the First Minister and deputy First Minister *acting jointly*. Mr. Lavery[142] suggested that where either the First Minister or the deputy First Minister refused to nominate, the other could exercise the power. I do not accept the argument. The terms of the provision are explicit; the First Minister and deputy First Minister must act jointly. Quite apart from this the entire ethos of the 1998 Act is that there should be agreement on a cross-community basis. This would be substantially compromised if either the First Minister or the deputy First Minister could act alone and without the agreement of the other. I am satisfied that both must agree on the appointment of a Minister for that appointment to be effective."[143]

Thus, Justice Kerr held that the provisions of the 1998 Northern Ireland Act, to the extent that it incorporated the provisions of the Good Friday Agreement, elevated the principle of cross-community representation, not only as an end to be achieved, but also as an essential element of the decision making framework in achieving that end.

Turning to an issue raised by Trimble, namely that the First Minister and deputy First Minister had some discretion under the Act to determine who to nominate for these positions, the Justice declared;

> "The nature of the discretion that arises under statute must be determined primarily by the statutory provision itself. The principal purpose of the nominating duty under section 52 (1) is to achieve cross-community representation. But it is clear that even where a purpose is clearly specified may undertake tasks which are 'reasonably incidental' to the fulfillment of that purpose- see DeSmith Woolf and Jowell, Judicial Review of Administarative Action, Fifth edition paragraph 6-066.

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[142]Counsel representing Minister of Education Martin McGuiness.

[143]*Ibid*.

> I accept that the First Minister could not be required to nominate someone whom he regarded as unsuitable in the sense that that person was working against the implementation of the Agreement. Indeed, it appears to me that it would be open to the First Minister to conclude that a potential nominee was unsuitable for nomination because he had not made appropriate efforts to implement the Agreement.
>
> I do not consider, however, that it would be open to the First Minister to refuse to nominate a Minister who was in every way suitable to attend the sectoral meeting simply because he wished to induce the Minister - or the political party to which he belonged - to act in a particular way. The First Minister's primary duty under the section is to nominate Ministers who will fulfil the necessary requirement of cross-community participation. In my opinion, he must also have regard to the need to nominate a Minister who will be able to participate in a meaningful way in the business of the Council. It is not open to the First Minister, in my opinion, to disregard the clear intention of Parliament that the Ministers nominated to attend the sectoral meetings should be in a position to contribute to the work of the Council. Provided he has regard to this, however, and seeks to observe the obligation to nominate Ministers on a cross-community basis, he enjoys a discretion as to whom to nominate.
>
> ....Given the interdependence of the Council and the Assembly within the terms of the Belfast Agreement, the conclusion that a minister who was undermining the Agreement was not suitable to represent the Assembly on the Council would be beyond challenge, not only because of its rationality but also because it would have been taken to fulfill the objectives of section 52. By contrast a decision not to nominate in order to bring pressure on a political opponent does not involve any assessment of his suitability for the nomination nor does it seek to fulfil the purpose of section 52."[144]

Turning to the reason acknowledged by Trimble for not nomination deBrun and McGuinness, their Sinn Fein membership, Justice Kerr held;

> "The First Minister has not claimed that the applicants are unsuited to be appointed to attend the sectoral meetings. He has not disputed that their appointment (together with other Ministers) would achieve cross-community

[144] *Ibid.*

participation in the North-south Ministerial Council required by section 52 (1). The sole reason advanced by him for refusing to nominate the applicants is that he believed that this would persuade Sinn Fein to exert influence to secure the decommissioning of paramilitary arms. The issue which arises therefore is whether the First Minister may use his powers under section 52 (1) to seek to achieve this aim.

Self evidently, a decision not to nominate in order to bring pressure on a political opponent does not purport to achieve the objective of section 52...

I do not accept that a decision taken under section 52 in order to promote an objective of the Agreement that is wholly unrelated to the purpose of that section can be upheld...In the present case...the implementation of the Agreement has a number of aspects and no single theme emerges either from the Agreement or the Act itself. Indeed, in order to promote the objective espoused by Mr. Trimble, (decommissioning of weapons) he has adopted a strategy that will inhibit - if not frustrate - another objective (effective North-South Council meetings). I have concluded, therefore, that the decision of the First Minister to refuse to nominate Ms de Brun and Mr McGuiness is for a purpose that is collateral to the purpose of section 52 and that it cannot be rescued by recourse to a separate objective of the Agreement that Mr. Trimble hopes to secure. It is well settled that a decision taken for a collateral purpose will be amenable to judicial review-see for instance, *In re Cook's Application* [1986] NI 242. the refusal of the First Minister to nominate Ms de Brun and Mr McGuiness must therefore be declared unlawful."[145]

[145] *Ibid.*

On March 22, 2001 the Independent International Commission on Decommissioning, again, reported to the Governments of Ireland and the United Kingdom.[146] In the report, the Commission stated that;

[146]Report of the Independent International commission on Decommissioning (IICD) 22 March 2001.

> "Meetings in recent weeks with representatives of the UVF and UFF confirmed their willingness to consider decommissioning their arms, and their general agreement on methods and related supporting issues. Both groups continue to affirm that they will not move on decommissioning before the IRA does."[147]

The Commission further reported that it had resumed contact with the IRA and the latter had agreed to enter into a dialogue with the Commission ;

[147] *Ibid*.

> "...on the basis of the IRA leadership's commitment to resolving the issues contained in our statement of May 6, 2000 and no other basis."[148]

In its statement of May 6, 2000, the IRA leadership had;

[148] *Ibid*.

> "...pledged to initiate a process that will completely and verifiably put IRA arms beyond use in the context of the statements made by the two governments on May 5, 2000."[149]

In their May 5, 2000 statements the Governments had declared that they;

[149]Report on the First Inspection of IRA dumps by President Martii Ahitsaari and Mr. Cyril Ramaphosa, 6 June 2000.

> "...now believe that the remaining steps necessary to fulfill implementation of the [Good Friday] agreement can be achieved by June 21, 2000 and commit themselves to that goal."[150]

They had further committed that;

[150]Report of the Independent international Commission on decommissioning (IICD), 26 October 2000.

> "Subject to a positive response to this statement, the British Government will bring forward the necessary order to enable the Assembly and Executive to be restored by 22 May 2000."[151]

As noted earlier, this sequence of events, which was followed by the IRA's unilateral disclosing and allowing repeated inspections of its weapons and ammunition dumps by the IICD had led to the restoration of the Northern Ireland Assembly. Notwithstanding, what can only be characterized as "good faith" actions by the IRA, no corresponding action was undertaken by the unionist/loyalist paramilitaries.

[151] *Ibid.*

On May 10, 2001 the Court of Appeals in Northern Ireland ruled on an appeal taken by First Minister David Trimble from the judgment rendered by Justice Kerr earlier that year.[152] In dismissing the appeal, Justice Carswell agreed ;

[152]*In the Matter Of Applications By Bairbe de Brun and Martin McGuinness For Judicial Review* (2002) NICA 43 In her Majesty's Court of Appeals In Northern Ireland,[REF: CARF 3482 (05 .10. 01)]

> "...with the judge's conclusion that the terms of paragraph 5.1 of the Ministerial Code, but using the word 'normally', carry the clear implication that it is not obligatory to nominate the Minister responsible for the topic to be discussed."[153]

The Court went on to observe;

[153] *Ibid.*

> "The appellant's counsel submitted that although it was not in dispute that that Minister should be nominated, the First and deputy First Minister retained discretion to nominate another person in appropriate circumstances. we agree in principle with that submission, but in such an untested area we are reluctant to attempt to spell out the ambit of those circumstances. The judge expressed the view at pages 19-20 of his judgment that the First Minister could not be required to nominate someone whom he regarded as unsuitable in the sense that that person was working against the implementation of the Agreement. We would prefer to reserve our opinion on the correctness of this proposition until such time as it may become necessary to decide it."[154]

Turning to Judge Kerr's finding that de Brun and McGuinness had been denied their respective nominations due to an improper collateral purpose, their membership in Sinn Fein and the desire to prompt further IRA decommissioning, Justice Carswell declared;

> "We are in agreement with this conclusion. The purpose of section 52 is to enable the working of the NSMC to proceed .The power of nomination was conferred on the first Minister and deputy first Minister in order to further that purpose, and they are obliged to use their power to carry out the statutory purpose. The refusal to make nominations of Ministers who were appropriate Ministers with executive responsibility for the topics to be discussed at forthcoming meetings inhibited the carrying out of that purpose, notwithstanding that it may have been intended to conduce to the fulfilment of another substantial purpose of the Act. If it were clear that the overall policy and objects of the 1998 Act were directed solely towards the decommissioning of arms, then it might be possible to invoke the principle summarised in Lord Reid's phrase in *Redfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 907 at 1030:
>
> > 'Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act...'

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[154] *Ibid.*

We agree with the judge that is only one of the objects of the 1998 Act, however important, and the purposes of section 52 are directed to another and different object of the act, the fostering of North-South links through the operation of the NSMC. we therefore consider that the judge was correct in his conclusion that the First Minister's refusal to nominate the applicants must be regarded as an incorrect exercise of the discretion conferred upon him by section 52. It must follow that as a matter of law it cannot be sustained as a valid exercise of that discretionary power. We regard it as appropriate that the judge should have made a declaration rather than granting any other remedy and we affirm the declaration contained in his order of 30 January 2001. We also agree with his description contained in his judgment at pages 26-7 of the action which should be taken in respect of further nominations."[155]

[155] *Ibid.*

On May 30, 2001, the Commission reported that it had made a third inspection of the IRA weapons dump.[156] In this report, the Commission members reiterated that;

> "...these dumps held a substantial amount of military material, including explosives and related equipment, as well as weapons and other material. We confirm that the arms dumps had not been tampered with and that they remained secure.

[156]Report of the Third Inspection of IRA weapons Dumps by Martii Ahitsaari and Cyril Ramaphosa, 30 May 2001.

> We observed that the weapons and explosives continued to be safely and adequately stored. We remain confident that they cannot be used without our detection.[157]

The Commission went on to make an observation which could only highlight the lack of similar activity by the loyalist/unionist paramilitaries;

[157] *Ibid.*

The IRA has once again fully honoured their commitments and complied with the terms of our engagement and we are convinced this co-operation will continue."[158]

[158] *Ibid*.

On June 30, 2001, the Commission, again, reported to the two Governments.[159] This report set forth a somewhat detailed summary of the Commission's discussions with both the republican and loyalist/unionist paramilitary groups about the status of decommissioning and their intentions on this subject. At the outset it noted;

[159]Report Of The Independent International Commission on Decommissioning (IICD), 30 June, 2001.

"3.The commitments given us to date notwithstanding, we must report that no decommissioning by the IRA, the UVF and UFF has yet started, although each of these groups has re-affirmed the circumstances under which they might do so."[160]

Turning to its discussions with the IRA, the Commission reported;

"4. Since March, we have held a number of lengthy meetings with the IRA representative, most recently within the past week. During each of the meetings we have pressed for answers to three questions:

a. The IRA's commitment to put its arms beyond use;

b. The method it will use and whether it meets our remit to verify that arms are rendered permanently unusable; and

[160] *Ibid.*

c. When the process of putting arms beyond use will begin."[161]

It went on to report that in response to these concerns the IRA reiterated its position of May 6, 2000, that it would;

> "5...put its arms beyond use, completely and verifiably, but only in the context of its statement of 06 May 2000. Taken in conjunction with the continued maintenance of the July 1997 ceasefire, and the opening of some IRA dumps to inspections by the International Inspectors, we believe that this conditional commitment is made in good faith.

[161] *Ibid*.

> 6. We have, however, been unable to ascertain how the IRA will put its arms beyond use, except for the assurance that it will be complete and verifiable. The IRA has taken note of our need for this information, but until we know what method will be used, we cannot judge if it meets our remit. We should record that the representative has said he wishes to continue to engage us on issues related to our remit as the political process continues."[162]

Turning to its discussions with the UVF representative, the Commission reported;

[162] *Ibid*.

> "8. We have had a number of discussions with the UVF representative, most recently this week. He confirms that the statements he made earlier on decommissioning methods and supporting issues remain in effect; but he re-iterates that the UVF will not consider decommissioning before they know the IRA's intentions and hear that the war is over."[163]

Insofar as the UFF was concerned, the Commission reported;

[163] *Ibid*.

> "9. Similarly we have had a number of discussions with UFF representatives, most recently this week. At this most recent meeting, while the representatives did not withdraw their earlier statements on decommissioning methods and supporting issues, they told us that it would be difficult to discuss decommissioning further with us 'while members of the UFF continue to be interned."[164]

Thus while the target date contemplated for decommissioning had come and gone, and a stalemate between the republican and loyalist/unionist paramilitaries existed; it is interesting to look at the respective positions of the various parties in light of their past actions.

[164] *Ibid*.

The IRA had taken the position that it would not specify any particular decommissioning method until the Governments of Ireland and the United Kingdom had fully implemented the terms of the Good Friday Agreement, including the future of British troops in Northern Ireland, which the IICD had considered to be beyond its remit.[165] Moreover, in that same vein it had expressed an understandable concern about the status of the opposing paramilitaries.[166] The *Irish Times* on August 10, 2001, reported that unionist/loyalist paramilitaries had engaged in 134 pipe-bomb attacks in Northern Ireland in 2001, in which 50 had actually exploded.[167] When one considers that those paramilitary members were in possession of approximately 150,000 weapons,[168] unilateral decommissioning would, at the very least, seem unwise. Notwithstanding these reservations, the IRA had, as described by the IICD, disclosed the location of weapons dumps containing "substantial" quantities of arms, and allowed the Commission's inspectors to repeatedly inspect to the extent that the Commission was satisfied that the weapons had not been used or tampered with.

In contrast, the UVF and UFF, which had refused to engage in any decommissioning unless the IRA went first, had apparently not disclosed the existence of any of its weapons, or allowed any

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[165]See, Report of the Independent International Commission on Decommissioning, 11 February 2000.

[166]*Ibid*.

[167]"Police Blame UDA For Rise In Pipe Bombs," *Irish Times*, 10 August 2001.

[168]Coogan, Tim Pat, *The Troubles Ireland's Ordeal 1966-1996 and the Search for Peace*, Roberts Rhinehart Publishers, Boulder, Colorado 1996 p.410.

inspections of its weapons caches.

Moreover, while the IRA was repeatedly assailed by loyalist/unionist political leaders for its insistence that the Good Friday Agreement be implemented concomitantly with the decommissioning discussions, no criticism was raised of the UFF's reluctance to engage in decommissioning talks while its members were interned.

In the conclusion of its report, the Commission noted;

> " 10. We have been unable to meet either of the decommissioning target dates called for by the Agreement or by the Governments: respectively, 22 May 2000 and June 2001. Some people have said they believe our inability to engineer a start to decommissioning has called into question our usefulness in this process, and suggest we now withdraw from it. Others have urged us to remain engaged and to continue to press paramilitary groups to begin decommissioning. We have given both these views careful consideration.
>
> 11. Given the conditions the IRA, the UVF, and the UFF say they require before they will put their arms beyond use, we believe we cannot influence that activity by making demands or by setting deadlines. But will continue to do what we can to implement our mandate through continuing contact and discussion with each of the three paramilitary groups, insisting that the objectives of the legislation calling for arms to be rendered permanently inaccessible or permanently unusable are respected. We will do so mindful that this contentious issue must be resolved as soon as possible."[169]

[169] *Ibid.*

The following day, July 21, 2001, David Trimble, the First Minister, made good on a threat to resign if there had been no progress from the IRA on decommissioning.[170] This triggered the provisions of Part III, Section 16 of the Northern Ireland Act of 1998.

Section 16 (4)(b) of the Act provides in pertinent part;

> "The First Minister and deputy First Minister -
>
> (b) subject to the provisions of this Part, shall hold office until the conclusion of the next election fro First Minister and deputy First Minister"

Pursuant to Section 16(5)(b) of the Northern Ireland Act of 1998, which provides;

> "The holder of the office of First Minister...may by notice in writing to the Presiding Officer designate a Northern Ireland Minister to exercise the functions of that office-
>
> (a)during any absence or incapacity of the holder; or
>
> (b) during any vacancy in that office arising otherwise than under subsection (7)(a);
>
> but a person shall not have power to act by virtue of paragraph (a) for a continuous period exceeding six weeks.

As indicated by Section 16(5)(b), subsection (7)(a) appears to limit the authority to designate a successor, in as much as it provides;

> "If either the First Minister or the deputy First Minister ceases to hold office at any time, whether by resignation or otherwise, the other-
>
> (a)shall also cease to hold office at that time; but
>
> (b)may continue to exercise the functions of his office until the election required by subsection (8)"

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[170]CAIN Web Service, Chronology, 1 July 2001.

Subsection (8) provides;

> "Where the offices of the First Minister and the deputy first Minister become vacant at any time an election shall be held under this section to fill the vacancies within a period of six weeks beginning with that time."

Acting, ostensibly, under Section 16(5) of the Act, Trimble nominated a fellow Ulster Unionist Party member, Reg Emprey to fill his position of First Minister until an election could be held.[171]

Whether Trimble's nomination of Emprey was legally viable is an interesting question, since the authority to make such a designation under Section 16(5) appears to be limited by subsection (7)(a) . Indeed, that latter subsection appeared to have the effect of also triggering a vacancy in the office of deputy First Minister, then held by Social Democratic and Labour Party(SDLP) member Seamus Mallon.[172] A reading of Sections 16(5) and 16(7) together would seem to suggest that although Trimble's resignation had the effect of ending Mallon's official status but Mallon's status is preserved for the six week period in which an election to fill the vacancies occurs, although the powers he would exercise jointly with the First Minister would be curtailed.

On August 1, 2001, the Governments of Ireland and the United Kingdom set forth proposals for further implementation of the Good Friday Agreement covering decommissioning, policing, normalization of security arrangements in Northern Ireland,[173] and invited the various parties to respond.

On August 6, 2001 the Independent International Commission On Decommissioning issued a statement in which it announced;

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[171]British Broadcasting Corporation (BBC) news timeline Northern Ireland Assembly, www.news.bbc.co.uk.

[172]CAIN Web Service, Chronology, 1998, 1 July 1998.

[173]"Implementation Of The Good Friday Agreement", Northen Ireland Office and Department of Foreign Affairs, August, 1 2001.

"In a recent meeting with the Commission, the IRA representative proposed a method for putting IRA arms completely and verifiably beyond use.

We are satisfied that this proposal meets the Commission's remit in accordance with the Governments' schemes and regulations.

Based on our discussions with the IRA representative we believe that this proposal initiates a process that will put IRA arms completely and verifaibly beyond use."[174]

On August 9, 2001 the IRA issued its own statement confirming the Commission's

announcement, and further warned;

[174]Statement By The Independent international Commission on Decommissioning

(IICD), 6 August, 2001.

"We note the ongoing attempts in some quarters to prevent progress. They should not be permitted to succeed. Our representative will continue to meet the IICD. The IRA leadership will continue to monitor political developments."[175]

[175] A portion of the Text of Irish Republican Army Statement on its meetings with the IICD, 9 August, 2001.

The statement of the IICD had been greeted by former First Minister David Trimble, of the Ulster Unionist Party Party, with the response that the IICD statement did not go far enough and that the UUPwould only be satisfied with seeing the beginning of actual decommissioning.[176] In the ensuing days all parties would meet with the Secretary of State for Northern Ireland, John Reid, to set forth their various point of view.[177] The UUP sought suspension of the devolved government, while Sinn Fein sought new Assembly elections.[178] On August 10, Reid announced that he was suspending the Assembly at midnight that night. In announcing the suspension, he took note of the fact that the failure to elect a First Minister and Deputy First Minister would require his proposing a date for new Assembly election, as Sinn Fein advocated, pursuant to Section 32(3) of the Northern Ireland Act of 1998.[179] This Section provides in pertinent part;

> "...if the period mentioned in Section 16(1) or 16(8) ends without a First Minister and a deputy First Minister having been elected, the Secretary of State shall propose a date for the poll for the election of the next Assembly."

