Silencing Dissent: A comparative study of criminalising political expression and conflict transformation

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by

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Abstract

This thesis analyses the relationship between criminalising political expression and conflict transformation. It begins with a discussion of traditional approaches to researching crime in conflict contexts, arguing that the assumptions of state legitimacy and 'criminal' illegitimacy are particularly problematic in the contested contexts of deeply divided societies. Instead, drawing on critical legal and criminological research, it argues that through considering the process by which such categories of 'crime' are created – criminalisation – it is possible to analyse the contested role they can have. This means taking crime to embody a social construction which contributes towards a wider social reality of crime and the criminal. How this takes effect is through what the thesis describes as the interaction between formal criminalisation - the legal processes which codify and embody legal norms and principles established by a government – and informal criminalisation - the social reality of the formal process which is given expression through the way it is implemented, interpreted, resisted, or accepted by the wider population.

From the perspective of conflict transformation, conflict is not the problem but rather encapsulates a problem, and frequently embodies at least part of the solution. Indeed it is through dialogue and communication which transformation can occur (both constructively and destructively), and so the thesis narrowed its focus onto the criminalisation of political expression. Criminalising political expression, therefore, can directly shape the nature of an intergroup conflict in deeply divided societies undermining the ability of actors to find a peaceful resolution to their conflict, or potentially enhancing it depending on how it operates. Accordingly the thesis argues that this can be distinguished into an explanatory typology of three 'targets' of criminalisation: identity, activity, and violence. These, together with the nature of informal criminalisation, have important implications for conflict transformation depending on the context. Through considering four conflict contexts which criminalisation responds towards - namely non-violent movements, collective political violence, negotiations, and peacebuilding - the thesis argues that when criminalisation targets non-violent political expression it will likely undermine conflict transformation in the short and long-term by closing down opportunities for dialogue, contributing

towards intergroup polarisation, and dehumanising actors. On the other hand, criminalising political violence may facilitate conflict transformation, but this depends on the legitimacy of criminal justice and the nature of its enforcement.

Employing an interpretivist methodology, the research involved an in-depth comparative analysis of the case studies of Northern Ireland and South Africa through poststructuralist discourse analysis and practice tracing, drawing on original interviews with key actors, and archival research. Furthermore, the thesis then employed a small-n study of Belgium, Canada, Turkey, and Sri Lanka to consider how this theoretical relationship between conflict transformation and criminalising political expression applies to crucial, typical, and counterfactual cases. The thesis concludes by discussing the implications these findings have for a number of policy areas including criminalising non-violent extremism and legacy issues associated with criminal records for political offences.

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all as a whole. You have all greatly enriched my understanding of criminalisation, challenging my own assumptions, and inspiring what now follows.

Contents

List of Abbreviations

ANC	African National Congress
CCRC	Criminal Cases Review Commission
COIN	Counter-insurgency
CPA	Criminalisation of political activity
CPE	Criminalisation of political expression
CPI	Criminalisation of political identity
CPV	Criminalisation of political violence
CRE	Criminal record expungement
DDS	Deeply divided society
EPA	Emergency Powers Act
EPRS	Early prisoner release scheme
FEA	Flags and Emblems Act
FLQ	The Front de Liberation du Quebec
IFK	Inkatha Freedom Party
IRA	Irish Republican Army
LTTE	The Liberation Tigers of Tamil Eelam
LVF	Loyalist Volunteer Force
MK	uMkhonto we Sizwe
MP	Member of Parliament
NGO	Non-governmental organisation
NIACRO	Northern Ireland Association for the Care and Resettlement of Offenders
NICA	Northern Ireland Court of Appeal
NICRA	Northern Ireland Civil Rights Association
NICRO	South African National Institute for Crime Prevention
NP	National Party
NPA	National Prosecution Authority (South Africa)
NVM	Non-violent movement
ODC	Ordinary decent criminal
PAC	Pan Africanist Congress
PKK	The Kurdistan Workers' Party
PTA	Prevention of Terrorism Act

SACP	South African Communist Party
SADF	South Africa Defence Force
SAP	South African Police
SDLP	Social Democratic Labour Party
SPA	Special Powers Act
TRC	Truth and Reconciliation Commission
UDA	Ulster Defence Association
UUP	Ulster Unionist Party
UVF	Ulster Volunteer Force
WTV	West Tyrone Voice

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Introduction

Mapping the 'crime' of political expression

On March 1st 1976 Special Category Status (SCS) in Northern Ireland officially ended, signifying the beginning of the British Government's policy of 'criminalisation'. Since 1972 SCS had been granted to those convicted for terrorism related offences,[1] but following recommendations of the Gardiner report alongside political pressure, the Government decided that the time had come for a change in strategy. Political violence was accordingly reframed "as simple criminal activity" (Gormally, McEvoy and Wall, 1993:56), and corresponding changes were made in terms of criminal procedure to ensure as expedient a process as possible in incarcerating these 'criminals'.[2]

However this phase of criminalisation embodies an important puzzle, because while it represents a clear political strategy targeting violent political expression, in many ways it reflected previous policies which preceded the introduction of SCS. Moreover its core focus on labelling political violence as criminal was adopted by the Stormont Government up until direct rule (Donohue, 1998; Hadden, Boyle and Campbell, 1988). This is puzzling because it indicates that the 'criminalisation' strategy embodies a process which was not contained solely to the 1976-81 period but has similar manifestations in the previous decades (Walsh, 1983; Boyle, Hadden and Campbell, 1988). The puzzle becomes more compelling if further cases are also considered, such as South Africa where the National Party implemented comparable legislation with similar intent in the early 1960s (Dugard, 1978; Mathews, 1972). Therefore, what is generally framed as a specific British political strategy (Gormally, McEvoy and Wall, 1993; Hadden, Boyle, Campbell, 1988) appears to reflect a much wider pattern of state behaviour, and one which has received little academic attention. Indeed this thesis argues that it represents an important process of conflict transformation, shaping intergroup relations in terms of actor, issue, and structure transformation; determining

[1] These were termed scheduled offences relating to the schedule of included criminal offences committed for political purposes as part of the Northern Ireland (Emergency Provisions) Act 1973.

[2] There were a range of reforms implemented including amended rules on evidence, juryless courts and extensive new security powers. For more on this see Walsh (1983) or Tayler (1980).

what constitutes 'legitimate' political expression and the accompanying practices of law enforcement and political resistance.