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[176]CAIN Web Service, Chronology 2001, 9 August 2001.

[177]*Ibid.*

[178]*Ibid.*

[179]Northern Ireland Office, Media Centre, 10 August 2001.

While this language appears to be mandatory rather than permissive, Reid invoked the Northern Ireland Act of 2000 as authority for an order suspending the Assembly. The invocation of the Northern Ireland Act of 2000 is an interesting tactic since a review of the Act itself does not reveal any provisions illuminating when the Act should be invoked. Indeed, Section (1) of the Act entitled "Suspension of devolved government in Northern Ireland"[180] simply states;

> "While this section is in force, the Northern Ireland assembly is suspended and the following provisions have effect."

The Act thereafter recites all of the various powers and functions of the devolved Assembly and government which are suspended, and the ways in which these responsibilities are transferred to the British authorities, but makes no provision for what event triggers the suspension. In contrast, the Northern Ireland Act of 1998 provides various scenarios triggering dissolution of the Assembly, including that resulting where;

[180] Northern Ireland Act of 2000.

> "if the assembly passes a resolution that it should be dissolved the Secretary of state shall propose a date for the poll for the election of the next Assembly."[181]

as well as those previously discussed under Section 16 of the Act. Nevertheless. Reid suspended the government announcing;

> "It is because ....I believe that we are tantalisingly close to being in a different world here in Northern Ireland - that I believe the parties should be given more time."
>
> As so often in Northern Ireland, we have reached an immovable date. I know that many people who do not find politics absorbing may groan at the prospect of going past that date. But I believe that dates are here to serve the people not the other way round.
>
> It is now clear that the assembly cannot elect a First Minister and deputy First Minister before Sunday. In that case, I would then be obliged by Section 32(3) of the Northern Ireland Act 1998 to propose a date for the next Assembly elections This would be against a backdrop where, it is true, that we have not yet secured the final agreement that we are seeking. But since we and the Irish Government published our proposals on 1 August for completing the implementation of the Good Friday Agreement, there has been significant progress. the proposals have been welcomed and endorsed by several of the pro-Agreement parties. I believe that we have made progress on policing. The IRA's agreement with the IICD of a method by which they will put their arms completely and verifiably beyond use is a very significant step which has been welcomed by all.
>
> It has been put to me that, in these circumstances , at a delicate moment in the political process, when discussions are still continuing and the parties are still digesting the two Governments proposals, it would be against the interests of the peace process to plunge Northern Ireland into an election campaign, and the more polarised political atmosphere that would entail.

[181] Northern Ireland Act of 1998 Section 32(1).

> I have therefore decided to make an order under the Northern Ireland act of 2000 suspending devolved government in Northern Ireland. The order comes into effect at midnight tonight, and I hope that the period of suspension will be very short."[182]

The following day, he signed an order restoring the Assembly, which postponed the required election of another First Minister and deputy First Minister occasioned by Trimble's July 1, 2001 resignation in which he was succeeded by Emprey.

[182]See FN 177.

While Reid believed the momentary suspension of the Assembly and its consequent postponement of the leadership election was the best option for him, Martin McGuinness, Vice-President of Sinn Fein and Minister of Education in the devolved government, did not. On August 12, 2001 during a BBC[183] telecast declared that the suspension of the Assembly together with the unionist response had caused a "serious situation."[184]

Just how seriously the IRA viewed the Trimble response and the Reid's acquiescence to the unionist request for suspension of the Assembly rather than the request for fresh election, was apparent in the IRA's announcement on August 14, 2001 that it was withdrawing its plan for decommissioning made the previous fortnight. In a statement that day, the IRA announced;

> "On Thursday August 8 we confirmed that the IRA leadership had agreed to a scheme with the IICD [independent International Commission on Decommissioning] to put arms completely and verifiably beyond use. Our initiative was a result of lengthy discussions with the IICD over a protracted period of time.
>
> This was an unprecedented development which involved a very difficult decision by us, and problems for our organisation. While mindful of these concerns, our decision was aimed at enhancing the peace process.
>
> We recognise the very broad welcome which the IICD statement received.

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[183]British Broadcasting Corporation,

[184]*Breakfast With Frost*, BBC, Sunday, August 12, 2001.CAIN Web Service, Chronology 2001, 12 August 2001.

> However the outright rejection of that statement by the UUP leadership, compounded by the setting of preconditions, are totally unacceptable.
>
> The subsequent actions by the British government, including their failure to fill their commitments, is totally unacceptable.
>
> The conditions therefore do not exist for progressing our proposition. We are withdrawing our proposal.
>
> The IRA leadership will continue to monitor developments. Peacekeeping is a collective effort."[185]

On September 11, 2001, the United States was attacked by Al-Queda resulting in the destruction of the World Trade Center in New York City, a portion of the Pentagon in Washington, D.C., and the crash of an airliner in Pennsylvania and the consequent loss of thousands of lives. To what extent this motivated the IRA to return to discussions with the IICD regarding decommissioning is unclear but the mention of the attacks at the outset of their statement on September 20, 2001 announcing their willingness to resolve the issue of arms, suggests that the world opinion in the wake of the attacks was indeed a factor. In its statement, the IRA declared;

[185]Full Text of Irish Republican Army Statement, 14 August 2001.

> "First of all we wish to extend our sympathy to the people of the United States and especially the families and friends of the victims of the deplorable attacks in New York, Washington and Pennsylvania."[186]

The statement went on to recount the organization's discussions with the IICD, noting;

> "On August 8 we confirmed that the IRA leadership had agreed a scheme with the IICD...to put IRA arms completely and verifiably beyond use.

[186]Text of the Irish Republican Army (IRA) Statement on Decommissioning 20 September 2001.

> This unprecedented IRA initiative was the result of lengthy discussions with the IICD over a long period. It was another expression of our willingness to enhace the peace process and it involved considerable problems for us and our organisation."[187]

Turning to the response their August 8 proposal had received, the statement continued;

[187] *Ibid.*

> "The IRA leadership's ability to speedily and substantially progress the decision was completely undermined by the setting of further preconditions and outright rejection of the IICD statement by the Ulster Unionist Party leadership. Subsequent actions by the British government including a continued failure to fulfil its commitments, remove the conditions necessary for progress. On August 14 we withdrew our proposal."[188]

The IRA then went on to offer a renewed dialogue with the Commission, stating;

[188] *Ibid.*

> "However, as an earnest of our willingness to resolve the issue of arms, the IRA leadership wish to confirm that our representative will intensify the engagement with the IICD. This dialogue within the context of our commitment to deal satisfactorily with the question of arms. It is with a view to accelerating progress towards the comprehensive resolution of this issue."[189]

The statement closed with a veiled warning cloaked in its commitment to the peace process, declaring;

> "Progress will directly be influenced by the attitude of the other parties to the peace process, including and especially the British government. The IRA's commitment is without question.
>
> However, as we have said before, peace making and peace keeping is a collective effort. It is our considered view that the Irish peace process can succeed. The continued failure or refusal to sustain the political process and to deliver real and meaningful change has a direct bearing on how this will be accomplished.

[189] *Ibid.*

The IRA has contributed consistently and in a meaningful way to the creation of a climate which would facilitate the search for a durable settlement. We will continue to do so, including through our engagement with the IICD, particularly at this difficult time, and in the period immediately ahead."[190]

[190] *Ibid.*

Despite the IRA's offer to renew contact with the IICD, John Reid , Britain's Secretary of State for Northern Ireland, announced a second suspension of the Northern Ireland Assembly. this suspension was the result of a deadlock to reinstate the First Minister. Reid further announced that he would not carry out such a technical order again.[191]

On October 23, 2001, the Independent International Commission on Decommissioning reported, in a follow-up to the Agreement of August 6, 2001 with the IRA, that;

> "2. We have now witnessed an event - which we regard as significant -in which the IRA has put a quantity of arms completely beyond use. The material in question includes arms, ammunition and explosives.
>
> 3. We are satisfied that the arms in question have been dealt with in accordance with the schemes and regulations. We are also satisfied that it would not further the process of putting all beyond use were we to provide further details of this event.

[191]See Fn. 170.

4.We will continue our contact with the IRA representative in pursuit of our mandate."[192]

Perhaps nothing better reveals the divergent positions involving the primacy or priority that decommissioning has in the overall peace process than the respective statements made by Gerry Adams, President of Sinn Fein and British Secretary of State for Northern Ireland, John Reid, preceding the Statement by the Independent International Commission On Decommissioning on October 23, 2001.

[192]Statement By The Independent International Commission on Decommissioning (IICD) 23 October 2001.

In a speech entitled "Looking To The Future"[193] made at Conway Mill in west Belfast, Adams declared;

> "The current crisis in the peace process has for many been a source of great frustration, annoyance and anger.
>
> Nationalists and republicans see the potential of the peace process being frittered away by a British government not honouring its commitments, and a unionist leadership obstructing the fundamental change that is required.
>
> Unionists tell us that they are prepared to share power with nationalists and republicans
>
> They argue that they see the issue of the IRA arms as crucial to this. For this reason David Trimble says that he has triggered the latest crisis.
>
> The British government's suspension of the institutions, its remilitarisation of many republican communities, its emasculation of the policing issue, and the premature movement by others towards this inadequate position, along with the loyalist campaigns have all created difficulties which are coming to a head.
>
> From this clash of positions and perceptions has emerged a threat to the peace process that risks undoing the advances of the last decade.
>
> This must not be allowed to succeed.
>
> Our aim is to save the Good Friday Agreement.
>
> Sinn Fein's commitment to the process is absolute. The initiatives we have taken, the initiatives we have encouraged others to take, including the IRA, have contributed decisively to the peace process."

Turning to Sinn Fein's view of the Good Friday Agreement and the various issues it was intended to resolve, Adams made clear that, in their view, decommissioning was just one of

[193]CAIN Web Service.

many having equal importance, arguing;

> "Republicans and nationalists want to be convinced that unionism is facing up to its responsibilities.
>
> Most fair minded people on this island want to believe that a British government is prepared to usher in a new dispensation based on equality.
>
> But Sinn Fein is not naive. Our strategy is based upon objective realities. It is guided among other things by the fact that the democratic rights and entitlements of nationalists and republicans cannot be conditional. These rights are universal rights. They effect all citizens.
>
> In the Good Friday Agreement matters such as policing, the political institutions, demilitarisation, human rights, the justice system and the equality agenda are stand alone issues. These are issues to be resolved in their own right.
>
> We have put this to all of those we have been in negotiation with.
>
> It is clear to Sinn Fein leadership that the issue of IRA weapons has been used as an excuse to undermine the peace process as well as the Good Friday Agreement."[194]

Turning to the one-sided nature of the decommissioning that had been engaged in by the IRA up to that point, Adams declared;

> "Many republicans are angry at the unrelenting focus on silent IRA weapons. This is in marked contrast to the attitude to loyalist weapons and bombs in daily use, and the remilitaraisation by the British Army of republican heartlands in the north.
>
> The issue of all arms must be resolved. But not just IRA weapons - British weapons as well.

[194] *Ibid.*

This is a necessary part of any conflict resolution."[195]

Ultimately he concluded;

> "The Good Friday Agreement is after all an agreement that the British government is part of.
>
> The implementation of that agreement is not secondary to the issue of IRA weapons.

[195] *Ibid.*

It has been the consistent view of Sinn Fein that the arms question can be resolved as part of a collective move forward in which the issue of weapons is completely removed as a precondition for progress in other issues."[196]

[196]*Ibid*.

In contrast, that same day, John Reid, in a speech to the Society of Newspaper Editors in Belfast[197],

summarized the British Government's position, noting;

[197]CAIN Web Service.

"On Friday I met with Brian Cowen[198] to agree the way forward. We believe we have enough material to work with: David Trimble has said that, with movement from republicans, the UUP resignations would not have been necessary.

Martin McGuinness has said that, if it were up to him, he'd sort out decommissioning tomorrow.

So thee is common ground. Now we need to build on it - and urgently.

To do so will take courage on all sides. It will mean facing real challenges.

I do not mean to underestimate the difficulties for paramilitary groups in resolving the issue of arms. Nor do I underestimate the significance of the steps they have already taken. They are being asked to enter a new historical dynamic.

So I want to say to the paramilitaries:

'If you are able to do what the people of Northern Ireland want so desperately - to put arms beyond use and to take politics onto a new plain - then I believe you will not find the response from this government, from the Irish government, the American administration and the whole international community, to be grudging or ungenerous.

Those of us who support the Good Friday Agreement passionately will be allowed to press forward with its implementation.

' But if you cannot make the final transition to democratic means then I believe the same international community and more importantly, the people of Ireland, north and south, will simply not understand why.'

Freeing the logjam that has held back the implementation of the Belfast Agreement is our task for the coming days. I cannot promise anything except that we will be urging all sides to reach out, negotiate and accommodate to save devolved government and to build the best possible social and political culture for

[198]Minister for Foreign Affairs, Republic of Ireland.

all the people of Northern Ireland."[199]

Reid's words clearly implied that the British government, and perhaps the Irish government, viewed the IRA as a continuing obstacle to decommissioning, justifying Trimble and the UUP's withdrawal from the power-sharing government, and suspension of the Northern Ireland Assembly. It is little wonder that the republican movement, and particularly the IRA, felt that their efforts at decommissioning, heretofore engaged in with the IICD, went unrecognized and unappreciated

Particularly when only the republicans had taken such steps.

[199]See Fn.194.

Reid's viewpoint notwithstanding, the IICD met with Trimble the following day, and pronounced the IRA decommissioning event "complies with decommissioning legislation and regulations."[200] Two days hence, the Commission also met with the Democratic Unionist Party, represented by Ian Paisley, Peter Robinson, Iris Robinson and Nigel Dodds during which it pronounced the IRA decommissioning event to be "an act that was significant."[201] That same day, October 24, 2001,Cyril Ramaphosa and Martii Ahtisarri, the two IICD inspectors that had overseen the inspections of the IRA weapons dumps resigned claiming that they were no longer needed since the IICD and the IRA were dealing with the weapons issue.[202]

On November 1, 2001 Secretary of State Reid was faced with an even more complicated dilemma than that which confronted him on August 10. David Trimble failed to secure enough votes to be elected First Minister of the Assembly in the election triggered by the September 21st suspension.[203] Reid was now faced with a menu of three choices. He could simply suspend the Assembly indefinitely and re-introduce direct rule; set a date for new elections pursuant to Section 32(3) of the Northern Ireland Act of 1998; or engage in another "technical" suspension as done previously thereby triggering another six week window in which the parties could try

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[200]Meeting between the Ulster Unionist Party and the Independent International Commission on Decommissioning on October 23, 2001. Note taken and released by the UUP.

[201]Meeting between the Independent International Commission on Decommissioning and the Democratic Unionist Party, October 25, 2001. Note taken and released by the DUP.

[202] Cain Web Service, Chronology, 2001, 24 August 2001.

[203]*Ibid*. Chronology 2001, 2 November 2001.

and rectify the situation, although authority for this, again, appears dubious. Instead, Reid decided to ignore the deadline. After some inter-party machinations to increase the size of the unionist bloc, Trimble was re-elected.[204]

. On January 9, 2002, the issue of arms decommissioning in Northern Ireland was addressed in the British House of Commons. Section 2(3)(b) of the Northern Ireland Arms Decommissioning Act of 1997 was amended to extend the time allowed for decommissioning for one year and allowed annual extensions for a maximum of five years.[205] Opposed by the Unionist parties, Trimble warned that if the British did not apply pressure to the IRA, that he would.[206]

On April 8, 2002, the Independent International Commission on Decommissioning reported that the IRA had, again, decommissioned a large quantity of weapons.[207] In its report, the Commission stated;

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[204]*Ibid*.

[205]*Ibid*.

[206]*Ibid*.

[207]Report of the Independent International Commission on Decommissioning, 8 April 2002.

> "1. we wish to inform you that we have witnessed an event in which the IRA leadership has put a varied and substantial quantity of ammunition, arms and explosive material beyond use. In accordance with the Governments' Scheme and Regulations, we have made an inventory of the arms concerned, which we will provide to the two governments when our task is completed."[208]

That same date, the IRA issued a statement in which it declared;

> "The leadership of Oglaigh na h-Eirann has taken another initiative to put arms beyond use...
>
> The initiative is unilateral at a time when there are those who are not fulfilling their obligations. It could be argued that the IRA should not take such an initiative, but it is precisely because of this that an initiative has been undertaken, so the peace process can be stabilised, sustained and strengthened....
>
> This is a leadership initiative.
>
> We are relying on the discipline and commitment of our support base and volunteers. We remain committed to achieving our republican objectives. However, the securing of a democratic peace settlement is not solely a task for Irish Republicans and we are mindful of the primary obligation of the British government and of the Unionist leadership.

[208] *Ibid.*

The process can work if there is the political will to make it succeed, the IRA has once again demonstrated that will."[209]

[209]Text of Irish Republican Army Statement on decommissioning, 8 April 2002.

Eight days later, on April 8, 2002, The IRA issued an apology to all those "noncombatants"[210] killed or injured in their operations that commenced in 1972. In the statement the IRA reached out to the unionist/loyalist paramilitaries, stating;

> "Their have been fatalities amongst combatants on all sides. We acknowledge the grief and pain of their relatives.
>
> The future will not be found in denying collective failures and mistakes or closed minds and hearts to the plight of those who have been hurt. That includes all of the victims of the conflict, combatants and non-combatants.
>
> It will not be achieved by creating a hierarchy of victims in which some are deemed more or less worthy than others.
>
> The process of conflict resolution requires the equal acknowledgment of the grief and loss of others. On the anniversary, we are endeavouring to fulfil this responsibility to those we have hurt.
>
> The IRA is committed unequivocally to the search for freedom, justice and peace in Ireland.

[210]Text of the Irish Republican Army statement of apology, 16 April 2002.

> We remain totally committed to the peace process and to dealing with the challenges and difficulties this presents. This includes the acceptance of past mistakes and of the hurt and pain we have caused others."[211]

Despite these two statements and the act of decommissioning, British Secretary of State for Northern Ireland, John Reid, the following month declared that a cease-fire by the IRA was not

[211] *Ibid.*

enough and that there had to be a "sense that the war is over."[212] Reid's singling out the IRA for this criticism is, at best, inexplicable in light of a report by the Police Service of Northern Ireland (PSNI), on the past January 4, in which it reported that loyalist paramilitaries had committed twice as many "punishment" attacks as republicans during 2001.[213] As noted previously, the *Irish Times* had reported in August 2001 that loyalist paramilitaries had engaged in 134 pipe-bomb attacks during the same period.[214] Reid's criticism is notably devoid of any commentary on the failure of unionist/loyalist paramilitaries to engage in any decommissioning or calling

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[212]See Fn. 170..

[213]CAIN Web Service; Overall there were 331 attacks in 2001; an increase in 25% on the 2000. figure. Loyalist paramilitaries were responsible for 121 shootings and 92 beatings while republicans were responsible for 66 shootings and 53 beatings.

[214]See Fn.166. The Royal Ulster Constabulary (RUC) reported essentially the same figures, attributing 129 pipe-bomb attacks to the loyalist paramilitaries during 2001. 53 exploded and 89 defused.

upon them to do so.

Reid's criticism of the IRA could only have encouraged UUP First Minster Trimble to issue a declaration on September 21, 2002 threatening to withdraw th UUP from the power-sharing executive. In the declaration, the UUP stated;

> "1. The Ulster Unionist Party reaffirms the commitment we gave to the people of Northern Ireland in our election manifesto in 1998, namely that 'we will not sit in government with unreconstructed terrorists.'
>
> 2. The Ulster Unionist Party further reaffirms its commitment to the Mitchell Principles of democracy and non-violence and its determination to achieve a real and lasting peace, with stable government in Northern Ireland. The Ulster Unionist Party will judge all the terrorist organisations in terms of the level of commitment to the Mitchell Principles . In particular, the UUP will continue to demand total disarmament and disbandment of all terrorist groups including the IRA.
> 3....In view of the failure of Sinn Fein/ IRA to honour their commitment to exclusively peaceful and democratic means, the Ulster Unionist Party will, with immediate effect, adopt a policy of non-participation in meetings of the North-South Ministerial Council at both plenary and bilateral level. In the absence of Ulster Unionist ministers, the NSMC will cease to function."
>
> 5. The Ulster Unionist party will initiate talks with the other partys and the Government over the next three months to ensure that there is a viable basis for the future governance of Northern Ireland and that unless upon conclusion of such talks it has been demonstrably established that a real and genuine transition is proceeding to a conclusion, the party leader will recommend to a reconvened UUC meeting on January 18, 2003, the immediate resignation of all Ulster Unionist ministers from th administration."[215]

Other events, however, would quickly occur to render the January 18, 2003 deadline set by Trimble moot. On October 4, 2002 the Sinn Fein offices at Stormont were raided by the PSNI as

[215]Ulster Unionist Council meeting on 21 September 2002.

part of a police investigation into alleged "intelligence gathering" by republicans.[216] Ten days later,

on October 14, 2002, Reid, without singling any particular party or group out for blame, invoked the Northern Ireland Act of 2000 and suspended the government returning Northern Ireland to direct rule by Britain. In his statement announcing the suspension, Reid observed;

> "As you know, over the past weeks and months the political process in Northern Ireland has encountered increasing difficulties. My sincere hope was that we would be able to overcome those challenges. But it is obvious that this would prove impossible in the short term.

[216] See, Fn. 170.

> Regrettably therefore, I have today made an Order under the Northern Ireland Act of 2000, suspending devolved government in Northern Ireland. It will come into effect at midnight."[217]

After reaffirming the British Government's commitment to the Good Friday Agreement, Reid went on to make several points concerning the continuation of the peace process;

> "Firstly, the recent difficulties in Northern Ireland stem from a loss of trust on both sides of the community. In particular it is essential that concerns about the commitment to exclusive democratic and non-violent means are removed. It is also essential that each community has confidence in the commitment of the other to the Agreement."
>
> .....

[217]Statement by John Reid, on the suspension of Devolution, Hillsborough, 14 October 2002.

> Thirdly, I want to stress that this is an impasse - hopefully short lived - in one aspect of the Agreement. It isn't the whole Agreement. It isn't the whole peace process. We will continue, in co-cooperation with the parties and our colleagues in the Irish Government, to carry forward that process and the implementation of the Agreement..."[218]

On October 19, 2002, David Trimble, speaking to the UUP annual conference, accused both Reid and British Prime Minister of duplicity by suspending the government rather than excluding Sinn Fein from participation in it, noting;

> "On 24 July John Reid gave Republicans what he called the yellow card. he promised that if they were caught with their hand in the till again the Government would support the exclusion of Sinn Fein from the Executive.
>
> Which would be the just result. Not the unfair result of suspending everyone - punishing the innocent along with the guilty!

[218] *Ibid.*

Reid and Blair have not bothered to justify breaking their word. Evidently they do not seek to explain. It's just what they do."[219]

Trimble's criticism of Reid's unilateral suspension of devolved government as a remedy for Sinn Fein's alleged transgression, rather than initiating exclusion is specious at best. Section 30 of the Northern Ireland Act of 1998 clearly provides Trimble, himself, with the means of bringing about Sinn Fein's exclusion from the government, if grounds for such exclusion exist.

Section 30(2) of the Act provides;

> "If the Assembly resolves that a political party does not enjoy the confidence of the Assembly-
>
> (a)because it is not committed to non-violence and exclusively peaceful and democratic means; or
>
> (b)because it is not committed to such of its members as are or might become Ministers or junior Ministers observing the other terms of the pledge of office,
>
> members of that party shall be excluded from holding office as Ministers for a period of twelve months beginning with the date of the resolution."

Subsection 5 of this provision sets forth the requirements for such a motion being made, as follows;

> "A motion for a resolution under this section shall not be moved unless-
>
> (a) it is supported by at least 30 members of the Assembly;

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[219]Speech by David Trimble at the UUP annual conference, Londonderry, 19 October 2002.

(b)it is moved by the First Minister and the deputy First Minister acting jointly; or

(c)it is moved by the Presiding Officer in pursuance of a notice under subsection (6)."

Subsection (6) , additionally provides that;

"If the Secretary of State is of the opinion that the Assembly ought to consider-

(b) a resolution under subsection (2)(a) in relation to a political party, he shall serve a notice on the Presiding Officer requiring him to move a motion for such a resolution."

In conjunction with this, subsection (7) requires that;

In forming an opinion under subsection (6), the Secretary of State shall in particular take into account whether the Minister or junior Minister or the political party-

(a) is committed to the use now and in the future of only democratic and peaceful means to achieve his or her 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 persons.

(d) is co-operating fully with any Commission of the kind referred to in Section 7 of the Northern Ireland Arms Decommissioning Act in implementing the Decommissioning section of the Belfast Agreement."

Finally, Subsection 8 of this Section requires that;

"A resolution under this Section shall not be passed without cross-community support."

Thus, Trimble, as First Minister, had a statutory framework within which he could have sought the ouster of Sinn Fein from the government, provided that he had grounds to do so; could persuade the deputy First Minister, who was *not* a member of Sinn Fein, to join in the motion;

that the evidence was persuasive enough to draw the support of at least thirty members of the Assembly; and the case against Sinn Fein was compelling enough to draw cross-community support. Yet, he took no such action.

Similarly, the Secretary of State for Northern Ireland could have initiated the same action under 30(6)(b) of the Act, rather than invoke the Northern Ireland Act of 2000 to suspend the devolved government.

One can only surmise why neither official availed himself of this course of action.

In Trimble's case, assuming that the stated reasons for the PSNI raid, i.e. to uncover evidence of republican intelligence gathering, came within the ambit of Section 30(2)(a), " a lack of commitment to non-violence and exclusively peaceful means", then support from the deputy First Minister as well as the votes of thirty members of the Assembly on a cross-cultural basis, should not have been hard to come by. Particularly given the rivalry and antipathy that existed between the SDLP and Sinn Fein.

Of even greater interest is the question of why Trimble did not seek judicial review of Reid's invocation of the Northern Ireland Act of 2000, as a basis for suspension for the devolved government ? As noted earlier, Reid's use of this Act to declare suspensions is somewhat questionable when the text of the Act is reviewed. While Section 1 of the Act provides in pertinent part;

> "(1) While this section is in force, the Northern Ireland Assembly is suspended...."

no prefatory language is contained in the Act setting forth the situations in which the Act is authorized to be invoked. As noted earlier, the remainder of the Act merely specified those

functions which are suspended and the methods by which suspension may be ended and the effect of restoration. Moreover when juxtapositioned with the plethora of mechanisms to both sanction members and restore leadership contained in the Northern Ireland Act of 1998, a challenge to the use of this Act to suspend the government would have seemed ripe. Trimble's failure to undertake any of these options can only lead to the conclusion that he, and the unionist preferred direct rule. This conclusion is buttressed even more, in light of Trimble's history of threatening to pull his party out of the government each time they didn't get their way on an issue.

Reid's use of the Northern Ireland Act of 2000 rather than the exclusion provisions of Section 30 of the Northern Ireland Act of 1998 has a more interesting dimension to it. As noted earlier, although the Secretary of State may initiate exclusion proceedings under this section, before he may do so, he must take into account whether the political party is co-operating in a decommissioning scheme pursuant to subsection 7(d) of the Act. In forming such an opinion, Reid would have been forced to deal with the fact that the IRA was the only paramilitary group engaged in such activity with the IICD out of all the paramilitary groups. Despite Sinn Fein's denials, all of the loyalist/unionist parties and the British Government contended that the IRA was an alter ego of Sinn Fein. Thus, under that view, Reid would have to wrestle with the image of the only party to be repeatedly engaged with the IICD being expelled from the government. Suspension of the devolved government must have seemed easier.

Trimble, to his credit, did have some harsh words for the loyalist paramilitaries in his speech at the annual conference, stating;

> "We will not be satisfied with some phantom disbandment. The paramilitaries

really do have to go away. Their day is over.

But please note, I said 'paramilitaries'-plural.

This message goes out to loyalists as well. People are fed up to the back-teeth with racketeering and feuding that is disguised as loyalism.

We congratulate the Police on the raids of Friday fortnight. We also congratulate them on the recent arrests arising from loyalist violence. We hope there will now be consistent action to bring charges and obtain convictions against all racketeers."[220]

Trimble's speech revealed a unionist view which spelled trouble for the future of the peace process and the ultimate accommodation of the republican and unionist aims, when he observed;

[220] *Ibid.*

> "It is not the only mistake they make in Dublin.[221] There is an ideological blind-spot there. The doctrine of consent is widely accepted in Irish public life but its implications are not fully grasped. There is still an unwillingness to accept the depth and solidity of our community's commitment to the Union and the political and cultural implications that flow from that.....
>
> Too many people in nationalism see unionism as a problem to be got around rather than a noble tradition to be accommodated in a spirit pf genuine engagement."[222]

This observation was a prelude to Trimble's expression of how he viewed the concept of devolved government and his suspicion of the British government's intentions concerning the future of Northern Ireland.

> "Equally dangerous is the loose talk about joint authority. This is lacking in any shard of realism. Under the arrangement that we all agreed Her Majesty's Government retains sovereignty as they demonstrated by suspending the institutions yet again.

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[221]Trimble was referring to the Republic of Ireland's speculation that it could work with Peter Robinson, a member of the rival Democratic Unionist Party.

[222]Fn. 203, *Ibid*.

> Like anyone else, the Irish can put forward their ideas. The danger lies with the direct rule Ministers and the Northern Ireland Office where there are too many unreconstructed minds, dark corners where the notion of consent has not penetrated..”[223]

Clearly Trimble was expressing the unionist view that its participation in the devolved power-sharing government was, at best, grudgingly undertaken; and that it viewed the prospect of a united Ireland under a republican form of government as being non-existent.

[223] *Ibid*.

The suspension of devolved government led to the IRA issuing a statement on October 30, 2002, announcing that it would suspend its contact with the IICD.[224] In its statement, the IRA charged that it had acted unilaterally in furtherance of the peace process and cast the blame for its failure on the unionist/loyalist paramilitaries, arguing;

> "Recent events show that the leadership of unionism have set their faces against political change at this time.
>
> There is also a real threat to the peace process from the British establishment and its agencies, as well as the loyalist murder gangs.
>
> For our part, the IRA remains committed to the search for a just and lasting peace.
>
> The complete cessation of military operations announced in July 1997 remains intact.
>
> In the past the IRA leadership has acted unilaterally to save and enhance the peace process.
>
> We have also outlined how, in our view, the full implementation by the two governments of their commitments could provide a political context with the potential to remove the causes of the conflict.
>
> Despite this, the British government says the responsibility for this present crisis and its resolution lies with us and there is an effort to impose unacceptable and untenable ultimatums on the IRA.
>
> At the same time the British government by its own admission, has not kept its commitments.

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[224]Full Text of Irish Republican Party statement announcing the suspension of contact with the Independent International Commission on Decommissioning (IICD) 30 October 2002.

The IRA has therefore, suspended contact with the IICD.

The onus is on the British government and others to create confidence in the process. They can do this by honoring their obligations."[225]

[225] *Ibid*.

On February 8, 2003, Sinn Fein President Gerry Adams, in a speech to party activists in Belfast[226], responded to David Trimble, observing;

> "There is a lot of speculation about what is happening within unionism but one thing is clear Mr. Trimble's approach has not changed in the last 5 years.
>
> Over the last five years on several occasions ha has sought to have Sinn Fein expelled from the Executive. He has not been successful.
>
> But what he did succeed in doing was to get British government to act outside the terms of the Agreement and to unilaterally introduce suspension legislation. It is apparent that the British government are pursuing a strategy whereby the survival of David Trimble as leader of the UUP is more important than the survival of the Agreement itself."
>
> And Mr. Trimble has successfully exploited the willingness on the part of London. This approach has been aided by other elements of the British system who are waging war against republicans.
>
> In the almost 5 years since Good Friday 1998 the political institutions, in a clear breach of the agreement, have been functioning less than half of that time. On 4 separate occasions, at the behest of the UUP leadership, the British Government has, suspended them.
>
> Of course, Mr. Trimble has to deal with the reality of the anti-Agreement faction in his own party and the anti-agreement DUP who are electorally snapping at his heels.
>
> But for many republicans there is a serious question mark over whether Mr. Trimble is willing or able to lead Unionism in support of the Good Friday Agreement.

[226]CAIN Web Service.

What is clear is that resistance to change has created yet another crisis in the process. And four months into this crisis there is no sign so far that the British government are willing to move effectively to deal with this."[227]

Turning to the position taken by Secretary of State Reid, and the unionist parties demands for IRA decommissioning, he declared;

"Accordingly we have seen much speculation in the media about a possible move by the IRA.

Let's put all of this into some sort of perspective. In the negotiations Sinn Fein are seeking the full implementation of the Good Friday Agreement as agreed by the British governments and the unionists.

For instance there is not a new beginning to policing. And let me be clear again about this. Sinn Fein is not prepared to endorse the current policing format on SDLP terms. We seek to continue to seek the new beginning outlined in the Good Friday Agreement.

We do not have equality of human rights.

We do not have a just or fair criminal justice system. We do not have demilitarisation. People are not living free from harassment and sectarian attack. We do not have Irish language rights.

The reality as Mr. Blair acknowledges is that the agreement has not been implemented. And the political institutions are suspended. Again.

Political unionism continues to oppose changes and seek to undermine the agreement.

British securocrats continue to target republicans.

While loyalist death squads wage war on the Catholic community and each other and their actions temporarily fill our TV screens, the focus continues to be on the Irish Republican Army. Is this the climate for a significant move on the

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[227] *Ibid.*

IRA ? I hardly think so. Does anyone think there will be movement unless everyone
moves ? Unless the British government honours its obligations ?

The current crisis in the peace process is not about the IRA. Of course the existence of the IRA is an affront to its enemies. But this process is about changing all that in a way which will bring an end to all of armed groups. Can that be achieved by ganging up on republicans ? Or making movement towards the basic rights conditional on movement by the IRA ? Or by punishing Sinn Fein voters and other citizens if the IRA doesn't comply with unionist demands.

The underlying problems in the process and the current crisis is about resistance to change and the role of Sinn Fein as an engine of that change. It is about trying to delay the equality agenda. it is about the growth of republicanism across this land.

That is why the unionists are boycotting the negotiations. That is why we have the British securocrats making strenuous efforts to wreck the situation through leaking spurious stories to the media.

That is why the UUP is lobbying for a postponement of the May elections. That is why new electoral legislation was brought in to deal with the registration of voters here. This legislation has wiped tens of thousands of voters from the register. Every political party is affected by this, but the areas most affected are those where Sinn Fein is strongest. Nationalist, working class and young voters have particularly disenfranchised. This is an issue of democratic rights. Every political party should concerned about the fact that th people are being disenfranchised. It is my very firm view that the motivation behind this legislation is designed to limit Sinn Fein's growth as a political party.

The focus for us must be to thwart the efforts to prevent the process of change. We must continue to build our political strength, and to defend the Good Friday Agreement."[228]

Adams, thus, called into question Trimble and the unionists commitment to the implementation of the Good Friday Agreement and reiterated to the British authorities the republican position

[228] *Ibid.*

that decommissioning was one ingredient of the Good Friday Agreement rather than a precondition to its full implementation.

Adams repeated some of these themes at the Sinn Fein Ard Fheis[229] held on March 29, 2003.[230] In addition, he chastised the Republic of Ireland's government when he observed;

> "All of which brings us to the current difficulties. depending on your viewpoint the crisis has been caused by unionism, or by the Irish republicans or by the British government or by the Irish government or by the accumulation of factors involving or allegedly involving all of these elements. I am not going to engage in the blame game in this speech and I want to acknowledge in a very clear way that the difficulties within unionism have been severely exacerbated by the ongoing focus on alleged IRA activities. And of course, on he republican and nationalist side there is anger, frustration and annoyance because there is little focus on the ongoing activities of unionist paramilitaries or the actions of the British forces. Should we give up hope in the process ? No.
>
> But we have to face up to the reality that the British government holds the survival of David Trimble and the ascendancy of the UUP within unionism as priority objectives, This might be a fair enough tactical approach if the dynamic was not being drained out of the process; if Mr. Trimble was fighting his corner and promoting the Agreement; and if the changes for which the British government has direct responsibility were proceeding regardless. But this is not the case. And where stands the Irish government in all of this? The Good Friday Agreement is an international treaty between the Irish and British governments. They have joint co-equal responsibility for its implementation. The British government has no right to act unilaterally and it needs to be told this again and again.
>
> In particular Irish citizens, victimised and targeted by sectarian violence, have a right to expect effective political protection from the government of Dublin. And

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[229]The party's annual convention.

[230]CAIN Web Service.

> all sections of the electorate have the right to expect that the Irish government will uphold their rights in the terms of the Good Friday Agreement, instead of stepping outside the agreement to bring in sanctions."

Adams then turned to the question of whether the other parties were genuinely working honestly for full implementation of the Agreement, declaring;

> "While I believe that the majority of unionists want to embrace change it is clear that their political leaders do not want the Good Friday Agreement to be implemented. That seems to be the Ulster Unionist Party's current position. Ian Paisley has always been clear about this. It appears that the demands of unionism are insatiable. They are also not deliverable. Not unless the two governments tear up the Good Friday Agreement. Not unless people in the south allow them to do this. Not unless nationalists and republicans in the north decide to accept less than our basic entitlements. We have no intention of doing that."[231]

He then went on to point out the fact that decommissioning, up to that point, had been one-sided, stating;

> "Our strategy, and Mr. Trimble knows this, is about bringing an end to physical force republicanism, by creating an alternate way to achieve democratic and republican objective. It wasn't us who promoted the issue of arms decommissioning as a precondition on an Agreement but it was us, and others , who moved so that the IRA came to do the unthinkable. To not only work with the Independent International Commission on Decommissioning but also to put arms beyond use under its auspices at a time when unionist paramilitaries were on a killing spree, when sectarian orange marches were being forced into Catholic neighborhoods and when the British Army was remilitarisisng.

[231] *Ibid.*

It wasn't us who came up with another demand once progress on the arms issue was being made. Sinn Fein is not the IRA but we have used our influence, as every party to the Agreement is obliged to, in order to advance the objectives of the Agreement. This party is not accountable for the IRA and I will not accept that we or our electorate can be punished or sanctioned for alleged IRA behaviour but I do have to say that the IRA is serious and genuine about its support for a peace process."[232]

[232] *Ibid.*

One day later, at the same Ard Fheis, Martin McGuinness, Sinn Fein's chief negotiator, commented on the UUP's unwillingness to participate in all party talks since the suspension of devolved government,[233] noting;

> "Some weeks after the suspension of the institutions of the governments fully convened all-party talks. In advance of these talks Sinn Fein set out for all the parties our view on all the issues which needed to be addressed.
>
> These included:
>
> The political institutions and the democratic rights of all sections of the electorate. Equality and Human Rights Victims of the Conflict, The Irish Language, The use of flags and public emblems for public purposes, The issue of Demilitarisiation Policing and Justice Transfer of powers on policing and Justice Prisoners.
>
> Once it became clear that discussions would in fact deal with the broader range of issues rather than the single item agenda the UUP withdrew from these discussions."

He then turned to the issue of sanctions on parties outside of the framework of the Agreement, declaring;

> "A related matter is the issue of sanctions outside the terms of the Agreement. This has recently become a part of the story around this phase of the negotiations.
>
> So let us be clear. Sinn Fein will not be held responsible fro any words or deeds other than our own.

[233]CAIN Web Service.

> We demand for our electorate the same democratic rights, entitlements and treatment as all other sections of the electorate. We reject all sanctions outside the terms of the Agreement."[234]

McGuinness's concerns about these types of sanctions was well founded as events would prove.

[234] *Ibid*.

On April 13, 2003, The IRA issued two statements, one public, the other private, concerning recent developments in the peace process. The public statement explained that it was being made for the purpose of explaining the private, unpublished statement that was not released to the public until May 6, 2003. In its public statement the IRA announced a third act of decommissioning in which it put more arms beyond use.[235] In its private statement the IRA noted;

[235]Irish Republican Army statement on recent developments in the peace process, 13 April 2003.