Furthermore, research on criminalisation in Northern Ireland emphasises its political significance particularly in how it contributed towards a new phase of prison resistance; culminating in the hunger strikes in 1980 and 1981 (Ellison and Smith, 2000; Moloney, 2002; Ross, 2006; Wright and Bryett, 1991). Hence, on its own it had a profound impact on the nature of the conflict in Northern Ireland, but if it embodies a wider pattern of state behaviour then it is important to consider whether it has similar implications beyond this immediate example. By broadening the analysis beyond this period to cover the entire conflict from partition, and comparing similar cases, this thesis contends that rather than representing a specific state strategy, it embodies an evolving mechanism of state power which responds reactively to the conflict context. The target, implementation, and legitimacy all change over the course of a conflict; so by considering the case studies of Northern Ireland (1922-2017) and South Africa (1950-2017), this thesis analyses criminalisation across four conflict contexts – non-violent movements, collective political violence, negotiations, and peacebuilding - to develop a theory of how criminalising political expression impacts conflict transformation.

Part of the reason why criminalising political expression has received relatively little academic attention is because of its subjective character. Criminalisation embodies a process much more complex than its instrumental design, because while a state may criminalise certain activities, its impact will depend on its enforcement and how the criminalised perceive the process. Theoretically this relates to the critical criminological conceptualisation of criminalisation as the process which constructs the social reality of crime (Becker, 1963; Hulsman, 1986; Quinney, 1977). Moreover, in conducting this project the subjective reality was evident throughout the fieldwork; definitions of what criminalisation referred to varied considerably throughout all interviews, even across actors from within the same political community. For instance, an IRA ex-prisoner described criminalisation as "another weapon" of the British state (IRA ex-prisoner C, 2016), contrasting with a senior British civil servant who described it as being "about bringing in new ways of defining behaviour" (Senior civil servant, 2016). The illegitimacy implied in the former contrasts with the assumption of state legitimacy in the latter. In this way criminalisation comes to embody an informal process of social

construction shaping the reality of conflict for each individual. In line with this the thesis distinguishes between the formal conceptualisation of criminalisation defined according to its instrumental design, and the informal conceptualisation reflecting its implementation and perceived reality. Incorporating this critical criminological conceptualisation of criminalisation into conflict analysis provides the field with an important theoretical framework which conveys both its complexity and subjectivity.

To analyse this subjective process the multilevel framework of conflict transformation is applied, as it considers how criminalisation can operate in multiple and fluid ways at the same time, depending on its implementation, perceived effects, and context (Cochrane, 2012; Maddison, 2017; Miall, 2004). In other words, the thesis does not claim strict causality, but develops theoretical arguments which explain how criminalising political expression can impact on the process of conflict transformation. According to these factors criminalising political expression can be understood in relation to whether it contributes towards the constructive or destructive transformation of a conflict (Miall, 2004). For this reason the thesis develops a typology of criminalisation distinguishing between three main targets: political identity, activity, and violence. In summary, the thesis develops three main arguments which explain how each type of criminalisation, defined according to its target, will impact conflict transformation: (1) if it targets the political identity of a group this will contribute towards intergroup polarisation framing groups in opposing terms as victims and perpetrators reducing their *political* identity to criminal characterisations; (2) by targeting political activity this closes off opportunities for non-violent political expression reducing the likelihood of accommodative strategies and intergroup dialogue; and (3) the targeting of political violence may both facilitate or inhibit conflict transformation depending on whether it is enforced impartially, targeting the behaviour of violence not political identities, and whether it is applied proportionately, not becoming a form of state repression.

Research aims

Through this framework the thesis seeks to address four broadly defined research aims. Firstly, it considers an important, yet under-researched, process in conflict –

criminalising political expression – providing an original typology and analysis. In other words, as theory building research it develops a theoretical framework that conceptualises the criminalisation of political expression, demonstrating how it intersects with conflict transformation. In this way it draws together the fields of critical criminology and legal theory with that of conflict transformation, providing an interdisciplinary analysis of how criminalisation operates in the conflict context, building on previous research in this area (McEvoy and Newburn, 2003; Toros, 2012).

Secondly, it provides original empirical data in the form of sixty-three interviews with political elites, academics, law enforcement personnel, ex-prisoners, NGOs, and survivors of conflict. This is complemented by primary archival research from the Linen Hall Library Political Collection in Northern Ireland, alongside the Historical Research Archive based at the University of Witwatersrand, and the Mayibuye Archive based at the University of Western Cape. By conducting fieldwork and directly consulting primary source material, the thesis has sought to maximise its empirical validity and contribution. These sources are referenced throughout the thesis and integral to the overall findings.

Thirdly, the thesis employs a mixed methods approach; conducting an in-depth comparative analysis of two cases and small-n analysis of a further four cases not previously compared before in relation to criminalisation. This has been primarily because criminalisation in Northern Ireland has been reduced to the 1970s strategy of the British Government, but this reduces a complex and important process down to a specific period. Therefore, the comparison enables a much broader and nuanced understanding of this process, demonstrating the spatial and temporal variation between and within the cases. The findings derived through the two case comparison are then applied to a further four cases through a small-n analysis of Sri Lanka, Turkey, Canada, and Belgium. These cases were selected on the basis of their case 'type' and, accordingly, provide further insights into a number of aspects of the relationship between CPE and the process of conflict transformation, particularly in terms of the evolving and reactive nature of CPE as it develops over the course of a conflict.

Fourthly, as the research draws heavily on interview data, it connects closely with key policy debates ongoing in the cases (and beyond) in relation to issues of criminal record

expungement, negotiations, criminalising non-violent extremism, and post-settlement criminal justice reform. The thesis will, therefore, provide theoretical and empirical contributions to these policy debates particularly centred on the two primary case studies. For instance, it discusses the current policies relating to criminal records in Northern Ireland and South Africa highlighting the various approaches towards violent and non-violent 'offenders' and the ongoing issues which result from this.

Chapter summary

Following this introduction the thesis is divided into seven chapters and a conclusion. Chapter one begins by discussing the traditional legal positivist approaches to the study of crime and conflict, explaining what these are, and how they are often based on two problematic assumptions, particularly in the contexts of deeply divided societies: (1) that the criminal categories applied by the state are legitimate; and (2) that they are homogenous. In contrast the chapter sets out a critical conceptualisation of criminalisation as a process of social construction which creates the 'social reality' of crime, distinguishing between formal instrumental legal process and the informal social reality it shapes. Narrowing the focus onto the criminalisation of political expression, the chapter considers how this would apply to the multilevel framework of conflict transformation. This is because, from the perspective of conflict transformation, conflict functions as "a motor of change" (Lederach, 2003:11), and as it is based in human relationships it is intertwined with the ability to communicate; with political expression. Criminalising political expression, therefore, can directly shape the nature of conflict undermining the ability of actors to find a peaceful resolution to their disagreement, or potentially enhance it depending on how it operates. In this way this chapter sets out the theoretical framework which is derived from the evidence in the rest of the thesis.

Chapter two discusses the methodological framework applied in the thesis, setting out its justification and implementation. Specifically chapters three, four, five, and six each consider how criminalising political expression operates within individual conflict contexts through a two case comparison of Northern Ireland and South Africa, and chapter seven extends the analysis through a further small-n analysis of four cases selected on the basis of case types. This chapter also explains the importance of the case

selection, data sources, data collection methodology, and analysis, and outlines the practical issues experienced in conducting fieldwork on such a topic, and the associated legal and ethical challenges.