> "Although the Irish Republican Army is not a party to the Good Friday Agreement, we are disappointed that the Agreement has not been implemented"[236]

Addressing the issue of further decommissioning, the statement went on;

> "The IRA leadership reiterates our commitment to resolving the issue of arms. The commitments from the two governments, including the ending of the suspension of the political institutions, and the firm pledge by the leader of the Ulster Unionist Party that he will actively support the sustained working of the political institutions and other elements of the Good Friday Agreement, enables us to do this.

[236]Text of Irish Republican Army (private) statement on recent developments in the peace process given to the British and Irish Governments 13 April 2003 [released publicly on May 6, 2003].

> We have authorised our representative to meet with the IICD [Independent International Commission on decommissioning] with a view to proceeding with the implementation of a process to put arms beyond use. This will be verified under the agreed scheme."[237]

The statement then, surprisingly, offered something of an olive branch to the unionist community,

as it continued;

> "We are Irish republicans. Our objective is a united Ireland. We are not unionists or British and no one should expect us to set aside our political objectives or our republicanism.

[237] *Ibid*.

> We do not claim to fully understand unionist perceptions. But we are prepared to listen and to learn. And we are committed to playing our part in creating the conditions in which unionists, nationalists and republicans can live together peacefully."[238]

Joint Declaration By The British And Irish Governments

April 2003

The following month, the Governments of Ireland and Britain put forth a Joint Declaration setting forth their joint views on what had been accomplished under the Good Friday Agreement as well as proposals to be accomplished under it in the future. At the outset of the Declaration, the Governments noted;

[238] *Ibid*.

"3. A key impediment to completing the evolution to such a society in Northern Ireland is that both major traditions have lacked confidence and trust in each other. A major factor in contributing to the erosion of the confidence and trust of law abiding people throughout the community has been the continuing active manifestations of paramilitarism, sectarian violence and disorder."[239]

In the section entitled "Acts of Completion", they pledged;

"5. The two Governments wish to see the devolved institutions restored as soon as possible. But devolved government in Northern Ireland can only flourish on the basis of trust between the parties. In order to re-establish that trust, it must be clear that the transition from violence to exclusively peaceful and democratic means is being brought to an unambiguous and definitive conclusion. It is also essential that each party has confidence in the commitment of the representatives of the others to the full operation and implementation of the Agreement in all respects and accords respect to each others' democratic mandate."[240]

In regard to the political institutions the British Government pledged that it would;

[239]Joint Declaration By The British And Irish Governments, April 2003, p.3, para. 3.

[240]*Ibid*., para.5.

> "...be prepared to repeal the power in the Northern Ireland Act 2000 to suspend these institutions by order."[241]

Although the Joint Declaration went on to spell out very comprehensive proposals and goals in the areas of security normalization, devolved policing, and equal rights, it was the declarations concerning paramilitarism which would receive the most immediate action and have the most significant impact on the future of the peace process. In the section dealing with "Paramilitarism", the two Governments declared;

[241] *Ibid*., para. 9.

> "We need to see an immediate, full and permanent cessation of all paramilitary activity including military attacks, training, targeting, intelligence gathering, acquisition or development of arms or weapons, other preparations for terrorist campaigns, punishment beatings and attacks and involvement in riots."[242]

On the issue of decommissioning, it urged;

[242] *Ibid*., p.5, para. 13.

> "All paramilitary groups should actively engage with the Independent International Commission on Decommissioning with a view to putting arms beyond use in a manner that is conducive to creating public confidence and all parties should, in accordance with the Agreement, use their influence to encourage and support the completion of that process. in accordance with its mandate, the Independent International Commission on Decommissioning will continue its existing functions. The two governments continue to believe that putting all arms beyond use remains an indispensable part of implementing the Agreement."[243]

In what could only be a tacit recognition of the IRA's decommissioning events with the IICD, the

Governments observed;

[243] *Ibid*., p.5, para. 14.

> "Paramilitary groups need to make it clear that they have made such a historic act of completion, and that it is reflected in reality on the ground. The Governments are aware of the strides made by some groups and acknowledge that the paramilitary ceasefires, independent arms inspections and acts of decommissioning have been important in enabling and sustaining the political process over recent years."[244]

When one reads those words, it is hard to fathom why Reid was castigating the IRA the previous May because it had not "declared the war over," particularly in light of the next observation that is made;

[244] *Ibid*., p.5, para 15.

> "The Governments believe it is essential that those paramilitary groups that have not, to date, shown a willingness to follow the route towards peace should do so now. Should these groups fail to respond positively and decide instead to pursue criminal activities, such a course will not be tolerated."[245]

Agreement Between The British And Irish Governments

April 2003

On May 1, 2003, the two Governments announced an Agreement to create a new body to monitor and report on the fulfillment of the commitments to end paramilitary activity and breaches of the obligations under the Good Friday Agreement. Although only three paragraphs long, the Agreement was significant in the aims it hoped to achieve, and in what it ultimately spawned. It's opening paragraph recounted the past, noting

[245] *Ibid*., p.6, para. 16.

> "On account of the divisive legacies of the past and the deficit of confidence between both communities, we now judge it necessary to build various safeguards and assurance mechanisms into the proposals set out in the Joint Declaration. These do not reflect a lack of confidence by the two Governments in the willingness of the various parties to meet their commitments. However, it is our judgement that, without such mechanisms , it will be impossible to generate the confidence which is required all round if we are to achieve the necessary outcomes. We accept that some of the parties will not be able to endorse these proposals, but the two governments believe that they are essential to the secure the future of the Agreement."[246]

The Agreement next spelled out the creation of the new body, declaring;

[246]Agreement Between the British And Irish Governments, April 2003.

> "A new independent body will therefore be created that will monitor and report on the carrying out of the commitments relating to the ending of the paramilitary activity and the programme of security normalisation , as set out in paragraphs 12-19 and Annex 1 of the Joint declaration. It will also have a more general responsibility to consider the claims by any party in the Assembly that another party is fundamentally in breach of requirements in the Declaration of Support or elsewhere in the Agreement. The body will have four members, two appointed by the British Government (including one from Northern Ireland) and one each by the Irish and U.S. Governments. It will carry out its activities with a view to promoting public confidence and ensuring that any serious non-compliance with these acts of completion is identified and reported. These terms of reference of this independent body are outlined in the attached annex."[247]

The Agreement then proceeded to lay out the procedures that would be followed by the body in its operation,

[247] *Ibid.*

> "The following procedures will apply. Any incidents of non-compliance by any party will, in the normal course of events, be subject to either the political exposure or where appropriate, the process of law. However, with a view to further enhance the public confidence, the Governments recognise that it will also be important to consider other appropriate responses to non-compliance in the light of any reports on breaches by the Independent Monitoring Body. In this connection, the Governments propose that if the Independent Monitoring Body concluded, following its own inquires, that there were good reasons to believe that a party or individual member of the Assembly was in breach, it would report its findings to the two Governments, making clear what action needed to be taken to remedy the breach and what measures, if any, it would be appropriate to apply. The Governments would initiate discussions in the Implementation Group to consider the action to be taken in response to the report. If the Implementation Group recommended that a motion be put before the Assembly, the Secretary of State would give notice requiring the motion to be moved. Any motion put before the Assembly following the tabling of a report would be subject to decision on a cross-community basis. Where such a motion failed to attract cross-community support, or where the Implementation group had failed to agree on a course of action, it would be a matter for the British Government in consultation with the Irish Government and the parties, to resolve the matter in a manner consistent with a report of the Independent Monitoring Body. The British Government would envisage amending the Northern Ireland Act of 1998 to enable a variety of responses appropriate to the gravity of the breach in question, including motions of censure, the withholding of allowances, temporary suspension from participation in the Agreement's institutions or, in the most serious cases, exclusion for varying periods, to be made."[248]

Annexed to the Agreement was a document entitled "Terms Of reference Of The Independent

[248] *Ibid.*

Monitoring Body, which dealt with specific functions of the proposed body.[249] The document dealt with the issues of paramilitary groups and political parties among other issues. In regard to paramilitary groups, the annex recited;

> "In relation to the remaining threat from paramilitary groups the Independent Monitoring Body would publish its findings on:
>
> any continuing paramilitary involvement in attacks on the security forces, murders, sectarian attacks, involvements in riots, and other criminal offenses;
>
> any continuing involvement of paramilitary groups in training, targeting, intelligence gathering, acquisition or development of arms or weapons and other preparations for terrorist campaigns;
>
> the extent to which any paramilitary groups still appear to be engaged in punishment beatings/attacks and exiling;
>
> their assessment of whether the leaderships of such organisations are directing such incidents or seeking to prevent them; and

[249] *Ibid*.

trends in security incidents."[250]

Insofar as political parties were concerned, the Annex provided for certain measures which could be taken where breaches of the Good Friday Agreement were alleged, as follows;

> "3. At the request of the Governments, the Independent Monitoring Body may be asked to consider claims by any party in the Assembly that another party is in breach of requirements in the Declaration of Support or elsewhere in the Agreement.
>
> 4. The Independent Monitoring Body would report to the two Governments, making recommendations as to appropriate remedies for particular breaches and what measures, if any, it would be appropriate to apply.

[250] *Ibid*. Annex. p.4, para. 1.

> 5. The Independent Monitoring Body would have acces to all the information necessary to carry out its functions, subject to appropriate conditions to ensure confidentiality."[251]

On October 21, 2003, The IICD issued a statement in which it confirmed the third act of decommissioning that the IRA had announced it would undertake in its statement on the previous April 13. In the statement, John de Chastelain described the breadth of the act of decommissioning,

> "The arms comprise light, medium and heavy ordinance and associated munitions.
>
> They include automatic weapons, ammunition, explosives and explosive material.
>
> The quantity of weapons involved was larger than the quantity put beyond use in the previous event.

[251] *Ibid.*

> I do want to make the point-and that is why we have indicated this time-that the amount of arms put beyond use was larger-I would say considerably larger-than the previous event."[252]

Fellow Commission member, Andrew D. Sens, added;

[252]Statement By The Independent International Commission On Decommissioning (IICD) 21 October 2003.

"The material put beyond use this morning could have causes death or destruction on a huge scale had it been put to use."[253]

The Northern Ireland (Monitoring Commission Etc.) Act 2003

On September 18, 2003, the British Parliament passed the Northern Ireland (Monitoring Commission etc.) Act of 2003. (hereinafter referred to as the "Northern Ireland Act of 2003")the Republic of Ireland passed a companion act on November 25, 2003.

Section One of the Northern Ireland Act of 2003 provides that the functions of the Commission include;

(a) monitoring activities of paramilitary groups,

(b) monitoring security normalisation, and

(c) reporting on claims relating to commitment to the observing of terms of the pledge of office set out in Schedule 4 of the Northern Ireland Act 1998 (c.47).

Section Two entitled "Commission's duty to avoid prejudicial effects" provides;

"(1) The monitoring commission shall not do anything in carrying out its functions which might-
(c) have a prejudicial effect on any future legal proceedings."

This section, however, limits the duty imposed under this restriction in that it recites;

"(2) The duty under subsection (1) is owed to Her Majesty's Government in the United Kingdom."

This particular provision will be examined further in this article.

The Northern Ireland Act of 2003 more significantly amended Section 30 of the Northern

[253] *Ibid.*

Ireland Act of 1998 to provide greater latitude for both the Assembly and the office of Secretary of State for Northern Ireland to be able to exclude ministers and political parties from the Assembly for conduct prohibited under Section 30 0f the 1998 Act.

Subsection one of section 30, which had previously called for exclusion from the assembly pursuant to an exclusion resolution, was amended to alter the time period for exclusion from twelve months to a period of ;

> "...not less than three months and not more than twelve months..."[254]

[254] Northern Ireland Act of 2003, Section 4, para.2.

It further added a new subsection which allowed the Assembly to extend the period of exclusion for a similar time period, provided it did so before the expiration of the initial exclusion resolution.[255] Identical time periods were set forth for the exclusion and extension of exclusion of party members from holding ministerial positions in an amendment to section 30(2) and (3) of the Northern Ireland Act of 1998.[256]

Subsection (6) and (7) of Section 30 were also amended with respect to the requirements which the Secretary of State for Northern Ireland must meet in recommending that a resolution of exclusion should be laid before the Assembly. In addition to the factors the Secretary must consider in forming such an opinion was added;

> "(c) any recommendation about steps the Assembly might consider taking which is contained in a report-
>
> (i) made by the Commission mentioned in section 1 of the Northern Ireland (Monitoring Commission etc.) Act 2003,or

[255] *Ibid*., Section 4, para. 3.

[256] *Ibid*., Section 4, para 4 and 5.

(ii)made under the Agreement establishing that Commission by members of that Commission."[257]

The Act further added new provisions to strengthen the Secretary of State's hand in the area of exclusion by granting the Secretary the authority to take the same disciplinary action authorized by the original Section 30 and its amended provisions in the event a resolution failed to attract the necessary cross-community support originally contemplated to give such a remedy legitimacy. Section 30A was added which provided that in the event a resolution to exclude either a minister, junior minister or a political party failed because it did not attract cross-community support;

[257]Ibid., Section 4, para. 7(e).

"...the Secretary of State may by direction, exclude the Minister, junior Minister concerned from holding office as a Minister or junior Minister for such period of not less than three months, and not more than twelve months..."[258]

[258]Northern Ireland Act of 2003, Section 5, para.1.

The same authority for the exclusion of political parties is set forth in new Section 30A (5)[259], and

the Secretary may extend the periods of exclusion prior to the expiration of the exclusion order in the same manner as the Assembly could where the motion passed with cross-community support.[260]

As if this authority was not sufficiently arbitrary, a new Section 30B was added to the Act entitled "Secretary of state's powers in exceptional circumstances."[261] This grant of authority allowed the Secretary of State to exclude a Minister or junior Minister until either

> "(a) a report from the Commission has been made; or
>
> (b) the Assembly has considered a resolution under section 30(1) or (2); or

[259] *Ibid*.

[260] *Ibid*., see Section 5.

[261] *Ibid*., Section 6.

(c) a period of two weeks has elapsed."[262]

The "exceptional circumstances" permitting the exercise of this authority included;

"(a) there is insufficient time for the Commission to make a report; and

[262]*Ibid*.

(b) there is insufficient time for the Assembly to consider a resolution under Sections 30(1) or (2)."[263]

[263] *Ibid*.

Exercise of the authority under this provision does require that such a direction be presented to the British Parliament in writing.[264]

In addition to the sanction of exclusion, the 2003 Act also added new sections to the 1998 legislation allowing for the reduction of remuneration of individual ministers and political parties. Action by the Assembly under new Section 47A requires that the it cannot be moved unless;

> "(a) it is supported by at least 30 members of the assembly;
>
> (b) it is moved by the First Minister and deputy First Minister acting jointly; or

[264] *Ibid*.

(c) it is moved by the presiding officer in pursuance of a notice under subsection (7).”[265]

[265]*Ibid*., 47A(6)(a), (b), (c).

Subsection 7 of this new section merely allows the Secretary of State to submit such a resolution to the Presiding Officer of the Assembly after forming an opinion, taking into account all of the criteria required for submitting a resolution for exclusion under Section 30(7) of the Act of 1998 as amended.[266] Like a resolution for exclusion, this sanction may not be invoked unless it is passed with cross-community support.[267]

A new Section 47B was also enacted as part of this Act empowering the Secretary of State to take the action of reducing the remuneration of a Minister, junior minister or political party, where it is recommended by the Independent Monitoring Commission, despite there being no cross-community support for such action.[268] This particular section applies if;

> "(a) the Monitoring commission has, or members of that commission have under the agreement establishing it, made a report containing a recommendation about steps the assembly might consider taking;
>
> (b) the taking of those steps by the assembly requires the passing of a resolution under section 47A(1),(2),(3) or (4) in relation to a Minister, junior Minister or political party, and;

[266] *Ibid*, para 7 and 8.

[267] *Ibid*., para. 9.

[268] *Ibid*., Section 47B.

> (c) the first motion for a resolution under that provision in relation to the Minister, junior Minister or political party concerned that is put to the vote after the making of the report does not attract cross-community support."[269]

Subsection 2 of this particular section provides where all three of the foregoing conditions exist, the Secretary of State may, by direction, reduce or suspend the remuneration of any Minister, Junior Minister.

Subsection 3 additionally authorizes the Secretary of State to extend the period of suspension or reduction, if, a motion to extend has failed.

Subsection 5 and 6 authorize the Secretary of State to take the same action in the same manner with respect to the remuneration of members of a political party.

[269] *Ibid*, 47B(1).

A new section, 47C, was also enacted, which provided for two related outcomes.[270] Section 47C(1) set forth the days on which the resolution for suspension or reduction of remuneration took effect, lasted and could be extended.[271] Section 47C(2) further provided that pension benefits would not accrue during any period of suspension or reduction.[272]

The Northern Ireland Act of 2003 also added a new section, 51A, to the 1998 Act which allowed the Assembly to suspend all or a portion of funding that a political party might be eligible for under the Political Parties Act (Northern Ireland) 2000 for the reasons set forth in Section 30 of the 1998 Act.[273] Like the other sanctions enacted in the 2003 Act, a motion for under this section requires the support of at least 30 members of the Assembly, must be moved jointly by the First Minister and junior First Minister or by the Presiding Officer at the instance of the Secretary of State for Northern Ireland.[274] The Secretary of State is required to consider those same factors required to be considered for an exclusion resolution in Section 30 of the 1998 Act as amended Like the other provisions, a motion under this section requires cross-community support.[275]

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[270]*Ibid*., 47C.

[271]*Ibid*. 47C(1) allowed for a period up to twelve months, and which could be extended for an additional twelve months.

[272]*Ibid*., 47C(2).

[273]*Ibid*.,Section 8 Reduction of Financial Assistance 51A.

[274]*Ibid*., 51A(5) and (6).

[275]*Ibid*., 51A(8).

A companion section, 51B was also added giving the Secretary of State for Northern Ireland the authority to impose this sanction, in the same manner as authorized by Section 30A and 47B, where the Independent Monitoring Commission has made a report containing recommendations the Assembly might consider taking and a motion to impose this sanction has not attracted cross-community support.[276] Action pursuant to this particular section would become the basis of litigation by Sinn Fein .

A new section 51C authorizing extension of this sanction until the end of the financial year but not more than 12 months was also added.[277]

The Northern Ireland Act of 2003 further contained a section authorizing the Assembly to censure the first Minister, a junior Minister or political party for the reasons set forth in Section 30 of the 1998 Act, if such resolution had the support of 30 members of the Assembly, was moved jointly by the first Minister and junior First Minister or by the Presiding Officer of the Assembly at the instance of the Secretary of State for Northern Ireland in accordance with the requirements of Section 30(7) of the 1998 Act as amended.[278]

Finally, in a new section, 95A, the Act spelled out the manner in which a direction by the Secretary of State would be implemented pursuant to Sections 30A, 47B and 51B. As noted above each of these sections empower the Secretary of State for Northern Ireland to exclude, reduce or suspend remuneration to Ministers and junior Ministers of a political party and suspend

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[276]*Ibid*., Section 8, 51B.

[277]*Ibid*., Section 51C.

[278]*Ibid*., Section 9, Censure resolutions, 51D.

or reduce payments to a political party under the Financial Assistance to Political Parties Act of 2003, where motions seeking the same have failed due to lack of cross-community support. Such action must be preceded by a direction in writing.[279] Subsection 3 of this particular Section provides that no direction shall be made unless it is first approved by both Houses of Parliament.[280] Notwithstanding this "safeguard," this provision does not apply where;

[279]*Ibid*., Section 10, Secretary of State's directions: procedure etc., 95A.

[280]*Ibid*.

"...where the secretary of State considers it expedient for the direction to be made without the approval mentioned in that subsection..."[281]

[281] *Ibid*., 95A(4)

In such a situation, the copy of the direction shall be presented to Parliament after the it has been given, and, unless it is approved within 40 days of the date of the direction, it shall no longed have effect.[282] Similarly, if either House of Parliament rejects a motion to approve the direction within the 40 days, it ceases to have effect that day.[283] In calculating the 40 days, any time period in which Parliament is dissolved, postponed, or adjourned for more than four days, is not counted.[284]

In analyzing the provisions of the Northern Ireland Act 2003, enacted by the British Parliament it is hardly coincidental that the addition of the new sanctions which could be imposed on Ministers, junior Ministers, and political parties, particularly those that could now be imposed by the Secretary of State *after* cross-community support could not be obtained, were adopted in the wake of the unionist parties attempts to exclude Sinn Fein had twice failed[285] and Sinn Fein had added seats in the Assembly, making it the largest nationalist party in Britain and Northern

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[282]*Ibid*., 95A(5) and (6)

[283]*Ibid*., 95A(7).

[284]*Ibid*., 95A(8).

[285]On September 24, 2001, Trimble and DUP leader Ian Paisley met to try and reach agreement on obtaining enough voted to bring forward a motion to exclude Sinn Fein. The UUP motion lacked three votes and the DUP motion lacked one. On October 8, 2001 both motions failed due to a lack of cross-community support CAIN Web Service, Chronology 2001, 24 September 2001.

Ireland.[286]

The Independent Monitoring of 2003

The Independent Monitoring Commission Act of 2003 passed by the Republic of Ireland, is, by comparison, extremely spare. This enactment provides for little more than the reciprocal requirements concerning nomination to, composition of, and functions of the Commission as referenced in the Agreement between the Governments of the United Kingdom and the Republic of Ireland entered into on November 25, 2003 incorporated into the legislation.[287] The Act contains a reciprocal provision concerning the duty to avoid prejudicial effect to both the United Kingdom and the Republic.[288] It further provides authorization for members of the Republic's police authority, (Garda Siochana), to disclose such information to the IMC that is necessary to the performance of its function, and prohibits any members or employees of the Commission from disclosing the same.[289] It also requires that the Minister for Justice, Equality and Law Reform shall present the Commission's reports to both Houses of the Oireachtas (Legislative body).[290]

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[286]In the general election held in Britain and Northern Ireland on June 7, 2001, Sinn Fein replaced the Social Democratic and Labor party (SDLP) as the largest nationalist party. Cain Web Service, Chronology 2001, 7 June 2001.

[287]Independent Monitoring Commission Act 2003, Section 1

[288]*Ibid*., Section 6.

[289]*Ibid.*, Section 7.

[290]*Ibid*. Section 10.

As noted earlier, membership of the Commission was spelled out in the Agreement between the two Governments in the Agreement of November 25, 2003. Article 10 of the Agreement called for the selection of four members. The agreement recited that;

> "(a) two members, one of whom shall be from Northern Ireland, shall be appointed by the Government of the united Kingdom of great Britain and Northern Ireland.;
>
> (b) one member shall be appointed by the Government of Ireland;
>
> (c) one member appointed jointly by the two Governments, who shall be a nominee of the Government of the United States of America."[291]

Perhaps nothing more starkly highlights the differences between this Commission and the Independent International Commission on Decommissioning (IIDC), their conclusions, actions and outcomes than the differing backgrounds of their respective members.

[291]Agreement between the Government of the United Kingdom and the Republic of Ireland, November 25, 2003, Article10.

It will be recalled that the IIDC, at the outset, had as its members John de Chaseltain, Tauno Niemines and Donald C. Johnson.[292] DeChaseltain, who was appointed chairman of the IIDC was a retired Chief of the Canadian defense forces, and a former Ambassador to the United States.[293] Tauno Nieminem was a retired Finnish military officer, and Donald Johnson was an American career foreign service officer.[294] Johnson resigned from the IIDC on July 2, 1999, and was replaced by Andrew D. Sens, a senior United States State Department official and a staff member of the Commission[295].

In contrast, the IMC was composed of John Alderice, a member of the British House of Lords, former Presiding Officer of the Northern Ireland Assembly and a leader of the loyalist Alliance Party;[296] Richard Kerr, a former Deputy director of the United States Central Intelligence

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[292]Mitchell, George J., Making Peace, Alfred A. Knopf, Inc. New York, New York, 1999, p114, fn.6.

[293]*Ibid*., p.27. DeChaseltain had also been a member to the forerunner organization, the International Body on Decommissioning, along with United States senator George J. Mitchell, and Harri Holkeri, former Prime Minister of Finland.

[294]See Fn. 270.

[295]Northern Ireland Office, Media Centre, statement, 25 June, 1999.www.nio.gov.uk

[296]Independent Monitoring Commission, www. independentmonitoringcommission.org and CAIN Web Service.

Agency;[297] Joe Brosnan, a former secretary General of the Department of Justice in the Republic of Ireland;[298] and John Grieve, former Assistant Commissioner in the Metropolitan Police in London.[299] Grieve's professional experience included being the Director of Intelligence for the Metropolitan Police, and in that capacity he led the MPS Intelligence project and the Anti-Terrorist Squad as National Coordinator during the 1996-1998 bombing campaigns.[300]

Clearly, while the IICD was composed of members with substantial diplomatic training; the IMC members were steeped in intelligence and policing backgrounds.

Although the IMC is charged with examining and reporting on several different subjects, this Article will focus on the reports and recommendations made under Article 4 of the Agreement between the Republic of Ireland and the United Kingdom establishing the IMC since this subject area, like decommissioning, and the Commission's recommendations, seem to have had the greatest impact on the ongoing peace process. Article 4 provides as follows;

"In relation to the remaining threat from paramilitary groups, the Commission

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[297] *Ibid*.

[298] *Ibid*.

[299] *Ibid*.

[300] *Ibid*.

shall:

(a) monitor any continuing activity by the paramilitary groups including:

i. attacks on the security forces, murders, sectarian attacks, involvement in riots, and other criminal offenses;
ii. training, targeting, intelligence gathering, acquisition in development of arms or weapons and other preparations for terrorist campaigns;
iii. punishment beatings and attacks and exiling;

(b) assess:

i. Whether the leadership of such organisations are directing such incidents or seeking to prevent them: and
ii. Trends in security incidents."[301]

Article 4 further provided for the intervals at which the reports on these activities should be submitted;

[301]Agreement between the Government of the United Kingdom of great Britain and Northern Ireland establishing the Independent Monitoring Commission 7 January 2004, Article 4.

"(c) report its findings in respect to paragraphs (a) and (b) of this article to the two Governments at six monthly intervals; and, at the joint request of the two Governments, or if the Commission sees fit to do so, produce further reports on paramilitary activity on an *ad hoc* basis."[302]

[302] *Ibid*.

In April 2004, The IMC submitted its First Report concerning the continuing activity of paramilitary groups.[303] This report dealt with the activities of paramilitary groups and spelled out their links to political parties on the "republican"[304] side as well as the "unionist/loyalist"[305] side.

[303]First report of the Independent Monitoring Commission April 2004, Section 1.1.

[304]"Republican" paramilitary groups were identified as "Continuity Irish Republican Army"(CIRA) and Republican Sinn Fein (RSF); Irish National Liberation Army (INLA) and Republican Socialist Party (RSP); Provisional Irish Republican Army (PIRA); Real Irish Republican Army (RIRA); Thirty two County Sovereignty Movement (32SCM). First Report of the Independent Monitoring Commission, April 2004, section 3 (3.2), (3.5), (3.10), and (3.15).

[305]"Loyalist/Unionist" paramilitary groups were identified as Loyalist Volunteer Force (LVF); Ulster Defense Association (UDA); Ulster Volunteer Force (UVF); and Redhand Commando (RHC), *Ibid*., Section 3((3.7), (3.20), (3.26).

It proceeded to analyze the history of paramilitary homicides in the six years following the signing of the Good Friday Agreement, reporting;

> "The number of deaths attributable to paramilitary groups declined sharply after 1998 and has not exceeded 18 in any one year. Whereas loyalists killed fewer than republicans in the year before the Belfast Agreement, since 2000 they have consistently killed more."[306]

The Commission went on to further analyze the incidence of nonlethal attacks by paramilitaries since the signing of the Agreement, noting;

[306] *Ibid*., at 4(4.3).

> However recent years, and particularly the years since the Belfast Agreement, have seen a marked increase in total paramilitary violence by both republican and loyalist groups. Loyalist violence has increased at a higher rate."[307]

Pursuant to Article 7 of the Agreement between the Governments of the United Kingdom of Great Britain and the Republic of Ireland establishing the Independent Monitoring Commission, the Commission is required it to report on any remedial measures, if any, it considers might appropriately be taken by the Northern Ireland Assembly, if it were in operation. In Section 7 of the Report the IMC alleged that;

[307] *Ibid*., at 4(4.4).

> "Two parties that would be represented in a restored Assembly have links to paramilitary groups - Sinn Fein and the Progressive Unionist Party."[308]

Addressing the alleged link between Sinn Fein and the PIRA, the Report charged;

> "It is difficult to be precise about what the relationship between Sinn Fein and the PIRA really is about or the PIRA's own decision making processes. Nevertheless on the basis of the information that we have received we believe that the situation can reasonably be summarised as follows:
>
> -some members, including some senior members of Sinn Fein, are also members, including some members of PIRA.

[308] *Ibid*., Section 7 (7.3).

-Sinn Fein, particularly through their senior members, is in a position to exercise considerable influence on PIRA's major policy decisions, even if its not in a position actually to determine what policies or operational strategies PIRA will adopt. We believe that decisions of the republican movement as a whole about these matters lie more with the leadership of PIRA than with Sinn Fein.[309]

[309] *Ibid*., at 7(7.4).

In essence, the Commission charged, Sinn Fein was an alter ego of PIRA or, at worst, one and the same. This accusation flies in the face of the history documented by the IIDC in its earlier reports in which it noted it had discussions with Sinn Fein about decommissioning, at a time when the IRA had not nominated a representative to meet with the it[310] Moreover, once the IRA had nominated a representative to work with the IICD, all of the IICD's subsequent reports documented that its decommissioning events resulted from its interaction with the IRA representative not with the representative of Sinn Fein. While Sinn Fein and the IRA had a readily acknowledged common interest in the full implementation of the Good Friday Agreement, Sinn Fein leader Gerry Adams had been clear that they and the IRA were not one and the same.[311]

Indeed, Adams has been quite explicit about this point, writing;

[310]See, Report of the Independent International Commission on decommissioning (IICD) 2 July 1999, para. 5-6, and its Report of 10 December 1999, para. 3.

[311]See, Presidential Address by Gerry Adams, Sinn Fein Ard Fheis, Dublin 29 March 2003, CAIN Web Service.

"Sinn Fein is not the IRA. The IRA has continued to make its own judgments and is protective of its right to do so. The simplistic notion that Sinn Fein represents the IRA or that we are its 'political wing' is wrong. If that were the case, it would be much easier to manage republican responsibilities and obligations to a conflict resolution process. It has never been easy. However in all my dealings with the British and Irish governments, with the United States government, and with other political parties and political representatives, I have worked in two simple rules of thumb. First, I will not deceive them about the IRA. Second, I will not deceive the IRA."[312]

[312]Adams, Gerry, *A Farther Shore, Ireland's Long Road to Peace*, Random House trade Publications, New York, N.Y. (2005), p.35.

This position has been reaffirmed by Sinn Fein's chief negotiator, Martin McGuinness.[313] Moreover, the history of the talks leading up to the Good Friday Agreement belies this accusation. While the entry of Sinn Fein into the talks was predicated on the IRA announcing a ceasefire, there was a very public split between Sinn Fein and the IRA concerning each entities acceptance of the Mitchell Principles and their requirement of a commitment to non-violence.[314] Indeed. During September ,1997 *An Phoblacht*, the Sinn Fein newspaper, published an interview with an IRA spokesman in which the IRA disputed portions of the Mitchell Principles but acknowledged that Sinn Fein was free to subscribe to them.[315] Furthermore this dichotomy was implicitly acknowledged by the various parties to the Good Friday talks on September 23, 1997 when the Ulster Unionist Party unsuccessfully moved to have Sinn Fein expelled from the talks because of the IRA's reticence to accept the Mitchell Principles.[316]

What is disturbing about this allegation by the IMC is that it is made without the slightest illumination about the either the source or nature of the information upon which it is based, other than the vague assertion of "information that we have received."[317] This technique of making damaging accusations without the slightest substantiation would foreshadow a pattern of making

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[313]See, Report on Current Negotiations, Martin McGuinness, Dublin, 30 March 2003, CAIN Web Service.

[314]CAIN Web Service, *ibid*.

[315]*Ibid*.

[316]*Ibid*.

[317]Independent Monitoring Commission, First Report, 7(7.4).

more damaging charges in future reports, leading to troubling developments for Sinn Fein and ultimately the peace process..

Having linked Sinn Fein to the IRA, the IMC went on to damn both of them with the faintest of praise, observing;

"We recognise that there might not have been a PIRA cease fire in the first place without influence from the leadership of Sinn Fein. By the same token Sinn Fein must bear its responsibility for the continuation by PIRA of illegal paramilitary activity and must recognise the implications of being in this position."[318]

Like almost all of its conclusions regarding connections between Sinn Fein and the IRA, the IMC offered no evidence to substantiate its claims[319], and in this instance ignored the historical record concerning the renewal of the IRA cease-fire. The only document offering an explanation of th IRA's impetus to renew its cease-fire in July 1997, was a statement issued by the IRA on July 19, 1997 which made no mention of Sinn Fein.[320] While this statement had been preceded the day before by appeals from Gerry Adams and Martin McGuinness, as well as a joint

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[318]*Ibid*., 7.(7.5).

[319]In Annex II to its report, the IMC, describing how it intended to go about performing its task, justified its apparent use of unattributed hearsay with the statement: "In reporting on the activities of paramilitary groups we are thus seeking the best information and intelligence possible from the maximum number of sources. We will make our assessments on th basis of that material using our best judgment. *We are not bound by the strict rules of evidence applicable in a court of law*." (emphasis added) *Ibid*., para. 18.

[320]Statement by the Irish Republican Army. 19 July 1997, CAIN Web Service, *ibid*.

statement by Adams and John Hume of the Social Democratic and Labor Party (SDLP) urging a return to the cease-fire[321], the IRA statement made no allusion of either of them. Indeed, it would seem that if one could conclude that Sinn Fein's appeal to the IRA to return to the peace process is evidence of its influence on the IRA; then the same could be said of the SDLP, which made the same appeal. Yet no similar conclusion was drawn nor sanction imposed. Thus, the accompanying finding that;

[321]CAIN Web Service, *ibid*.

> "...Sinn Fein must bear its responsibility for the continuation of illegal paramilitary activity and must recognise the implications of being in that position."[322]

should be evaluated accordingly.

What is also of considerable interest is the way in which the IMC treated the loyalist party, the Progressive Unionist Party, and its alleged links to loyalist paramilitary groups. Like Sinn Fein, the IMC, in making its evaluation apparently relied on unattributed hearsay information. In the Report, it charged;

[322]Fn. 294, *ibid*.

"While the Progressive Unionist Part is currently represented by only one person in the Assembly, the overall leadership of the party has close personal links with the leadership of the UVF and the RHC and we believe it is aware of the paramilitary activiteis of both organisations. The Progressive Unionist Party's leadership as a whole does not determine these activities and may not be in a position to ensure prevention of them, but it can exert appreciable influence. While we are satisfied that the Progressive Unionist Party and others exerted a positive influence in achieving the loyalist ceasefires we believe it has not sufficiently discharged its responsibility to exert all possible influence to prevent illegal activities on the part of the UVF and RHC."[323]

[323] *Ibid*., 7.(7.6).

Unlike the IRA, which nominated its own representative to interact with the International Independent Monitoring Commission, the Ulster Volunteer Force nominated Billy Hutchinson, a member of the Progressive Unionist Party, for the same role;[324] thus establishing a clear identifiable link between the PUP and the UVF with the former having apparently considerable authority to speak for the latter on an issue of vital importance to the viability of the paramilitary group. Notwithstanding this disparity in the respective connections between the parties and the paramilitary groups, the IMC, which found that "loyalist groups were now responsible for more violence than republican ones,"[325] declared that it would have recommended that both parties be excluded if the Assembly had been in session,[326] and went on to make a recommendation that the Secretary of State;

[324]Report of the Independent International Commission on Decommissioning (IICD), 2 July 1999, para. 5.

[325]*Ibid*., 8(8.3).

[326]*Ibid*.,8(8.5).

"...should consider taking action in respect of the salary of assembly members and/or the funding of Assembly parties so as to impose an appropriate financial measure in respect of Sinn Fein and the Progressive unionist Party."[327]

[327] *Ibid*. 8(8.6).

On April 20, 2004, Paul Murphy, the Secretary of State for Northern Ireland announced that he had accepted the IMC's recommendation and would suspend the financial assistance that both parties would receive commencing on April 28.[328] In taking this action, Murphy stated;

[328]Statement by Paul Murphy on Publication of the First Report of the Independent Monitoring Commission (IMC) 20 April 2004, CAIN Web Service, *ibid*.

> "When we debated the legislation relating to the Commission last year in this House, I made it clear that the Government believed it very important that the commission's recommendations should be given effect. And I indicated that, in circumstances where the Commission had made recommendations but action had not been taken, I would be able to use the powers of last resort granted to me by the Act to take action myself in line with such recommendations."[329]

In effectuating the recommendation, Murphy invoked the new legislation under the Northern Ireland 2003 Act declaring;

[329] *Ibid*.

"I have therefore today made an Order under the urgency procedure, amending the Northern Ireland Act 1998, as amended by the legislation we passed last year, to allow me to take this step in the absence of a sitting Assembly. It will also permit me to reduce members' salaries should I see fit to do so in light of a future IMC report."[330]

[330] *Ibid*.

Thus, the British Government, by virtue of the provisions of the 2003 Act, was able to sanction the Northern Ireland parties, without having to seek cross-community support, on the strength of a report based on unattributed, undisclosed hearsay before an unelected Commission. If the procedures reminded one of those utilized in the Diplock courts[331], it was not hard to see why.

While the IMC's next report dealt with the issue of security normalization in Northern Ireland,[332] its Third Report, again, returned to the issue of paramilitary activity.[333] In its assessment of current activities of the paramilitary groups, it reported;

[331]Single judge courts in which terrorism offenses are tried. They are presided over by anonymous judges with relaxed evidentiary rules.

[332]Independent Monitoring Commission, Second Report, 20 July 2004.

[333]Independent Monitoring Commission, Third Report, 4 November 2004.

> "PIRA has committed no murders and has engaged inn a lower level of violence than in the preceding period, committing fewer paramilitary shootings and assaults."[334]

In the same paragraph, however, it charged;

[334] *Ibid*., 3(3.10).

> "We believe it was responsible for the major theft of goods in Dunmurry in May and was engaged in significant amounts of smuggling."[335]

Again, however, no evidence was offered in support of this allegation.

In contrast, commenting on the Ulster Defense Association (UDA), the Commission observed;

[335] *Ibid.*

> "Though it has not been responsible for any murders it did undertake shootings and assaults. In August members of the UDA are believed to have undertaken a vicious attack against 3 Catholic men."[336]

Reporting on the incidence of violence and exiling among the paramilitary groups, it reported;

[336]*Ibid*., 3(3.15).

> "The six month period since our last report has seen continuing high levels of paramilitary violence. However the rate is considerably lower than before, particularly by republican groups."[337]

Almost as an afterthought, the IMC raised the issue of paramilitary groups funneling the proceeds of criminal activity to political parties. Without singling any particular paramilitary group or political party out, the report declared;

[337] *Ibid*., 4(4.4).

> "In Section 7 of this report we address the question of the leadership of paramilitary groups and of the links with the leadership of political parties. Such links have given rise to public debate on whether funds which paramilitary groups raise through crime or in other ways reach political parties, and whether there might be measures to prevent this. To date there is a dearth of empirical evidence to support allegations to this effect."[338]

Although it cited no "empirical evidence" to support this proposition, it went on in Section 7 to repeat its charges concerning the relationship between Sinn Fein and the IRA as well as the Progressive Unionist Party and UVF and RHC, utilizing its previously unsubstantiated claim with Sinn Fein as a bootstrap in making its case, noting;

[338] *Ibid*., 6(6.20).