Chapter three focuses on the first conflict context, on the implications of criminalising non-violent political expression, thereby representing the first of the four chapters comparing the two primary cases; in this case involving a two case comparative study of Northern Ireland from 1922 until 1968, and South Africa from 1950 until 1961. In such cases criminal justice is used to consolidate the power of the state by reducing or eliminating the capacity to challenge the state through non-violent political means. This chapter therefore builds on the critical conceptualisation of criminalisation developed in chapter one, arguing that it contributes towards the creation of a particular social reality, and that violence often operates as a reflection of this reality (Väyrynen, 1991). In summary it argues that such criminalisation can impact upon actor motivations to engage in political violence for three interrelated reasons: (1) it contributes towards intergroup polarisation; (2) it collectivises repression; and (3) it increases the cost of non-violent collective action.

Chapter four considers the implications of politicising crime as part of a wider counter-insurgency strategy. Specifically, following the onset of collective political violence states frequently respond by implementing counterinsurgency policies, where the criminal justice system is used to legalise various emergency powers. These powers become normalised and justified through an important transformation within the criminal justice system, as ordinary criminal offences are linked to a political motivation, creating a criminal 'other'. The implications of this particular cooption of the criminal justice system are that the predominant approaches within criminal justice - deterrence, retribution, and reform - become subsumed under the wider paradigm of counter-insurgency. For this reason the chapter advances three arguments linked to each of these approaches: (1) that the logic of deterrence is ineffective for political actors who perceive the costs of criminal sanctions differently from ordinary offenders; (2) that reform becomes a site of resistance for political actors, as it becomes designed to break their political resolve; and (3) that punishment for offences is less about the moral cost of the crime than it is about the potential for actors to reoffend.

Chapter five considers how (de)criminalisation in the context of negotiations can facilitate conflict transformation. The intersection between negotiation and conflict transformation is important because they initially appear to be in tension. By negotiating with criminalised actors the state's international legitimacy may enhance that of a criminalised group, whereas criminalisation is inherently a process designed to delegitimise these same actors. Furthermore, conflict transformation advocates for the resolution of underlying causes whereas negotiations often involve parties seeking to maximise their bargaining power and achieve the best outcome for their interests. This chapter, accordingly, argues that criminalisation embodies an important incentive structure which can facilitate conflict transformation in particular contexts, but also undermine it depending on its target and implementation. Specifically, focusing on the criminalisation of non-violent political expression, this typically impedes, or at least constrains, conflict transformation. This is because it undermines dialogue, dehumanises actors, and embodies structural constraints. Therefore conflict transformation may be facilitated through some form of decriminalisation, the timing and nature of which varies depending on the wider context. However, this needs to be qualified because decriminalisation can contribute towards intergroup polarisation alienating actors who perceive justice as being compromised. In other words, what is needed for conflict transformation to occur is not necessarily decriminalisation or criminalisation in general, but a reorientation of criminalisation away from actors and on to specific acts, thereby legitimising non-violent political expression and negotiations.[3] Put differently, continuing to criminalise non-violent political expression signals a lack of credible commitment on the part of the state, perpetuating intergroup hostility. Therefore, this reorientation embodies an important incentive structure which has the potential to facilitate conflict transformation depending on how it is implemented.

Chapter six considers the process of criminal record expungement as an illustrative example of how informal decriminalisation can take effect and the complex relationship it has with conflict transformation. Through such a process the prevailing narratives of culpability within a conflict will frame who is considered legitimate or not, polarising intergroup relations into polemic categories of victims and perpetrators, making their

[3] A paper version of this chapter has been published in *Studies in Conflict & Terrorism* (Kirkpatrick, 2017).

transformation integral to the wider peacebuilding process. However, if used as a mechanism of state power, criminal record expungement will likely embed intergroup polarisation and structural issues potentially perpetuating the conflict; or if the criminal record is for an offence which is still widely deemed to be illegitimate, expunging the criminal record could inhibit conflict transformation. The comparison between Northern Ireland and South Africa highlights these complexities, demonstrating how the potential for criminal record expungement to facilitate conflict transformation depends on whether it addresses – or indeed can address - informal criminalisation as embodied in the prevailing conflict narratives, stigmatisation, and identity polarisation. Furthermore, the chapter argues that expunging criminal records can exacerbate intergroup conflict if they only address formal criminal sanctions without accounting for their wider socio-political implications.

Chapter seven extends this analysis through a small-n comparative framework considering the cases of Belgium, Canada, Turkey, and Sri Lanka. This mixed methods approach was employed to add an additional layer of analysis through the consideration of crucial, typical, and counterfactual cases. In other words, these cases are instructive because Belgium represents a counterfactual case where the state never implemented the criminalisation of political expression, providing an important contrast to the other cases, particularly in terms of why, in the context of a deeply divided society, the state might not implement CPE. Canada acts as a crucial case because, although the state criminalised political activity during the October Crisis, this did not lead to an escalation in the conflict due to the nature of informal criminalisation. Turkey and Sri Lanka embody typical cases whereby the states in both cases implemented CPI, CPA, and CPV, but by considering the entire conflicts together this provided insights into the evolving and reactive nature of CPE as it shapes and is shaped by changes in the conflict context.

Although each previous chapter addresses a specific aspect of criminalising political expression and in a particular conflict context, they will be brought together in the thesis' conclusion to show their connection with each other. The complex relationship between criminalisation and conflict transformation will be discussed, emphasising the importance of its experienced reality as well as the substantive legal framework: formal and informal criminalisation. Furthermore, this section will consider the research

implications of the two primary cases, applying the key themes to the contemporary context to understand how they can inform particular policy areas.

Chapter 1

Re-conceptualising criminalisation: A conflict transformation approach

The threat of 'crime' and the 'criminal' are evocative concepts, which, when applied to behaviours and individuals, enable the labeller to delegitimise their target, justify certain security powers, and implement sanctions. For instance, by defining the crime of 'theft', the state not only determines what constitutes the crime, but also establishes the parameters for punishment, providing for certain enforcement powers like police searches, and also delegitimises the perpetrators of the offence by labelling them as criminals. Yet in the context of political conflict this process has profound implications for the nature of conflict itself, and particularly so in the case of deeply divided societies (DDS). In such cases, if the state is dominated by a single group, the state may use criminalisation to target certain forms of political expression as a means of subordinating other groups. In other words, criminalising political expression (CPE) has considerable power to shape intergroup relations in ways which could either facilitate or undermine conflict transformation.

Previous research has shown how such measures are often used by states because they can provide a legal veneer over state repression (McEvoy and Rebouche, 2007; TRC Report 4, 1998), help consolidate in-group cohesion (Ó Dochartaigh, 2013; Patterson, 1999; Todd, 1987), justify expanded security powers (Brewer, 1994; Donohue, 1998; Dugard, 1978), and delegitimise opposing groups (Abel, 1995; Brewer *et al*, 1996; Frankel, 1979; McConville, 2014). But while these studies have provided a number of valuable insights into the significance of criminalisation for conflict analysis, none have gone so far as to develop a substantive theory of criminalisation or identify a pattern of state behaviour.[1] This has three important implications: firstly because it tends to result in crime being studied as a "taken-for-granted construct" (Cohen, 1996:3) implicitly assuming the legitimacy of the labeller (the state), the practices of labelling (law enforcement), and the acceptance of the label within the wider population (narrative), even when this legitimacy is subject to contestation and resistance. The contestation of

[1] Brewer *et al.*'s comparative study would be the closest to a theory, but while an important comparative study it only outlines a limited conceptualisation. Their approach will be discussed later in this chapter.

prisoners over political status, and the concept of 'prisoners of conscience'[2] are emblematic examples of these challenges where the label's legitimacy is called into question. Secondly, it can lead to a conflation of non-violent and violent political expression making it unclear what the distinctions are between them. Thirdly, criminalising political expression embodies a fundamental process which shapes conflict transformation and is shaped by it, meaning it has the potential to affect the destructive and constructive transformation of a conflict. Developing a theory of CPE, accordingly, will demonstrate how such a relationship may operate in particular contexts.

Addressing this research gap the chapter will draw together critical criminological and legal approaches with those of conflict transformation, setting out a conceptual framework through which criminalisation can be analysed. It will argue that criminalisation represents an important mechanism of transformation which can both facilitate and undermine conflict transformation depending on its context and implementation. This chapter will, accordingly, outline how current research in conflict analysis has approached the concept of crime, first from a legal positivist understanding,[3] and then from a critical approach. To account for the contested and subjective nature of criminalisation (Becker, 1963; Hulsman, 1986; Quinney, 1970; Shiner, 2009) this thesis will position itself firmly within these critical approaches, arguing that criminalisation is an important process of social construction which a state may use to shape intergroup power relations. In this sense criminalisation can be used to permit state violence while challenging opposing expressions of political expression; consolidating in-group cohesion at the expense of intergroup relations. Analysing such a process requires a consideration of both the formal legal process embodied in legislation and its conformity with legal norms, but also – and arguably of greater importance – its diffuse implementation through law enforcement, the media, and wider society (Foucault, 1975; Shiner, 2009). For instance, implementing new drug regulations into an Olympic sport may be assessed in relation to how they complement or bring new meaning to current regulations, but also how they will impact the training and practices of athletes, how they are represented in the media, and whether they increase or

[2] For instance Amnesty International set up a relief organisation in 1962 called Prisoners of Conscience designed to address these issues through financial support to prisoners and their families.

[3] This refers to the positivist conceptualisation of crime, not the positivist methodological approach.

decrease public trust in the sport. The implications of these rules, accordingly, depend on their informal interpretation by athletes, coaches, the media, and general public. This chapter therefore draws together critical criminological and legal research with conflict analysis to develop an interdisciplinary conceptualisation of criminalising political expression.

Furthermore, in order to consider the various aspects of political expression which may be criminalised the chapter distinguishes between three different manifestations: political identity, activity, and violence. While these categories overlap, they relate to distinct processes particularly in terms of their implementation and perceived reality. Distinguishing between them enables these implications to be considered from a comparative perspective, to see how each individually and collectively operates. Because of the complexity inherent in such an analysis, the chapter will connect this critical conceptualisation with conflict transformation's multidimensional approach to understand the "complex and evolving conflict relationships" which these types of CPE represent (Cochrane, 2012:184; Lederach, 1997, 2003; Miall, 2004). This means criminalisation will be considered as a dynamic and evolving process which shapes and is shaped by conflict as it develops. In these ways this chapter discusses the theoretical framework which the rest of the thesis applies.

Crime and conflict analysis

Research into the relationship between criminal activity and political violence can be categorised into four broad sub-fields: economic approaches to conflict, the crime-terror nexus, human rights approaches, and critical approaches.[4] Of these, the first three can be grouped together in relation to their analytical assumptions regarding crime as a legitimate and measureable concept, whereas critical approaches begin from a distinct epistemological position (McEvoy and Gormally, 1997). In other words, the first three approaches all consider specific defined criminal behaviours from legal positivist and

[4] There is also a concept of criminal wars primarily relating to research on Mexico, but this chapter is concerned about the broader conceptual debate surrounding criminality and conflict, not just the convergence between organised crime and political violence. For more see Kalyvas, Stathis N. (2015) How Civil Wars Help Explain Organized Crime - and How They Do Not. *Journal of Conflict Resolution* 59(8):1517-1540.

state-centred perspectives, just different types and through different theoretical and methodological frameworks – i.e. how they conform to human rights norms or confer economic benefits.

Economic approaches focus on the economic benefits of a violent conflict, and how some actors perceive war as profitable, taking advantage of the security vacuum to develop lucrative criminal enterprises through the extraction of natural resources, the drug trade, extortion, and looting (Collier, 2000; Collier and Hoeffler, 2004; Duran-Martinez, 2015; Keen, 1998; Lujala, Gleditsch and Gilmore, 2005; Mehlum, Moene and Torvik, 2002; Mueller, 2000). In such cases actors are not engaging in violence to advance a political cause, nor fighting to defeat an enemy, but instead seek to perpetuate violent conflict because it is lucrative to do so. Whether it is the extraction of diamonds (Lujala, Gleditsch and Gilmore, 2005), extortion (Mehlum, Moene and Torvik, 2002), or looting (Mueller, 2000), these criminal acts are treated as a definitive and homogenous variable primarily based in the self-interest of actors. For instance, Collier (2000:852) argues that rebellion is "a variety of crime" with "the only difference from common crime being that predation is directed against natural resources instead of household wealth". The differences between ordinary crime and the crime of rebellion are therefore only in terms of the scale. So while such studies provide insights into how the 'crime' variables impact conflict, they do so through an essentialised construction of the 'criminal' and 'criminal behaviours'.

In contrast, research on the 'crime-terror' nexus discusses how there is a convergence between organised crime and terrorist groups, whether through alliances between such groups, or through terrorist groups developing 'in-house' criminal capabilities (Hutchinson and O'malley, 2007:1095; Cornell, 2005; Kynoch, 2005; Oehme III, 2008; Sanin, 2004; Silke, 1999a). Some of these studies focus specifically on 'terrorist' groups, whereas others will discuss insurgents or other politically motivated violent actors, but throughout all of these studies is a focus on the permeable boundaries between political violence and criminality. For instance, some analyse how terrorist groups are financing political activities through organised crime (Kynoch, 2005), or drawing on networks with organised crime to provide a support role for their political violence (Silke, 1999a). These approaches tend towards a more complex understanding

of crime by engaging with its diffuse boundaries with political violence, but still underpinning them is a positivist understanding of crime.