> "In our first report we found that there were associations between the leadership of paramilitary groups and two of the parties elected to the Northern Ireland Assembly, namely Sinn Fein in respect of the PIRA and the Progressive Unionist Party in respect of the UVF and RHC."[339]

The Commission went on to note;

[339] *Ibid*.,7(7.2)

> "The circumstances and associations were not the same in each case but we concluded that neither party had sufficiently discharged its responsibility to exert all possible influence to prevent illegal activity by the paramilitary groups which they were associated. We note that had the Assembly been functioning at that time we would have recommended measures against both these parties up to and possibly including exclusion from office, and that any recommendations we might make following restoration of the Assembly would be proportionate to the then prevailing circumstances. Because the Assembly was not restored at the time of our report we recommended that the Secretary of State should consider taking action in respect of the salary of the Assembly members of these two parties and/or the funding of the parties. He decided to do the latter for a period of twelve months." report."[340]

In its Conclusions the Commission found;

[340] *Ibid.*

> "-Paramilitary violence in the form of murder, shootings and assaults has considerably reduced in the past six months but remains at a disturbingly high level. The proportionate reduction is greater on the part of republican groups. Most violence is attributable to loyalist groups."[341]

This development notwithstanding, funding to Sinn Fein remained suspended. Indeed, in its recommendations, the Commission suggested;

[341] *Ibid*., 8(8.2).

"-In considering future controls over the funding of political parties both the British and Irish governments should take into account of allegations that paramilitary groups may be able to divert illegal funds to such parties, and should ensure that appropriate steps are taken to prevent this."[342]

[342] *Ibid*., 8(8.6).

On December 20, 2004 the Northern Bank of Belfast was robbed and 2.6 million pounds was stolen.[343] On February 10, 2005 the IMC issued its fourth report which was devoted exclusively to a robbery of the Northern Bank of Belfast on December 20, 2004.[344]

In the prefatory portion of its report, the IMC opined;

[343]Independent Monitoring commission, Fourth Report, 10 February 2005.

[344]Independent Monitoring Commission, Fourth Report, 10 February 2005

> "We believe that the robbery demands a special report for a number of reasons. It was exceptionally serious. It was a high risk crime which required careful and lengthy advance planning. It involved the violent abduction of two employees of the Northern Bank and the unlawful imprisonment of their families who continue to suffer as a result. In addition there are many other secondary victims, not least other bank employees who face the fear that similar things might happen to them and their families. The question of responsibility for the robbery had a significant impact on affairs in Northern Ireland and very different views have been publicly expressed about it. Thee possible involvement of aa paramilitary group falls squarely within our remit."[345]

Like the First report, the IMC relied, again, on untested, unattributed hearsay in pinning responsibility for the robbery on the IRA. Summarizing its fact-finding process, the Commission wrote;

[345] *Ibid*., p.3, para.3.

> "We have obtained information from a variety of official and other sources in Northern Ireland and the South. As we indicated in our last report, we meet a large number of people.[346]

Turning to Sinn Fein, it observed;

[346]In a footnote, the Commission categorized the people as "political parties; government officials; police; community groups; churches; charities; pressure groups and other organisations; businesses; lawyers; journalists; academics; private citizens, individually and as families(Third report, p.10)."*ibid*.,p.4, para.4.

> "In view of the public comments of senior representatives of Sinn Fein about responsibility for the robbery, and in particular the public statements that they had received a denial of responsibility direct from members of the PIRA, we invited them to meet us and give us the benefit of their understanding. Sinn Fein have said that while they had no knowledge of who was responsible fro the robbery, they did not believe it was the IRA: that Mr. Martin McGuinness had asked the IRA if they were involved and had been assured they were not; and that they believed this denial, which has been made public in these circumstances, and in the light of their views about the IMC, they said they did not believe a meeting with us would serve a useful purpose. We have taken into account, though we regret that they have felt unable to accept out invitation."[347]

Turning to the sources of the information it was going to rely upon in accusing the IRA of the robbery, the Commission echoed its procedure in its first and Third reports, stating;

[347] *Ibid*.para.4.

"We recognise from the clarification which has emerged during the course of the investigation. We have probed the information we have received from all sources so as to satisfy ourselves that the conclusion we draw is well founded, and particullarly that there are not alternative conclusions which might be reasonably drawn from the same material. We recognise too that although at the time of completing our report the police have made no arrests there may be arrests in the future and that it is essential that nothing we say could prejudice any criminal proceedings which could ensue. We are fully aware that we are not a criminal court and have very evidential requirements."[348]

[348] *Ibid*. para.5.

With that said, and no more, the IMC accused the IRA of committing the robbery.[349]

Not content to make this accusation solely, the Commission next proceeded to accuse the IRA of three additional robberies.[350] In support of the latter accusations, it attempted to bootstrap these claims by alluding to their prior reference in the Third Report.[351] Examining these references

made in the Third Report, however, provides no further basis for these claims. At paragraph 3.10 of the Third Report, referenced in footnote 1, the Commission declared;

[349]*Ibid*., para7.

[350]*Ibid*., para. 8-11.

[351]Ibid., para 8-9, fn.1and 2.

> "We believe it [PIRA] was responsible for the major theft of goods in Dunmurry in May and was engaged in significant amounts of smuggling."[352]

In paragraph 5.7 it similarly stated;

[352]Independent Monitoring Commission, Third Report, 3(3.10)

> "We believe that members of the republican military groups were involved in recent large scale robbery and violent theft. We cannot yet make a more firm attribution."[353]

While claiming that since that report, it had

[353] *Ibid*., para. 5.7.

> "...been able to consider in depth the significant further material which had become available about some of these incidents."[354];

the Commission was not forthcoming about the nature of this "further material."

[354]Independent Monitoring Commission, Fourth Report, 10 February 2005, para. 9.

In its Section entitled "Implications for Sinn Fein"[355] the IMC restated its charges, made in its First and Third Reports, that Sinn Fein and the IRA were closely linked.[356] In this report it did not stop there, but went on to paint a much deeper involvement, charging;

[355]*Ibid*., para12-15.

[356]*Ibid*., para 13.

"...In our view Sinn Fein must bear its share of responsibility for all of the incidents. *Some of its senior members, who are also senior members of PIRA*, *were involved in sanctioning the series of robberies*. Sinn Fein cannot be regarded as committed to non-violence and exclusively peaceful and democratic means so long as its links to PIRA remain as they are and PIRA continues to be engaged in violence or other crime. Although we note Sinn Fein has said it is opposed to criminality of any kind it appears at times to have its own definition of what constitutes a crime. We do not believe the party has sufficiently discharged its responsibility to exert all possible influence to prevent illegal activities on the part of PIRA."[357]

[357] *Ibid*., para. 14. (emphasis added)

In the Recommendation portion of the Report, the Commission reviewed its recommendations made in the First report concerning the possible exclusion of Sinn Fein and the Progressive Unionist Party, had the Assembly been sitting and the financial sanctions it recommended the Secretary of State ultimately imposed on both parties.[358] Concerning its findings in the current Report and its charge that the IRA committed the bank robbery with acquiescence of Sinn Fein, the IMC declared;

[358]*Ibid*., para.18.

> "If the Northern Ireland Assembly was now sitting we would be recommending the implementation of the full range of measures listed in paragraph 12, including exclusion from office. We say this recognising that this would have implications for the running of the Executive and the Assembly."[359]

In making its recommendation of sanctions that could be imposed by the Secretary of State, the Commission observed;

[359] *Ibid*., para.20.

> "We are very aware that the imposition of financial penalties is bound to seem paltry against the background of a robbery of 26 million pounds. It has also been put to us that if the financial penalties are imposed Sinn Fein will try to benefit from that by portraying themselves as victims. Be that as it may, in light of the provisions of the legislation we have decided to recommend that the Secretary of State should consider exercising the powers he has in the absence of the Assembly to implement the measures which are presently applicable, namely the financial ones. It has also been suggested that Sinn Fein should not continue to receive public money from other sources if they are denied in the context of the Northern Ireland Assembly. However, this is outside the measures available to us to recommend."[360]

What is interesting about the IMC's Fourth Report, apart from the fact that it contained not a shred of information upon which its accusation was based, is that it was preceded by a statement by the Secretary of State for Northern Ireland making the same charge, thus making the IMC's conclusion seem virtually preordained. On January 11, 2005, the Secretary told the British Parliament;

[360] *Ibid*., para, 21.

> "As the House will be aware a major robbery took place at the Northern Bank in Belfast just before Christmas. At the end of last week the Chief Constable of Northern Ireland indicated that in his professional opinion responsibility for that robbery should be attributed to the Provisional IRA..."[361]

In the statement the Secretary revealed;

[361]Statement by Paul Murphy then Secretary of State for Northern Ireland, on the Northern Bank robbery to Parliament, House of Commons, (11 January 2005)

"The Police Service of Northern Ireland thought initially that five groups could have been responsible for the robbery. Only when a great deal of evidence had been sifted did the Chief Constable make his statement."[362]

[362] *Ibid*.

Missing from the Secretary's statement was any information or evidence tending to substantiate this charge. What was contained in the statement, however, was a signal to the Unionists in Northern Ireland that they could forebear from working with Sinn Fein to effectuate the goals of the Good Friday Agreement unless the IRA gave up "all other forms of criminality."[363] In this regard, Murphy declared;

> "But we are in no doubt that it can only be achieved if the Provisional IRA not only gives up terrorism but also all other forms of criminality in which it is implicated. Unionists in Northern Ireland have made it clear that if those tests are met, they will work with Sinn Fein in a power-sharing executive.

[363] *Ibid*.

> As my Right Honorable friend the Prime Minister has said repeatedly, it is entirely reasonable for Unionists to withhold their co-operation until those tests are met."[364]

The Secretary's position in this regard is, to say the least, remarkable, in light of the IMC's First and Third Reports. Those reveal that violence and crime by the unionist paramilitary groups consistently exceed that of republican groups and no suggestion was ever made that Sinn Fein or the Social Democratic Liberal Party (SDLP) should have refrained from participating in the Assembly.

Equally interesting is the apparent evolution of the connections claimed to exist between Sinn Fein and the IRA. As noted previously, the IMC in its First Report claimed that it was

[364] *Ibid.*

> "difficult to be precise about what the relationship between the PIRA really is or about the PIRA's own decision-making processes."[365]

No different claim was made in the Third Report issued almost three months later. Yet in this

Report, the Commission declared that senior members of Sinn Fein are also senior members of the

[365]Independent Monitoring Commission, First Report, 7(7.4)

IRA and "were involved in sanctioning the series of robberies."[366] Like its previous reports, no evidence to substantiate its claims was cited or offered.

In defense of its failure to offer any concrete proof of its claims, the IMC has repeatedly cited its obligation under Section 2 of the Northern Ireland Act 2003 and Section 6 of the Independent Monitoring Commission Act 2003 passed by the Republic of Ireland[367]. Under these provisions the IMC shall;

> "...not do anything in carrying out its functions which might

[366]Independent Monitoring Commission, Fourth Report, *ibid*., para.14.

[367]See Independent Monitoring Commission, First Report, 2(2.8); Independent Monitoring Commission, Fourth Report, para.5.

(c)have a prejudicial effect on any present or future legal proceeding."[368]

[368]Northern Ireland Act 2003, Section 2(1)(c); Independent Monitoring Commission Act 2003, Section 6(c).

While the Commission purports to honor this commitment, in reality, it does so in the breach. Putting side the obvious prejudice that would inure to anyone charged with the robbery of the Northern Bank, the Commission has repeatedly recommended sanctions up to and including expulsion from the Assembly and financial penalties to members of a political party based undisclosed information which for all practical purposes, is not open to challenge. At this writing, while some arrests for the robbery have been made, no link to either the IRA or Sinn Fein has been established.[369]

Ultimately, and not surprisingly, the Secretary of State for Northern Ireland accepted the IMC's report and recommendation. In a statement to the House of Commons on February 22, 2005, Murphy declared;

> "I came to the House on 11 January to make a statement relating to the Northern Bank robbery on 20 December...
>
> Since then a major police investigation has been under way. As the House is aware the Chief Constable of Northern Ireland has made his conclusion clear that the Provisional IRA were responsible for the robbery. The Prime Minister and I have indicated that we accept the Chief Constable's judgement which is also shared by the Irish Government and their security advisers...

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[369]See, "Police Make Bank Robbery Raids," *Irish Voice* , Vol. 19 No. 45, November 9, 2005-Nov. 15, 2005, p.3. Also, "Two Charged In Northern Raid" *Irish Echo*, Vol. LXXVII, No. 45, Nov. 9-15, p.5.

Earlier this month. On 10 February, I laid before the House a copy of a report presented to the British and Irish Governments by the Independent Monitoring Commission. That report, which the Commission had elected to produce in addition to its normal twice-yearly reports to the two Governments, concluded that the Northern Bank robbery was planned and undertaken by the Provisional IRA and that this organisation was also responsible for three other major robberies during the course of 2004.

The IMC concluded, on the basis of its own careful scrutiny, that Sinn Fein must bear its share of the responsibility for these incidents. They indicated that had the Northern Ireland Assembly been sitting, they would have recommended that the full range of measures referred to in the relevant legislation be applied to Sinn Fein, including the exclusion of its members from holding Ministerial office. In the context of suspension, they recommended that I should consider exercising the powers I have to apply financial penalties to Sinn Fein.

Mr. Speaker the House will recall that following the IMC's first report in April last year, I issued a direction removing for twelve months, the block financial assistance paid to the Assembly parties in respect to both Sinn Fein and the Progressive Unionist Party.

Having reflected on the IMC's latest report I have concluded that it would be appropriate for me to issue a further direction removing Sinn Fein's entitlement to this block financial assistance for a further twelve month period, the maximum period permitted under the legislation."[370]

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[370]Statement by Paul Murphy, then Secretary of State for Northern Ireland, about Financial Sanctions against Sinn Fein following the Fourth report of the Independent Monitoring Commission (IMC), House of Commons,(22 February 2005), CAIN Web Service, *ibid*.

After briefly addressing an ancillary motion to suspend payment to the four Sinn Fein members who refused to take the oath of allegiance to the Queen as a prerequisite to taking their seats in Parliament, Murphy returned to the import of his action;

> "...The debate on that motion is for another day, but I should emphasize to the House, lest anyone accuse us of denying Sinn Fein's electoral support, that the measures we are proposing are designed to express the disapproval of all those who are committed to purely democratic politics at the actions of the Provisional IRA. All in this House recognise the degree of support for Sinn Fein, but we also believe that the actions of the republican movement are letting down everyone in Northern Ireland, including Sinn Fein voters."[371]

In opting to impose this sanction rather than exclusion from Ministerial office, Murphy argued that it furthered inclusiveness and stability in Northern Ireland;

[371] *Ibid.*

> "...the reality remains that long-term stability in Northern Ireland will not come about if we focus on exclusion. The objective requires inclusion."[372]

That sentiment, notwithstanding, Murphy declared that if the Assembly had been in session, the

scenario might have been very different, and indeed, still could be. He observed;

> "Had the robbery occurred while the Assembly was in operation, however, the decision about exclusion would have been very different It is inconceivable, in my view, that members of Sinn Fein could again hold ministerial office while the issue of parliamentary activity and criminality on the part of the Provisional IRA remained unsolved.

[372] *Ibid*.

> The suggestion is made in some quarters that I should restore the Assembly and then, if the Assembly itself failed to take action to exclude Sinn Fein, that I should take action myself using the powers available to me to exclude them. Mr. Speaker, that would be very difficult in the absence of a clear plan which would see the parties in the Assembly come together on a cross-community basis to form a government for Northern Ireland. But as I said to the House on 11 January, I have not ruled anything in or out as we continue to assess possible ways forward for achieving greater local political accountability."[373]

This last statement is almost breathtaking in what it reveals about the British and Unionist view of the autonomy of the devolved government. That it can be suspended and restored at a whim. Despite Murphy's bromides to inclusiveness being preferred to exclusion, as a rationale for suspending block financial assistance to Sinn Fein rather than exclusion from Ministerial office; the fact of the matter was that suspension of block financial assistance to Sinn Fein was far more crippling than exclusion, if only because there was nothing to exclude Sinn Fein from, since the government had been suspended..

[373] *Ibid.*

Murphy, in the same statement, made a point continuing the suspension of block financial assistance to the Progressive Unionist Party that was imposed after the IMC's First Report along with Sinn Fein's suspension.[374] While one might assume this reflected an even handed approach to both republican and unionist parties, it is important to remember that the PUP had a demonstrably identifiable link to the UVF and LVF as reflected by their nomination of a PUP member as their representative to the IICD.[375] Moreover, unlike Sinn Fein, which had become the largest nationalist party in the Northern Ireland Assembly[376], the Progressive Unionist Party had received 0.59% of the vote and elected no members to that body.[377] Thus the penalty fell far harder on Sinn Fein than the PUP.

In The Matter Of An Application By Sinn Fein For Judicial Review

Murphy's Order came on the heels of a ruling by the High Court of Justice in Northern Ireland which rejected Sinn Fein's challenge to the suspension of its funding following the IMC's First Report, which had been adopted by the Secretary of State in accordance with the Northern Ireland Act of 2003. In a decision entitled *In The Matter Of An Application By Sinn Fein For Judicial Review*, [2005]NIQB 10, Ref: WEAC5196, Delivered:14/02/2005, Justice Weatherup rejected the challenges made by Sinn Fein. The decision is an interesting one in the way it analyzes the IMC's findings regarding both Sinn Fein and the Progressive Unionist Party, as well

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[374]*Ibid*.

[375]See, Fn. 83.

[376]CAIN Web Service, Westminster General Election results, 7 June 2001.

[377]*Ibid*.

as its determination of the Secretary of State's reliance on the IMC Report.

After setting out all of the relevant portions of the Good Friday Agreement, the Northern Ireland Acts of 1998 and 2003, as well as the Agreement between the Governments of Ireland and Britain establishing the Independent Monitoring Commission, the Justice turned to Sinn Fein's challenge to the IMC and the Secretary of State.

Among the challenges to the IMC report were that;

> "IMC activity should as far as practicable be consistent with and not obstruct the implementation of the Good Friday Agreement and the acts examined by the IMC must be acts of 'political violence'"[378]

and

[378] *In The Matter Of An Application By Sinn Fein For Judicial Review,* [2005]NIQB 10,WEAC 5196, p.7,[17].

> "The IMC could not have reasonably concluded that Sinn Fein should bear any responsibility for PIRA activity."[379]

One of the challenges brought against the Secretary of State's action was;

[379] *Ibid.*

"The Secretary of State could not reasonably have concluded that Sinn Fein was not committed to non-violence and exclusively peaceful and democratic means"[380]

and

[380] *Ibid*.

> "The Secretary of State was exercising his statutory powers for the ulterior purpose of accommodating political sensitivities which were based on expediency rather than principle."[381]

Both sides submitted evidence in affidavit form. Justice Weatherup summarized the evidence relied on by Sinn Fein in support of its challenge;

[381] *Ibid*.

> "The affidavit of Conor Murphy, a Sinn Fein member of the Assembly, in support of the application stated that Sinn Fein is a completely independent political party with its own constitution. The party has no constitutional link to the IRA. Sinn Fein is committed to non-violence and exclusively peaceful means and is committed to such of its members as might become ministers or junior ministers observing the pledge of office Sinn Fein has also endorsed the Mitchell Principles (para.13). It is stated not to be within Sinn Fein's power to bring paramilitary activity to an end, that it is committed to exclusively peaceful and democratic means and is not aware of any decision that could be construed as diluting Sinn Fein's commitment to the peace process (para 14).Reference is made to statements made in support of that position by Sinn Fein President Gerry Adams and to the British Government's recognition of Sinn Fein's commitment as recently as 28 October 2003."[382]

He next laid out the evidence put forth by the Secretary of State;

[382] *Ibid*., [18].