Human rights approaches include a wide range of studies which consider specific criminal behaviours in the context of conflict - such as sexual violence, genocide, acts of terror, amongst many others - through a human rights framework (Cohen and Nordas, 2015; Edwards, 2008; Wachala, 2012; Walsh and Piazza, 2010). Now while each of these approaches varies considerably, they all consider certain criminal behaviours through the framework of human rights; that the crimes under analysis are violations of human rights. The theme of the 'criminal problem' is implicit throughout, with the normative focus being to prevent or address criminality from (re)occurring. Resolving conflict from these perspectives becomes synonymous with re-establishing the rule of law; ensuring that legal norms are abided by and human rights are respected. While they often will seek to change the law to address these issues, it is the state who represents the guarantor of these norms, and so it is through a reformed or enhanced state system that crime will be addressed. However, this assumes an objective criterion – human rights – to base their analysis on. The cultural interpretation of human rights, and their subjective implementation and realisation through politics, means focusing on an objective criterion created by states will be unable to account for the "complex and dynamic process of categorisation and discrimination" as opposed to the "static process of deductive reasoning from premises set by a legal definition" (Lacey, 1995:8). Therefore, the above assumptions are problematic given that those involved in assessing human rights are doing so through a subjective, culturally bound, politically defined framework.

Furthermore, these approaches do not engage explicitly with criminalisation because its source of legitimacy – the state[5] - is assumed. Instead they implicitly conform to the predominant legal framework of legal positivism (Sullivan, 1994). From this perspective, law places an obligation on individuals to obey, because to do otherwise would jeopardise social order by causing harm (Hart, 1994, 2008). Criminalisation therefore seeks to "encourage certain types of conduct and discourage others" (Hart,

[5] The underlying assumption here is that the legal system holds some domestic or international legitimacy, otherwise criminalisation will be of marginal importance. Therefore the 'type' of state is less important than the legitimacy the state holds in a given context. For more see the discussion on legitimacy in chapter 7.

2008:6); ordering a society so that it follows what is defined as acceptable behaviour. While legal scholars differ over the source of legal legitimacy (Conklin, 2001), the centrality of the state is consistent throughout. Crime is accordingly understood as an established and legitimate concept defined by the state. This was succinctly summarised in an interview with a member of the South African Parliamentary Committee on Justice and Correctional Services: "But nothing justifies crime. Crime is crime and it will always remain crime and it needs to be dealt with as such" (Member of the South African Parliamentary CJCS, 2016). From this perspective crime is a clear and legitimately defined concept. However, the above approaches focus primarily on 'crimes' which are widely deemed illegitimate - whether sexual violence, extortion, or the acts of terror - but if they are extended to more contested crimes their assumption of state legitimacy becomes much more problematic.[6]

This is because both the prognosis and cure associated with the positivist paradigm are restricted in their ability to address the complexity and subjectivity associated with criminalisation in deeply divided societies. This relates to contexts where "ascriptive ties generate an antagonistic segmentation of society, based on terminal identities with high political salience" (Lustick, 1979:326); or put differently, where groups are divided into competing political communities due to factors directly linked to their group identities. The political divisions between groups map onto "potentially violent vertical cleavages" which are serious enough to threaten the composition of the state (MacGinty, 2017:5; O'Flynn, 2015). Understanding these divisions can be achieved through considering the construction and contestation of group identities to understand how it "contributes to conflict in these societies" (Kachuyevski and Olesker, 2014:305). This is because "a society cannot survive if it loses its identity", meaning threats to a group's identity are existential, threatening the security of the group itself (Kachuyevski and Olesker, 2014:306). How groups defend or advance their identity relates to the wider cleavages themselves.

In such contexts where the government is dominated by a particular group(s), it may not use criminalisation necessarily as a legitimate mechanism which abides by international

[6] Critical approaches would also challenge this legitimacy as it is often used to justify other forms of violence such as state violence through counter-terrorism practices, or structural violence such as poverty, racism, or sexism.

norms of justice and equality, but as a mechanism of state power to consolidate its own hegemonic position at the expense of other groups. By criminalising political expression the state can frame an out-group's identity as 'criminal' placing restrictions on its ability to express and promote it, and directing law enforcement against it. In this way criminalisation embodies "disciplinary and regulatory mechanisms...which can serve the scope of a better and more efficient management of population" (Toros and Mavelli, 2013:79)[7] that the state frames as "achieving an overall equilibrium that protects the security of the whole from internal dangers" (Lemke, 2011:37). The problem which emerges, however, is that in deeply divided societies this 'whole' often refers to a particular group at the expense of others. Criminalisation frames the 'threat' to security in terms of the out-group's identity, thereby functioning as a factor "of segregation and social hierarchization...guaranteeing relations of domination and effects of hegemony" (Foucault, 1976:141). For instance, in Egypt, following the assassination of then President Anwar Sadat in 1981, an emergency law was re-enacted providing for the banning of public gatherings, censorship, and detention, all justified on "the pretext of fighting Islamist militants" (Abdelrahman, 2015:16). In such a context the label of crime is used to legitimise state repression, consolidating the power of the state at the expense of other communal groups. Therefore, when the state is dominated by a particular group, this enables that group to use "the law acts as a mechanism for the reproduction of social and political inequality" rather than as an impartial process (Zureik, Moughrabi and Sacco, 1993:440). Accordingly, the assumptions of state legitimacy and unit homogeneity with respect to crime are problematic in such contexts, as they will reinforce intergroup divisions by replicating the dominant state discourse of criminality. To understand this political subjectivity and complexity this chapter will, therefore, turn to critical approaches to the study of crime.

[7] Foucault refers to these as biopolitical mechanisms and applies it to systems of racism (1976). For more on this see: Leerom Medovoi (2012) Swords and Regulation: Toward a Theory of Political Violence in the Neoliberal Moment. *Symploke* 20(1-2):21-34; Kyle Grayson (2012) The ambivalence of assassination: Biopolitics, culture and the political violence. *Security Dialogue* 43(1):25-41.

A critical conceptualisation of criminalisation

Despite the prevalence of legal positivism in conflict analysis, a number of studies have analysed 'crime' through a critical legal or criminological framework (Cohen, 2001; Kennedy, 2006; McEvoy, 2001; McEvoy and Gormally, 1997; McEvoy and Newburn, 2003; McWilliams, 1997; Super, 2013; Walsh, 1983, 2000; Zedner, 2005). While these approaches are again varied, they are based in a unifying epistemological approach towards the study of 'crime' and 'criminals' which argues "crime is created" by an authority and ascribed to certain actors (Quinney, 1970:15). In other words, they reject the positivist claim to objectivity; instead arguing that this leads to a tendency towards "seeing like a state" (McEvoy, 2007:411; Cohen, 1984). From this perspective crime is understood as "the *product* of criminal policy" with criminalisation being "one of the many ways to construct social reality" (Hulsman, 1986:71, emphasis in original; Quinney, 1970, 1977). Accordingly, the focus is no longer solely on the criminal, but on the mechanisms which designate them as criminal and the structures which lead to such behaviour (Becker, 1963).

But even taking criminalisation as the analytical focus, its conceptualisation needs to distinguish between the formal legal process and its informal implementation;[8] as previous research has distinguished between primary and secondary criminalisation (Hulsman, 1986), formal and substantive criminalisation (Lacey, 2009), or the social practices of criminalisation which operate through formal and informal mechanisms (Shiner, 2009).In other words, formal criminalisation can be defined as the legal processes which codify and embody legal norms and principles established by a government; whereas informal criminalisation is the social reality of the formal process which is given expression through the way it is implemented, interpreted, resisted, or accepted by the wider population. To be clear, Shiner (2009:176, 174) distinguishes between these two forms of criminalisation linking the formal approach to "prosecution, trial, sentencing, and the operation of incarceration and parole", and informal to "the...media both journalistic and entertainment, schools, churches, families, clubs, and societies, corporations, water fountains, pubs, common rooms, and coffee shops". Therefore, informal processes are

[8] While linked, this is distinct from informalism which relates closely to restorative justice. For more on this see Kieran McEvoy and Harry Mika (2002) Restorative justice and the critique of informalism in Northern Ireland. *British Journal of Criminology* 42:534-562.

not necessarily the product of formal ones, but operate in an interactive relationship whereby both shape and are shaped by each other. Therefore this diverse list illustrates the subjective nature of criminalisation and the diffuse ways in which it permeates through media discourse (Hulsman, 1986:70), political discourse (McEvoy and Rebouche, 2007), and becomes manifest across multiple social, political, cultural, economic, and legal institutions. In other words, although formal criminalisation may appear to be almost the same across states, it may be fundamentally different with respect to informal criminalisation; groups may experience criminalisation differently depending on whether they are represented in the police, whether they are the 'source' of crime, whether they are politically marginalised, or whether they are culturally criminalised.

Take for example the analogy of a football match. While both sides understand the formal rules and regulations, their interpretation of them will depend on whether they perceive the referee as legitimate, and whether the potential sanctions are outweighed by the benefits. For instance, if the referee is perceived as being from the same community as one of the sides, the other side may be less likely to regard them as impartial and so challenge the referee's decisions. Indeed the referee may not be impartial, applying the regulations according to their personal bias. Similarly, if a player is about to score a goal but can only do so by nudging the ball with their hand (thereby committing a hand-ball) they may perceive the benefits justify the risk. The formal regulations themselves are therefore dependent on their informal implementation.

This subjective reality results in significant variation which positivist approaches are unable to convey. For instance, this was reflected in interviews conducted by the author with a range of actors in Northern Ireland and South Africa.[9] Depending on the community, vocation, politics, or culture, their perception of what constituted criminalisation differed. For instance a Member of the South African National Prosecution Authority stated, referring to the decision-making process regarding whether to prosecute: "So essentially it's the facts, the law, and then what the prospects

[9] The methodology underpinning these interviews will be discussed in chapter two, but in summary the author conducted sixty-three semi-structured interviews with law enforcement, politicians, academics, NGOs, political ex-prisoners, and survivors of the conflicts. All the interviews were conducted in 2016 in Northern Ireland, England, and South Africa.

are of a successful prosecution" (NPA Member, 2016). In this sense criminalisation is primarily based in the application of legal norms grounded in the positivist approach. Members of NGOs had a different interpretation with some highlighting its subjective nature: "Criminalisation creates the legal tools to actually incarcerate people on the ground of things that you've constructed as criminal acts" (Jobson, 2016). From this perspective the state determines what constitutes criminality to suit its particular agenda and responsibilities. In contrast former political prisoners understandably focused on its coercive nature; themselves having been subject to it. However, even within this group perspectives differed, with Republican ex-prisoners describing it as "just another weapon" (IRA ex-prisoner A, 2016), and Loyalist ones as "retributive" (UVF ex-prisoner A, 2016), and that it was designed "to strip you of any identity" (UVF ex-prisoner B, 2016). While Republican ex-prisoners regarded it as simply further evidence of the colonial oppression by the British, Loyalists were caught between accepting the legitimacy of the state and resisting the de-politicisation of their violence through criminalisation. Ex-prisoners from South Africa likewise had negative perceptions of criminalisation emphasising its indiscriminate nature under apartheid: "Anyone who fought the system was criminal. That was what we were irrespective of what organisation to which we belonged" (MK ex-prisoner A, 2016). Another interviewee referred to the phrase "they threw the book at you" (South African political ex-prisoner, 2016) meaning that the state would charge you with every possible crime so that at least one would 'stick'. These contrasting perceptions will be developed much more extensively throughout the thesis, but here they illustrate the diverse social realities criminalisation contributes towards (Hulsman, 1986; Quinney, 1970).

The implications of the formal process of criminalisation are, accordingly, interdependent on the wider perceptions of those subject to it, enforcing it, and witnessing it; succinctly summarised by a Northern Irish community worker: "People don't live in courtrooms around the rule of law or legal process. Quite often they make sense through their politics or lived experience" (Community Worker A, 2016). The nature of formal criminalisation can be understood, therefore, as interdependent with the everyday lives of individuals, or as Bourdieu (1977:188) explains: "Law does no more than symbolically consecrate...the structure of power relation[s] between groups and classes which is produced and guaranteed practically by the functioning of these mechanisms". Put differently, formal criminalisation is part of the wider social process

which shapes and is shaped by the context. The diversity and complexity illustrated by the range of perspectives above demonstrates how this applies, as the formal process is understood in terms of how it operates in people's lived experiences.

In turn this is interpreted at the level of the individual through their own *habitus*, the "socially constituted system of cognitive and motivating structures" (Bourdieu, 1977:76), and so the social reality of crime is derived through this complex outworking of informal criminalisation.[10] However, as *habitus* is "constituted in practice" (Bourdieu, 1992:52) criminalisation, therefore, needs to be understood as a practice which both shapes and is shaped by its context. This means criminalisation is understood as a social practice which designates what is criminal behaviour "by reference to practical functions, systems of classification (taxonomies) which organize perception and structure practice" (Bourdieu, 1977:97). For instance, criminalising public displays of a particular flag not only prohibits such displays, but by implication associates the flag's affiliation to be illegitimate, leading to wider social ostracisation of those who hold allegiance towards it. Likewise, the link between a particular ideology – for example communism - and 'threat' to order contributes towards the construction of social practices which seek to defeat the ideology rather than prevent specific criminal acts. In this way, when criminalisation targets political expression it produces the criminal label "as self-evident and undisputed" reducing a complex conflict to a single characterisation (Bourdieu, 1977:164). The practice of criminalisation constructs what is legitimate political expression and what is crime. Analysing criminalisation as a social practice, accordingly, ensures that both the rules and the wider context they are part of are considered: formal and informal criminalisation.