"Nicholas Perry, Director of Policy and security in the Northern Ireland Office, made an affidavit on behalf of the Secretary of State.. He stated that the Secretary of State gave very considerable weight to the IMC's Report and recommendations but that the government had made its own assesment; it was the Secretary's view that the IMC Report provided a firm foundation for his conclusion that Sinn Fein was not committed to non-violent and exclusively peaceful and democratic means and that he was satisfied that it was appropriate to take action in the form of making the direction made (para. 10)."[383]

[383] *Ibid*., [19].

Turning to the challenges made to the IMC, the Justice quickly disposed of the one predicated on the assertion that the Commission was limited to monitoring acts of "political violence" only. He pointed out that both the International Agreement establishing the Independent Monitoring Commission and the Joint Declaration by the Governments of Ireland and Britain incorporated language specifically referring to paramilitarism as criminality masquerading as a political cause.[384]

Ultimately, he decided that;

[384] *Ibid*.,[22].

"...given the scope of paramilitary activity that is described as the target of the International Agreement establishing the IMC, and given that the 2003 Act is making provision in connection with the establishment of the IMC, it is apparent form the scope of paramilitary activity that is to be monitored by the IMC that the sanctions against political parties are not, and were not, intended to be, limited to violence as a means of furthering political ends."[385]

[385] *Ibid*.,[26].

Turning to the issue of procedural unfairness, Sinn Fein raised the issue, which was apparent from even a cursory review of the IMC reports, the fact that it was based upon "untested and unpublished information from unidentified sources" and was based on "incorrect information."[386]

The court in resolving this issue, reasoned that;

> "It is in the nature of the IMC monitoring of continuing activity by paramilitary groups that it receives intelligence information. Section 2 of the 2003 Act imposes on the IMC a duty to avoid prejudicial effects. It is required not to do anything in carrying out its functions which might prejudice national security, put at risk the safety or life of any person or have a prejudicial effect on any present or future legal proceedings. Further by the 2003 Order the IMC is granted immunity from suit and process. That is the context of the IMC duty of procedural fairness in carrying out its statutory functions in relation to the monitoring and assessment of paramilitary groups.

[386] *Ibid*., [33].

That is also the context of such monitoring and assessment as reaches into political parties. Whether procedural fairness has been achieved will depend on the circumstances of the case. When the information provided to the IMC in the course of its monitoring and assessment is intelligence based there will be public interest concerns relating to the disclosure of the information. In that context, as in all cases, the requirements of procedural fairness will depend on the legal framework of the decision making. In the present case the applicant met the IMC in January 2004 and March 2004. At these meetings representatives of the applicant outlined their objections to the operation of the IMC as being outside the terms of the Good Friday Agreement. The opportunity was available to examine and make representations on the inquiries undertaken by the IMC. However the applicant did not avail of the opportunity but elected to voice its opposition to the operation of the IMC The procedures that would have applied if the applicant had engaged with the IMC have not been established. The applicant cannot maintain a challenge to the procedural fairness of the IMC methods of monitoring and assessment, in so far as those methods touched the applicant, when the applicant failed to avail of the opportunity to address the IMC approach. Accordingly the applicant has not established that the procedures were unfair.[387]

[387] *Ibid*., [33-34].

This rationale is confusing at best. At the outset of the analysis, Justice Weatherup seems to be saying that whatever analysis he conducts, it might not have any precedential value since the question of procedural fairness "...will depend on the circumstances of the case."[388] At the same time he appears to arrive at two separate and distinct conclusions which leaves the question raised even more unsettled. On the one hand, Sinn Fein has not made out a case for procedural unfairness on the facts presented because it failed to raise specific arguments or objections to the IMC's factual findings and instead challenged its method of operation. On the other hand, the Court seems to suggest, that had it made specific factual objections, no guiding principles for such a challenge had been formulated.

Turning to the issue of whether the IMC was justified in concluding there was a link between Sinn Fein and the IRA, the Court's reasoning became even more murky and it put an imprimatur on the IMC's conclusion that was totally vacuous. On this issue, Justice Weatherup wrote;

[388] *Ibid*.

> "... the applicant contended that it was necessary to establish some credible link between the applicant as a political party and the activities of PIRA. Accordingly it was submitted that it would have been necessary to establish that the applicant had control over those activities or their perpetrators and could have prevented them or at the very least that they condoned the activities. It was submitted that, on the contrary, Sinn Fein had restated its commitment to non-violence and exclusively peaceful and democratic means.[389]

In responding to this position, the Court restated Sinn Fein's argument about the IMC's findings, and, although already set forth previously, in the context of the conclusion the Court reaches, they are worth repeating here.

[389] *Ibid*., [37].

> "The IMC conclusions were that there were some common members and senior members of Sinn Fein and PIRA, that Sinn Fein was in a position to exercise considerable influence on PIRA's major policy decisions, that there might not have been a PIRA ceasefire in the first place without influence from the leadership of Sinn Fein and by the same token Sinn Fein must bear its responsibility for the continuation of Sinn Fein activity. The applicant contrasted the above statements with those applied to the Progressive Unionist Party and its links to the leadership of the UVF and the RHC. While being satisfied that the Progressive unionist Party had exerted a positive influence in acheiving the loyalist ceasefires the IMC stated 'we believe it had not sufficiently discharged its responsibilities to exert all possible influence to prevent illegal activities on the part of the UVF and RHC.' The IMC conclusions and recommendations indicated that political parties should not be associated with illegal activities of any kind, including that by paramilitary groups, that Sinn Fein had links with PIRA and that all politicians must exert every possible influence to bring about a cessation of paramilitary activity, which included not only public calls for such a cessation but also included encouraging individuals to take a stand personally and collectively against paramilitaries."[390]

The Justice went on to sustain the IMC's position, without expressly endorsing their view, holding;

[390] *Ibid.*

> "The conclusion reached by th IMC that Sinn Fein was not exercising available influence on PIRA is within the range of conclusions that the IMC was entitled to reach. In Judicial Review proceedings it is not for the Court to accept or reject that conclusion but rather to establish whether it is a rational decision made within the IMC remit and taking account of relevant considerations and leaving out of account irrelevant considerations. It has not been established that there is any such grounds for setting aside the conclusion."[391]

The court then went on to express, what can only be called, a very curious view of the IMC's conclusion, observing;

[391] *Ibid*., [39].

> "The IMC finding against the applicant concerns a failure of the leadership to exercise sufficient influence over PIRA. It is not a finding that the applicant is controlling events or is actively encouraging the activity or that it has the power to stop the activities but that it has not exerted the influence that the IMC believes it has. This is not inconsistent with the finding that it did exercise considerable influence on a previous occasion. The applicant has not established any of the stated grounds for Judicial Review of the approach of the IMC."[392]

It goes without saying, that this view of the IMC's rationale and the endorsement of its power to levy sanctions predicated upon it, could lead to some very strange inquiries Query; What exactly is "sufficient influence" ? Is Sinn Fein being punished because it had previously exercised some influence to persuade the IRA to enter a ceasefire ? If Sinn Fein's influence on the IRA to enter a ceasefire had come up short, could it have been similarly sanctioned for any paramilitary activity the IRA might have engaged in because of its lack of influence?

If the Court was disinclined to second-guess the IMC in its findings, it also gave the green light to the Secretary of State for Northern Ireland to do so too. Ruling on the challenge to the Secretary it held;

[392] *Ibid*., [40].

> "The IMC Report was the basis on which the Secretary of State was satisfied that the applicant was not committed to exclusively peaceful and democratic means required positive action to further those goals and that positive influence was possible and had not ben exercised. The applicant contended that the Secretary had taken a quantum leap from a finding of the exercise of insufficient influence to being satisfied there was not a commitment to non violence. The Secretary's conclusion that an absence of exercise of available influence amounted to a lack of the necessary commitment was one that the Secretary was entitled to reach."[393]

Thus, at the end of the day, the Court held that the IMC could predicate its findings on untested, unattributed hearsay evidence and recommend the imposition of sanctions. That the Court would not second guess the Commission in making such findings and recommendations. Further that the Secretary of State could rely upon such findings and recommendations in imposing such sanctions, utilizing the streamline procedural mechanisms provided in the Northern Ireland Act of 2003, with out regard to the lack of cross-community support. It would be hard to draw any conclusion other than that such a state of affairs was likely to impede the advance of reconciliation rather than further it.

[393] *Ibid*., [43].

On May 24, 2005, the IMC submitted its Fifth Report[394] to the Governments of the United Kingdom and the Republic of Ireland. This report contained an assessment of paramilitary activity, as well as the murder of Robert McCartney.[395] At the outset of the report the IMC trumpeted the fact that it had prevailed over Sinn Fein in the Party's judicial challenge to the suspension of block financial assistance following its first report.[396]

In its review of paramilitary activities concerning the IRA, the IMC renewed its charge that the group was responsible for the robbery of the Northern Bank in Belfast and added a new accusation that;

[394]Independent Monitoring Commission, Fifth Report, 24 May 2005.

[395]*Ibid*.

[396]*Ibid*., 1(1.7).

> "It was also responsible for an arson attack against a fuel depot in early September."[397]

Once again, neither charge was made with any amplification or substantiating evidence. It next turned to certain language utilized by the British and Irish Governments the previous December when they floated a proposal for a comprehensive political agreement to get the peace process back on track, noting;

[397] *Ibid*., 2(2.10).

> "In view of the attention it has attracted there is one other matter to which we wish to refer. The proposals for a comprehensive political agreement in Northern Ireland which the British and Irish governments published on 8 December last year we spoke of an 'immediate full and permanent cessation of all paramilitary activity by the IRA' (i.e.PIRA). With it was the draft of a statement which the two governments had hoped that PIRA would put out in the event of a successful conclusion of the talks. The draft statement referred to the need not to endanger anyone's personal rights or safety and to all PIRA volunteers being instructed not to engage in any activity which might endanger th new agreement. The statement which the PIRA actually put out following the failure to achieve an agreement contained the last phrase, but not the reference to ensuring the rights and safety of everybody. Two things are clear from what we say in this report and from our account of the activities of PIRA in our ad hoc report. First, there have continued to be occasions before and since early December 2004 when the rights and safety of others have been disregarded.. Second, the manifest abuse of safety and rights which the abductions and robbery at the Northern Bank involved were being planned long before the December announcements; we are unable to say whether they would have been called off had there been a political agreement."[398]

It then went on to conclude;

[398] *Ibid*., 2(2.12).

> " We believe that PIRA is at present determined to maintain its effectiveness , both in terms of organised crime, control in republican areas, and the potential for terrorism. We have no present evidence that it intends to resume a campaign of violence despite the political collapse of political talks in December 2004, but its capacity remains should that become the intention."[399]

Turning to the Ulster Defence Association, the loyalist paramilitary group, the Commission observed;

[399] *Ibid*., 2(2.13).

> "In November last year the Secretary of State announced the de-specification of the UDA following the statement that it would desist from 'all military activity', focus on social and economic issues within the community, and work with the British Government towards an end to all paramilitary activity."[400]

Notwithstanding the UDA's promises, the Commission charged;

> "In September and October 2004 the UDA were involved in both violence and targeting. Members of the UDA shot Darren Thompson on 29 September 2004 (he died on 1 October). On 19 September 2004 UDA members, with the approval of the local leadership, attacked Stephen Nelson who died on 18 March 2005. As part of the dispute with the LVF in Belfast they were responsible for an arson attack in late October. At the end of November 7 UDA and an eight associate were arrested before being able to commit an abduction and armed robbery, which known to the North Belfast leadership of the organisation. More recently, they have engaged in a targeting in anticipation of a possible dispute halt the LVF following the release of Johnny Adair from prison in January 2005, and have monitored the dissident republicans with a view to mounting attacks if they themselves are attacked. In January 2005 UDA members forced two families from their homes. We have found nothing to suggest that the UDA have agreed to the return to Northern Ireland of the people it has exiled or that it is considering doing so. The organisation was, we believe , responsible for shootings and assaults. It remains involved in organised crime, and members were responsible for two robberies in February 2005.

[400] *Ibid*., 2(2.17).

We have always recognised that transition may be a messy and difficult process for aa paramilitary group. To date it is not clear if the UDA will achieve the transition it pointed to in the statement of November 2004. Certainly the process is still very far from complete, and the fact remains that during the period under review it was responsible for two murders."[401]

[401] *Ibid*., 2(2.18-2.19).

Perhaps there is no better example of the uneven-handed approach on the part of the IMC and the British authorities in there dealings with republican and loyalist parties and paramilitaries than is demonstrated here. On September 28, 2001 the Secretary of State for Northern Ireland, John Reid, announced that he was prepared to specify the Ulster Defence Association (UDA) and declare their ceasefire over, for engaging in paramilitary violence.[402] Reid declared that his intention had been to specify the UDA at that time but;

[402]Statement by Secretary of State for Northern Ireland, John Reid at Hillsborough, 28 September 2001.

> "...in the course of the briefing received within the last two hours it was communicated to me that the leadership of the UDA has accepted the damage their violence is doing and decided to bring it to a halt."[403]

Two weeks later, on October 12, 2001, Reid made good on his threat, announcing;

> " The UDA and UFF have undoubtedly been responsible for recent attacks, notably in Belfast last night,. I have warned them in stringent terms on 28 September that any further violence would cause me to specify them without further warning.

[403] *Ibid.*

> I have also assessed the actions of the LVF over the recent period taking into account of the murder of Martin O'Hagan two weeks ago, and have concluded that they no longer maintain a ceasefire."[404]

Spelling out the implications of what specification meant, Reid went on;

[404]Statement by Secretary of State for Northern Ireland, John Reid, Hillsborough, 12 October 2001.

" The attacks by these organisations are incompatible with any claims to be on ceasefire. Society cannot tolerate these actions. The result is that early released prisoners associated with the UDA, UFF, and LVF can now have their licences suspended and be returned to jail if they are believed to continue to support the organisation; the provisions now embodied in the Terrorism Act 2000 relating to charges of membership introduced originally after the Omagh bombing in 1998 will also apply to all three organisations; and any UDA, UFF or LVF person found guilty of a scheduled offence that took place before the Good Friday Agreement cannot qualify for early release provisions."[405]

[405] *Ibid.*

As noted previously, the IMC in its First and Third Reports had found that loyalist/unionist paramilitary violence was consistently twice the level of republican groups.Nevertheless, on November 15, 2004, Secretary of State for Northern Ireland, Paul Murphy went ahead and announced that he would despecify the UDA and the UVF.[406] In making his announcement, Murphy was cognizant of the IMC findings, as he noted;

[406]Statement by secretary of State for Northern Ireland, Paul Murphy, House of Commons, 15 November 2004.

> "I appreciate that some may question that decision in light of negative comments in recent IMC reports. I have carefully studied both relevant IMC reports and support the strong language directed against a range of paramilitary organisations. But it is clear between the first and second relevant reports, that there has been a reduction of UDA activity. Other material provided to me would endorse that view. [407]

Despite the Commission's documentation of murder, arson, and planned attacks on republicans, no recommendation was made about imposing any sanctions on the group, nor was any levied by the Secretary of State in the period following the report. While unsubstantiated criminal activity by the IRA could lead to sanctions being imposed on Sinn Fein, paramilitary violence on the part of the UDA was viewed as just being "messy."

The Fifth report contained two further subjects that are worth commenting on. The first was the Murder of Robert McCartney and the second was the comparative difference of paramilitary violence by republican and loyalist groups, as well as the recidivism rates of prisoners of both sides released pursuant to the Good Friday Agreement.

[407] *Ibid.*

Robert McCartney was murdered outside a pub in Belfast on January 20, 2005.[408] While the Commission found that;

[408]Independent Monitoring Commission, Fifth Report, 4(4.2).

"...members of PIRA were involved in the murder. We do not believe that the central PIRA leadership sanctioned it in advance, but those concerned may have believed they were acting at the direction of a local senior PIRA member at the scene."[409]

[409] *Ibid.*

The report goes on to recount the sometimes conflicting directives given by the IRA to its members concerning cooperation with the investigating authorities, as well as statements made by Sinn Fein also encouraging cooperation.[410]

What is curious about the IMC's discussion of this incident is that the McCartney murder was a non-sectarian killing of a fellow Catholic from a republican family during a an altercation in a pub. No claim was ever made that McCartney was killed for sectarian purposes.

Like the findings concerning the incidence of paramilitary violence in the First and Third reports, the Fifth Report summarized the incidence of republican and loyalist paramilitary violence, noting that;

[410]*Ibid*., 4(4.3- 4.5).

> "Loyalists continue to commit more violence than republicans: over four times as many shooting victims and 25% more victims of assault.[411]

It did note that despite this disparity, loyalist violence appeared to be declining at a greater rate

[411] *Ibid*., 3(3.10).

than republican in comparison to the corresponding period in 2003-2004.[412]

As noted before, the report also contained section devoted to the recidivist activities of prisoners released pursuant to the Good Friday Agreement.[413] This was the first such analysis and covered the entire period under the Agreement through September 2004.[414] The analysis concerned 430 prisoners released, who had documentable paramilitary links prior to imprisonment.[415] Almost half, 49%, were IRA members, 24% were UDA/UFF members, 16% were UVF/RHC members, 7% were INLA members, and 4% were LVF members.[416] The IMC reported that;

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[412]*Ibid*.

[413]*Ibid*., section 5.

[414]*Ibid*., 5(5.3).

[415]*Ibid*., 5(5.4).

[416]*Ibid*., 5(5.5).

> "In the period until September 2004, some 3% of the prisoners released in Northern Ireland had been convicted or were being prosecuted for paramilitary type offences and 11% for non-paramilitary offences, making a total of 14%."[417]

In terms of specific group members if found;

[417]Ibid., 5(5.7).

> "...the two republican groups have the lowest percentage of released members convicted or with a prosecution pending. The LVF had by far the highest percentage for paramilitary offences and the UVF/RHC th highest for non-paramilitary offences..."[418]

Despite the more positive overall conduct of the republican paramilitary groups in contrast to the unionist/loyalist groups in the areas of paramilitary violence, the IMC and British authorities chose to sanction the republicans and defer any criticism of the unionists, except for the Progressive Unionist Party upon whom it imposed a meaningless penalty of suspending block financial assistance when it had no elected members.

[418] *Ibid.*

On July 28, 2005, the IRA issued a statement announcing the end of its armed campaign.[419] In the Statement the group declared;

> "All IRA units have been ordered to dump arms.
>
> All volunteers have been instructed to assist in the development of purely political and democratic programmes through exclusively peaceful means
>
> Volunteers must not engage in any other activities whatsoever.
>
> The IRA leadership has also authorised our representative to engage with the IICD [Independent International Commission on Decommissioning] to complete the process to verifiably put its arms beyond use in a way which will further enhance public confidence and to conclude this as soon as possible.

[419] Irish Republican Army Statement, 28 July 2005.

We have invited two witnesses from the Protestant and Catholic churches, to testify to this."[420]

[420]*Ibid*.

Reaction to the announcement was immediate and generally favorable. The Secretary of State for Northern Ireland, Peter Hain, in a letter to Parliament lauded the announcement and called upon the IMC and the IICD to monitor and confirm the decommissioning.[421] These sentiments were echoed by the Irish Prime Minister, Bertie Ahern and Tony Blair, the British Prime Minister on that same date.[422] Gerry Adams, President of Sinn Fein, also issued a Statement that day, laying out what the development meant to the republican community.[423] In it he declared;

> "Today's IRA initiative also presents challenges for others.
>
> In my April appeal I made the point that commitments, including commitments from the two governments were reneged in the past. History will not be kind to any government which plays politics with today's developments.
>
> In particular this means an end to the pandering to those unionists who are rejectionist....

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[421]Text of Letter from Peter Hain to members of Parliament, 28 July 2005, CAIN Web Service, *ibid*.

[422]Joint Satement by Taoiseach, Bertie Ahern and British Prime Minister, Tony Blair, on 28 July 2005, CAIN Web Service.

[423]Statement by Gerry Adams, President of Sinn Fein, 28 July 2005, CAIN Web Service.

> It means the unionists who are for the Good Friday Agreement must end their ambivalence. And it is a direct challenge to the DUP to decide if they want to put the past behind them, and make peace with the rest of this island.
>
> Today's IRA statement can help revive the peace process; it deals with genuine unionist concerns and removes from the leadership of unionism its excuse for non-engagement."[424]

Adams's olive branch to the Democratic Unionist Party was rejected by its leader, Ian Paisley, who issued a statement in which he declared;

[424] *Ibid*.

"The history of the past decade in Northern Ireland is littered with IRA statements which we were told were 'historic,' 'ground-breaking', and 'seismic'. These same statements were followed by the IRA reverting to type and carrying out more of its horrific murders and squalid criminality. The unionist community feels no obligation to cheer the words of P.O'Neill.[425] We will judge the IRA's bonafides over the next months and years based on its behavior and activity.

Even on the face of the statement, they have failed to explicitly declare an end to their multi-million pound criminal activity and have failed to provide the level of transparency that would be necessary to truly build confidence that the guns had gone in their entirety. This lack of transparency will prolong the period the community will need to make its assessment.

We treat with contemp their attempt to glorify and justify their murder campaign and we will be evaluating the extent of the price paid by the Government and the consequences that will have for the political process."[426]

[425]A pseudonym under whose name all IRA statements are issued.

[426]Statement by Ian Paisley, CAIN Web Service.

In September 2005, the IMC issued an ad hoc report to the British and Irish Governments on the subject of a violent feud between two loyalist groups, the Ulster Volunteer Force (UVF) and the Loyalist Volunteeer Force (LVF).[427]

In describing the background of the UVF the Commission noted;

[427]Independent Monitoring Commission, Sixth Report, September 2005, para. 1.

> "We drew attention in our report published in November 2004 to the fact that the UVF leaders had restated their commitment to the loyalist ceasefire of 1994. The Combined Loyalist Military Command ceasefire statement expressed 'abject and true remorse' for the victims of the previous twenty years. Nevertheless the UVF has not decommissioned weapons, has suspended contact with the IICD and in the past two years has been involved in murders, shootings, assaults and in organised and other crime."[428]

In describing the LVF it noted that it;

[428] *Ibid*., para.5.

> "...declared a ceasefire in 1998 and handed over some weapons to the International Independent International Commission on Decommissioning but despite this has been involved in murders, shootings, assaults and other crimes since that time."[429]

What is interesting about these two observations is that it is the first time that the IMC has cited any paramilitary group's history of interaction with the IICD as a factor which is significant in the group's history. Clearly the IMC considered the LVF's act of decommissioning with the IICD as a positive aspect of that group's history, and the UVF's failure to engage in decommissioning as a negative part of the UVF 's history. Yet, in all of its allegations about the IRA, it never apparently considered that group's repeated acts of decommissioning with the IICD as a consideration that should be weighed in determining its commitment to non-violence and the peace process as it weighed whether to impose sanctions on Sinn Fein.

In arriving at its conclusions about the leadership of the LVF and the vicarious responsibility of the Progressive Unionist Party, the IMC declared;

[429] *Ibid*., para.6.

> "We have noted the comments of Mr. Ervine of the PUP in response to the announcement of the Secretary's intention. He said that neither he nor other PUP leaders were in leadership positions of the UVF and that they had not broken any law. He argued that it was contrary to natural justice to punish people who were not responsible for what the paramilitaries did and he subsequently made representations to the Secretary of State."[430]

Responding this argument, the IMC stated;

> We are aware of the view that the PUP is not strong enough to influence the UVF – in effect that it is the UVF rather than the PUP which leads. But two facts remain. First, the PUP is a political party represented at both Assembly and local government levels, and in the case of the latter it stood in the May 2005 elections. Second, it is associated with the UVF. No democratic political party can expect to have it both ways. It can either disassociate itself from the paramilitary group, or it must accept the consequences of its association. The circumstances of the current feud make that all the more important."

[430] *Ibid*., para 22.

We believe that there is still an association between he PUP and the UVF. We think now, as we have before, that the PUP has not done all that could be done to prevent paramilitary activity and has not credibly voiced or exerted its opposition to paramilitaries, and the UVF in particular. The events we describe in this report reinforce the conclusions we reached in our last report, namely that removal of block financial assistance from the PUP in the Northern Ireland Assembly for twelve months should be renewed."[431]

[431] *Ibid*., para. 23-4.

In the days following the issuance of this report, Belfast and other loyalist towns and villages were the scene of some of the worst rioting and sectarian violence by loyalist groups and paramilitaries in nearly a decade.[432] Chief Constable, Sir Hugh Orde, of the Police Service of Northern Ireland (PSNI) charged that both the UVF and LVF were involved in the clashes along with the Orange Order, who were angered by re-routing of a parade to avoid a Catholic enclave.[433] The rioting was preceded by comments by Ulster Unionist Party Leader, Reg Empey, and Democratic Unionist Party leader, Ian Paisley, who said that;

[432]"Loyalist Rioting Erupts in Belfast", *Irish Voice*, Vol. 19, No.37, September 14-20, 2005, p.3.

[433]*Ibid*.

"The issue could be the spark which kindles a fire there would be no putting out."[434]

[434] *Ibid*.

Officials in the aftermath of the rioting pointed to the comments of both Empey and Paisley as the catalyst for the violence and disorder that ensued.[435]

On September 26, the International Independent Commission on Decommissioning (IICD) announced that the IRA had put all of its arms beyond use.[436] In its announcement, the IICD made it clear that based upon what it had learned during the previous decommissioning events, the estimates provided by "security forces in both jurisdictions, and the number of arms decommissioned, it believes that the IRA had put the "totality of its arms" beyond use.[437] In concluding its report, the Commission declared;

" 7. In summary, we have determined that the IRA has met its commitment to put all its arms beyond use in a manner called for by the legislation.

8. It remains for us to address the arms of the loyalist paramilitary organizations, when these are prepared to cooperate with us in doing so."[438]

This report was accompanied by a statement from two clergymen, one Catholic and the other Protestant, who witnessed the decommissioning event.[439] In a press conference that same day, in

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[435]"Reiss Says Loyalists Lack Leadership," *Irish Voice*, *ibid*.

[436] Independent International Commission on Decommissioning (IICD) Report, 26 September 2005

[437]*Ibid*.

[438]*Ibid*.

[439]Joint Statement by the Eyewitnesses, Reverend Harold Good and Father Alec Reid, on the Decommissioning of IRA Weapons, (26 September 2005), CAIN Web Service, *ibid*.

response to a question about when loyalist decommissioning might take place, John DeChaseltain said;

> "With regard to the loyalists, I don't know. We worked with the loyalists in the early years of this process, with the UVF right from the start. They [UVF and the UDA] have both since broken off contact with us. Indeed, it has been a number of years since we talked with the UVF.
>
> More recently, the Ulster Political Research Group (UPRG) has talked to us on behalf of the UDA to try and open some dialogue, but not in terms of talking about decommissioning."[440]

As expected, the announcement by the IICD was greeted with praise by politicians in the Republic and the United Kingdom who sought to take credit for the development. In a joint statement, Berie Ahern, the Taoisech (Irish Prime Minister) and British Prime Minister, Tony Blair, stated;

[440]Transcript of Press Conference given by the Independent International Commission on Decommissioning (IICD), 26 September 2005, CAIN Web Service, *ibid*.

> "We welcome this landmark development. Having sought to achieve this outcome for so many years, its significance now needs to bee acknowledged and recognised."[441]

In a separate statement that same day, Ahern was even more self-effusive, stating;

[441]Joint Statement by Bertie Ahern and Tony Blair on the Decommissioning of IRA weapons, 26 September 2005, CAIN Web Service, *ibid*.

> " I have worked unstintingly for this outcome for the past seven years to fulfill the mandate that the people gave me in that referendum, to secure a permanent peace on this island. In spite of the many setbacks and disappointments, I have continued to pursue that goal because, as a Constitutional Republican, I was convinced that it was the only way to achieve a final resolution of the Northern conflict."[442]

Oddly enough, the only politician who seemed to recognize where the credit for this move belonged was Ian Paisley, the leader of the Democratic Unionist Party, who denounced the witnesses, the IICD, the IRA, and Sinn Fein. In his statement, Paisley declared;

> "This afternoon the people of Northern Ireland have watched a program which illustrates more than ever the duplicity and dishonesty of the two Governments and the IRA. Instead of openness there was the cunning tactics of cover-up and a complete failure from General John de Chaseltain to deal with the numerics of decommissioning...
>
> The witnesses could only testify that the General was correct in his report and the General had already declared that his report was based on IRA assurances. The witnesses were clearly under the control of the General and they were not given any further opportunity to comment during the press conference. In fact they had no extra detail to add to the proceedings.
>
> It must be clearly stated that both witnesses were approved by the IRA and therefore were accepted by the IRA and in no way could be independent.

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[442]Statement by Bertie Ahern on the Decommissioning of IRA Weapons, 26 September 2005, CAIN Web Service, *ibid.*

> ...The people of Ulster are not going to be forced by IRA/Sinn Fein or by the two Governments along the pathway of deceitfulness and treachery. The hidden things of darkness are surely coming to light when the extent of the shameful betrayal of truth will be uncovered. Ulster is not for sale and will not be sold."[443]

In his statement lauding the IRA decommissioning, Sinn Fein President, Gerry Adams, alluded to the loyalist violence that had recently swept Northern Ireland and suggested that it had a darker motive than mere outrage at the re-routing of the Orange Order Parade, observing;

[443]Statement by Ian Paisley, Leader of the Democratic Unionist Party (DUP) on the Decommissioning of IRA Weapons 26 September 2005, CAIN Web service, *ibid*.

"The words of some in the past have fueled sectarian violence against Catholics and this has been a particularly difficult summer. There were serious attempts to provoke a reaction from nationalists and republicans. There may well be other attempts in the time ahead so I call upon people to show the calm and discipline that was evident over the summer months and particularly in recent times."[444]

[444]Speech by Gerry Adams About the IRA's decision to Put its Arms Beyond Use., (26 September 2005), CAIN Web Service, *ibid*.

In the aftermath of the IRA's decommissioning there were calls for the loyalist paramilitaries to decommission also,[445] however, no credit or recognition was given to Sinn Fein had made

[445]See, e.g., Joint Statement of Bertie Ahern and Tony Blair, *ibid.*; Statement by Reg Empey, Leader of the Ulster Unionist Party (UUP), on IRA Decommissioning of Weapons, 26 September 2005; Statement by Mark Durkan, Leader of the Social Democratic and Labour Party (SDLP) on the Decommissioning of IRA Weapons, 26 September 2005; and Speech by Dermot Ahern, Minister of Foreign Affairs, Republic of Ireland, to the Dail on Recent Developments in the Peace Process, 28 September 2005, CAIN Web Service, *ibid*.

repeated calls for the IRA to take such action.[446]

On October 19, 2005, the IMC issued its Seventh Report, and the last at this writing.[447] It was the first report since the IRA's July 28, 2005 statement that it would end its armed campaign and authorizing the IICD to verify that its arms had been put beyond use, and the IICD report of September 26 that they had been put beyond use.

At the outset of its report the IMC took note of these developments and quoted from the IRA statement of July 28 which directed that;

> "All volunteers have been instructed to assist the development of purely political and democratic programmes through exclusively peaceful means...

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[446]Statement by Gerry Adams, President of Sinn Fein, calling on the IRA to End the 'Armed Struggle', Belfast, 6 April 2005; Speech by Gerry Adams to the Derry Chamber of Commerce, 11 April 2005; Statement by Gerry Adams on Confirmation From the IRA Leadership That A Discussion About the April 6 Initiative Had Been Authorized By The IRA, 26 April 2005, CAIN Web Service, *ibid*.

[447]Independent Monitoring Commission, Seventh Report, 19 October 2005.

Volunteers must not engage in any other activities whatsoever."[448]

The IMC interpreted these words to mean;

[448]*Ibid*., 2(2.2).

"...that members of PIRA have been instructed to give up all forms of criminal activity whatsoever."[449]

[449] *Ibid*.

After reviewing the paramilitary activities of the republican splinter groups[450], and the LVF,[451] it

turned to the IRA. Among the assessments it made with respect to the them, it noted;

[450]*Ibid*.,3(3.2)-3(3.9).

[451]*Ibid*., 3(3.10-3(3.12).

> "We believe that PIRA generally wanted the summer's marching season to pass without civil disorder incited by republicans and that it sought to prevent rioting by nationalists. PIRA did organise protests at this time which led to some disorder, and as in the past years made preparations for weapons to be available should nationalist communities need to defend themselves from loyalist attacks."[452]

Despite the IRA's fulfillment of its announced intention to decommission, the IMC declared;

[452] *Ibid*., 3(3.16).

> "In conclusion, on PIRA we emphasise again that as the PIRA statement of 28 July came at a point when 5/6 ths of the period under review had already elapsed it is too early to be drawing firm conclusions about possible overall changes in behaviour, although we do note some indications of changes in PIRA's structures. Clearly we are looking for cumulative indications of changes in behaviour over a more sustained period of time, building on the PIRA statement of 28 July and the decommissioning of weapons by the IICD on 26 September."[453]

In assessing the Ulster Defense Association, which had been involved in the rioting in Belfast and other parts of Northern Ireland the month before, as the IMC indicated it was well aware of this conduct as it summarized;

[453]Ibid., 3(3.18).

> "Although the rioting in September 2005, which was extremely violent falls outside the period under review in this report a number of things are already clear. It involved such serious violence that we feel compelled to comment. We believe that both the UDA and the UVF were involved in the planning and execution. Over 100 shots including high velocity rounds, were fired at the police and army and some 150 blast bombs were used. There were numerous injuries to members of the police and the Army. The ostensible cause of the rioting was the anger on the part of the Orange Order and its supporters about the rerouting and postponement of the march. But it is clear that the rioting was spontaneous community disorder; it was planned, and individual members of the Orange Order were involved, some wearing their regalia. When the Orange Order or any organisation brings people on to the streets it bears some responsibility for the consequences, including the attacks on the police."[454]

Nevertheless it had this to say about the conduct;

[454] *Ibid*. 4(4.13).

> "...Some of the UDA activities of the UDA described above raise questions about the status of the UDA ceasefire. We will address this more fully in our next report."[455]

In contrast turning to the issue of leadership of the IRA and Sinn Fein, the IMC had this to say;

[455] *Ibid*., 3(2.26).

> "We have said earlier in this report that five of the sixths months under review precede the PIRA statement and that it is therefore too early for us on this occasion to be drawing firm conclusions about possible changes to the organisation's over all behaviour. Although the initial signs are encouraging we do not therefore make any comment at this stage on the recommendation we previously made about the financial support Sinn Fein receives in the Northern Assembly. Nor do we pursue the point we then made separately about whether it should receive public money from other sources."[456]

And on the issue of the suspension of block assistance to the Progressive Unionist Party, the IMC

declared;

[456] *Ibid*., 6(6.4).

"...up to the time of presentation of this report we have not seen evidence which presently causes us to change our previous recommendation on the removal of financial support for the party in the Northern Assembly."[457]

[457] *Ibid*. 6(6.6).

While this sanction appeared somewhat toothless in light of the fact that the PUP had elected no members during the last Assembly elections, following the Commission's report, there were revelations which made it appear totally edentulous, when it was disclosed that the party had been receiving funding since April 2005.[458]

Although the IMC has linked Sinn Fein to the IRA's alleged criminality, based upon unattributed and undisclosed evidence, and sanctioned them accordingly; it has been positively myopic in its failure to acknowledge the Democratic Unionist and Ulster Unionist Parties' responsibility for the rioting and violence caused by the UDA during September 2005. No clearer example of a violation of Section 30(1)(A) of the Northern Ireland Act of 1998, exists than the remarks of both Paisley and Empey which preceded this event. Yet, no recommendation of any sanction was taken up by the Commission for action by the Secretary of State was contained nor even hinted at in this Report.

On October 19, 2005, Peter Hain, the Secretary of State for Northern Ireland, announced that he had received the latest IMC report and was restoring Sinn Fein's funding.[459] Whether this action was taken as a recognition of the decommissioning by the IRA or because of the

[458]"Loyalist Group Retains Links," *Irish Voice*, Vol. 19 No. 42, October 19- October 25, 2005, p.3.

[459] Statement by Peter Hain, Secretary of State for Northern Ireland, on the Seventh Report of the Independent Monitoring Commission (IMC), House of Commons, 19 October 2005, CAIN Web Service.

revelation that the PUP funding had been secretly restored previously, is unclear.

In December 2005 the Northern Ireland Bureau of Public Prosecutions dismissed charges against Dennis Donaldson, a Sinn Fein Party official, his son-in-law, and a British civil servant who were arrested following the October 4, 2002 raid on Sinn Fein offices at Stormont for allegedly gathering intelligence on Northern Ireland officials for the IRA.[460] While the Bureau of Public Prosecutions would only state that the reason for this decision was that it was "in the public interest,"[461] the dismissal followed the trial court's denial of a gag order sought by the British Government on the evidence to be disclosed during their impending trial.[462] Donaldson subsequently disclosed that he had been spying on Sinn Fein for M-15, the British intelligence agency, for the past two decades, and that "The so-called Stormont-gate affair was a scam and a fiction. It never existed. It was created by Special Branch."[463] There can be little doubt that the British Government manufactured this incident as a pretext to suspend the devolved government ten days later because it was concerned about Sinn Fein's growing popularity in the Northern Ireland electorate.

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[460]"Sinn Fein Expels Key Party Member For Serving as a British Agent" *New York Times*, December 17, 2005, p3.

[461]*Ibid*.

[462] Cadwallader, Anne,"Britain's Agent; Spy revelation rocks Sinn Fein," *Irish Echo*, December 21-27, 2005, p.3.

[463]Cowell, Alan, "British Agent Tells (a Bit) of years Undercover in Ulster", *New York Times*, December 23, 2005, p.3.

Conclusion

At various times throughout the peace process, participants and observers have proclaimed the prospect of a lasting peace to be "tantalisingly close,"[464] only to have events occur that leave the hopes and dreams dashed yet again. In pursuit of this dream, legislation was crafted and bodies and schemes devised to try and achieve this ultimate reconciliation. At the beginning of the process, the creation of the International Independent Commission on Decommissioning (IICD) and the passage of the Northern Ireland Act of 1998 with its provisions for an Assembly, power-sharing executive and requirements for cross-community support showed great promise in the path toward an ultimate peace. Unfortunately, as the electoral process unfolded and the republican parties, like Sinn Fein, grew in strength as the unionist parties fractured, the prospect of devolved government with Sinn Fein in the ascendancy appears to have become more frightening to the unionists, the British Government, and to a lesser extent, the Republic of Ireland. The British, as we have seen, manufactured a crisis as a pretext to suspend the devolved government with the tacit approval of the Government of Ireland. On the heels of that suspension both the British and Irish Governments have enacted legislation, namely the Northern Ireland Act of 2003 and the Independent Monitoring Commission laden with measures designed to thwart the growth of Sinn Fein, as well as water down and undermine the guarantees of procedural fairness that were so essential to instilling confidence in all the parties in the Assembly and its associated bodies. To make matters worse, the Secretary of State for Northern Ireland and the IMC have exercised these powers in an arbitrary and uneven-handed manner,

[464]See Fn. 178

even in the face of realized, long-sought goals, such as the complete decommissioning of arms by the IRA..

The Irish historian, Tim Pat Coogan, in his biography of Michael Collins observed;

> "There is a well-established British tradition for dealing with such problems. Buy time, be seen as doing something, set up a tribunal, a commission, a forum, an assembly, a convention. The history of Ireland is strewn with such milestones."[465]

Unless the Governments of Britain and Ireland and the various entities they have created to facilitate and further the goals of the Good Friday Agreement begin to engage in the process in an honest, forthright and even-handed way, the parties in Northern Ireland are doomed to repeat their history.

[465]Coogan, Tim Pat, *The Man Who Made Ireland, The Life and Death of Michael Collins* Roberts Rinehart Publishers, Niwot Colorado 1992, p.66.