This complexity does not, however, preclude theoretical observations about such practices as "no social relationships and practices are so unique as to foreclose the possibility of theorisation and categorisation", just that they are "established locally" as it is "meaningful contexts that give practices their social effectiveness and generative power" (Pouliot, 2015:237; 2007, 2012). Criminalisation therefore represents "repetitive patterns" which are established locally – in their particular context – and are "dispersed,

[10] The debates around how habitus operates, and its implications, are beyond the parameters of this thesis. Instead, this interpretation of the concept is used here only to clarify the relationship between formal and informal criminalisation.

dynamic, and continuously rearranging", being co-constitutive with the wider social context (Bueger and Gadinger, 2015:456). In this sense "[a]ccounts of practices are interpretations of interpretations; they are fundamentally reconstructive" (Pouliot, 2015:250). Making sense of these therefore involves a level of abstraction away from reality to identify patterns. In other words, the theoretical framework which this chapter goes on to explain relates to an explanatory model which helps one interpret the implications of CPE for conflict transformation. It is from this interpretivist epistemological approach that the rest of the chapter will proceed.

Criminalising what? A typology of criminalising political expression

In deeply divided societies formal criminalisation often targets political expression because this enables the state to place restrictions on certain out-group practices which threaten the status quo (Horowitz, 1985). Moreover conflict itself, when understood from this critical perspective, is closely related to the relationships between actors (Lederach, 2003), and is accordingly intertwined with the ability to communicate, with political expression. Criminalising political expression, therefore, can directly shape the nature of an intergroup conflict in DDS undermining the ability of actors to find a peaceful resolution to their conflict, or potentially enhancing it depending on how it operates. In other words, CPE involves criminalising various 'types' of political expression, which can be disaggregated depending on its target and classified into an explanatory typology (Elman, 2005). In terms of political expression this thesis develops an original typology which distinguishes between three broad and interrelated 'targets': the criminalisation of political activities (CPA); the criminalisation of political identity (CPI); and the criminalisation of political violence (CPV). The first two categories are exclusively focused on non-violent political expression whereas the last is focused solely on political violence. This first distinction is important because criminalisation is often designed with the very purpose of conflating political violence with non-violent political activity to delegitimise both (Abel, 1995; Dugard, 1978).

CPA is distinct as it is targeted against specific political behaviours such as protests, strikes, publications and political meetings, and involving "the re-allocation of political acts into criminal categories" (Cohen, 1996:4). In contrast, CPI targets actors

themselves by criminalising particular ideologies, cultural practices, political views, or symbols. CPV relates to the criminalisation of political violence which includes any form of physical violence motivated by a political ideology or objective. This final category links closely with acts of terror, but the conceptual and definitional issues inherent in this term mean it will not be reduced to this concept exclusively in this thesis though it will be discussed (Bryan, Kelly and Templar, 2011). Each of these distinctions are summarised in Table 1.

Table 1.Typology of criminalising political expression

Criminalising Political Identity (CPI)	Targets actors by criminalising particular ideologies, cultural practices, political views, or symbols
Criminalising Political Activities (CPA)	Targets political behaviours including such as protests, strikes, publications and political meetings
Criminalising Political Violence (CPV)	Targets violent actions committed for a political motivation; i.e. to advance a political cause or ideology

Building on the critical conceptualisation of criminalisation, the distinction between CPA and CPI is the relation to their "normalising power....guaranteeing relations of domination and effects of hegemony" (Foucault, 1976:141). Accordingly, in DDS criminal justice can be used to consolidate the power of one group over another by designating political expressions as illegal to delegitimise and subordinate the out-group. Regarding CPI, a political identity becomes equated with criminal deviance, so that actors expressing this identity are monitored, regulated, and restricted, with the goal of *correcting* their deviance (Becker, 1963). In other words, criminalisation is designed "not to punish the offence, but to supervise the individual, to neutralise his dangerous state of mind, to alter his criminal tendencies" (Foucault, 1975:18). However, this thesis does not argue that this removes the agency of the criminalised, just that CPI enables the state to regulate and subordinate out-groups, thereby consolidating its own power. Law enforcement accordingly regulates and isolates non-violent political identities, restricting any efficaciousness they may have on changing the status quo, while still permitting its deviance so long as it remains subdued. In this way the political expression of a criminalised identity becomes reduced to the 'legal' parameters placed upon it, with the goal of regulating it into obscurity. The criminalised may nevertheless

choose to resist CPI through developing counter-hegemonic narratives of legitimacy, and developing social practices in opposition to those of the state.

In contrast, CPA is not only to regulate and control – as it usually will be complemented by CPI – but it also seeks to eradicate the criminal deviant, widening the focus onto actors. By criminalising political mobilisation against the state, law enforcement becomes re-orientated to not only monitor and regulate, but to punish the criminal deviance of political actors opposed to the state. Activities challenging the political hegemony of the state are met with "sword" of the state – the law – so that transgressions against the law are regarded as transgressions against the norm of justice (Foucault, 1976:144). By criminalising protests, strikes, political publications, and political gatherings, law enforcement is mandated to directly confront the very face of criminalised political expression, repressing rather than regulating deviance.

The third category of criminalisation is distinct from the others because of its focus on political violence, these being violent acts committed to advance a political cause or ideology. State responses to such violence are frequently complemented by corresponding changes in legislation which either criminalises specific 'political' offences supporting violence – financing, promoting, and training – or link what are usually ordinary crimes to a political motivation (Brewer *et al.,* 1996). This enables the state to justify emergency security powers to address the legislatively defined 'threat'. Through such criminalisation the state will try to delegitimise not just the violence committed, but also the political motivation underpinning it (Brewer *et al.,* 1996:221). Bringing such violence under the criminal justice system ensures that it is dealt with as a domestic issue, eschewing international scrutiny, and consolidating the state's sovereignty over the criminal problem (Bell, Campbell and Ní Aoláin, 2004).

Even by refining the focus of criminalisation on to political expression it still embodies distinct types which will vary considerably depending on the context of their implementation. In order to account for this, this thesis applies what has been defined as the "critical theory-based approach to conflict" (Toros, 2012:65), conflict transformation, as it enables the complexity inherent in criminalisation to be built into the analysis through its multilevel framework, and likewise challenging statist accounts of conflict by considering all levels of analysis.

The trifocal lenses of conflict transformation

Conflict transformation links closely with critical theory because it challenges the assumptions underlying other approaches to conflict analysis – conflict management and resolution – emphasising the importance of context and complexity (Toros, 2012:65; Cochrane, 2012). For instance, it highlights how other approaches are often "more concerned with tactics than with strategy" (Väyrynen, 1991:2), focusing on specific acts of violence – or in this case crime - rather than the underlying grievances and/or strategic utility of violence (Cochrane, 2012). Instead conflict transformation seeks to develop long-term responses to conflict that address the "root causes" (Lloyd, 2001), providing for intergroup reconciliation (Maddison, 2017), not just for an end to violence. From this perspective conflict can be considered as both an opportunity, and a problem to be solved. It is "a normal and continuous dynamic within human relationships" (Lederach, 2003:22), and without it "life would be a monotonously flat topography of sameness and our relationships would be woefully superficial" (Lederach, 2003:25). In other words, conflict should not be avoided as it forces us to constantly reassess our situations, seek solutions, and challenge assumptions. The question for conflict transformation scholars then is not how to bring an end to conflict, but rather how to reduce all forms of violence (Galtung, 1990). In other words, conflict is not the problem but rather encapsulates a problem, and frequently embodies at least part of the solution.

When conflict is seen through this framework, responses such as criminalisation are understood in relation to their ability to facilitate constructive or destructive transformation. Constructive transformation means changing the very constitution of society in such a way that it no longer "supports the continuation of violent conflict" (Miall, 2004:4). This means addressing the structures, practices, and even beliefs, which encourage violence: "It encourages greater understanding of underlying relational and structural patterns while building creative solutions that improve relationships" (Lederach, 2003:26). Gandhi's method of non-violent conflict, *satyagraha*, embodies a clear example of how such transformation can occur through non-violent means, because it is based on the belief "that to suffer wrongs [is] less degrading than to inflict them", resulting in conflict being seen "as an opportunity to transform society" rather

than as a process which escalates suffering (Weber, 2001:510, 494). Addressing the root causes of conflict, reframing actor relationships, facilitating intergroup dialogue, and strengthening civil society are but some of the ways such constructive transformation takes effect (Cochrane, 2012; Lloyd, 2001; Miall, 2004; Toros, 2012).

In contrast, destructive transformation involves the "intensification of damage to the participants" and it "further destroys their cooperative capacities" (Miall, 2004:11). Building on the critical approaches to crime outlined above, this means responses to violence must be analysed as much as the violence itself (Toros, 2012). For example, while the counter-terrorism powers to interrogate suspected terrorists through the use of physical violence may provide some intelligence, it itself embodies a form of destructive violence and is highly unlikely to foster cooperation. Indeed, when placed under physical duress, detainees are often more likely to tell the interrogator what they want to hear, lying to make the violence end, providing false or incomplete intelligence (Bellamy, 2006; Rejali, 2007). Therefore, because criminalisation acts as "a power whose task is to take charge of life" (Foucault, 1976:144) it is necessary to consider whether this power is for the emancipation or the subjugation of actors; on the one hand it can act as a coercive process which undermines intergroup dialogue, while on the other it can deter destructive behaviours. States may respond to both non-violent movements and to collective political violence by criminalising political expression to undermine its efficaciousness, yet the nature and implementation of both contexts will vary depending on the states' objectives, the legitimacy of the process, and the power of the criminalised. In other words, because "we cannot know what, exactly, the mechanisms cause, because mechanisms do not cause anything in and of themselves" (Pouliot, 2015:253). Framing the implications of CPE in terms of conflict transformation therefore builds in the necessity of context; that while certain aspects of formal and informal criminalisation may contribute towards constructive or destructive conflict transformation, the implications of this are context dependent and subjective.

Conflict transformation accounts for these challenges by using a multilevel framework providing "a set of lenses" through which to consider the variable impact that criminalising political expression can have on conflict, because "no one lens is capable of bringing everything into focus, we need multiple lenses to see different aspects of a complex reality" (Lederach, 2003:16-17). Because conflict is rooted in the relationships

between actors it is inherently subjective, with different actors perceiving the causes and solutions from various (often competing) perspectives. The diverse perceptions of criminalisation outlined above illustrate the importance of this, because a single lens would only provide a limited analysis and give an incomplete account of criminalisation's implications. Therefore, conflict transformation considers how transformations take place across three primary levels: issues, actors, structure (Miall, 2004).[11] For each of the three levels of transformation criminalising political expression has a number of potential implications, varying depending on their implementation as actors resist or accept them, and on their particular subject; whether it is CPI, CPA, or CPV.

Theoretical framework

Following from the primary research conducted throughout this thesis, it develops three main arguments which summarise the relationship between CPE and conflict transformation.[12] For the first, it argues that criminalising non-violent political expression will result in destructive conflict transformation by closing off opportunities for dialogue, raising the costs associated with non-violence, contributing towards intergroup polarisation, and dehumanising actors; with chapters three, five, six, and seven providing affirmative evidence to support this argument. The second argument is that when CPI or CPA are combined with CPV this likewise contributes towards destructive conflict transformation. This is because it directs law enforcement against a political identity as well as violent behaviours, creating new opportunities for resistance, embodying a form of structural violence through the criminal sanction, and contributing towards intergroup polarisation through retribution; evidence in chapters four and seven affirms this. The third argument posits that if CPV is implemented on its own it may facilitate constructive conflict transformation by delegitimising it as an alternative to

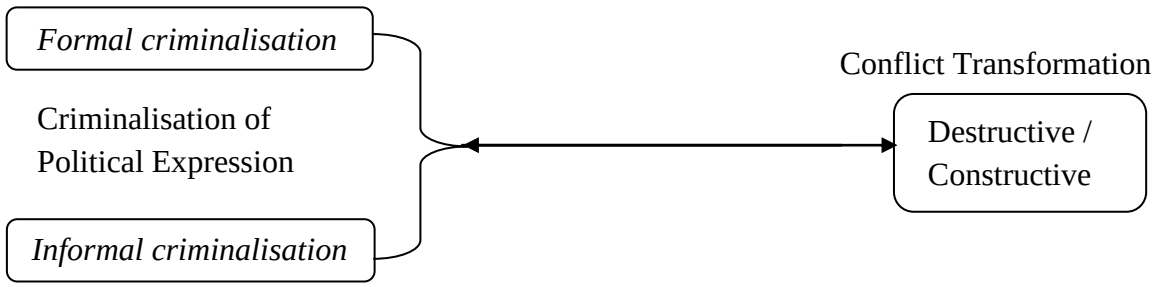
[11] Context and personal/small group levels have been omitted because they arguably overlap too closely, in relation to criminalisation, with the other levels.

[12] Certain critical theory scholars would not ascribe to such causal claims such as Foucault who was sceptical of claims that "social life is subject to linear and evolutionary change" (Hunt and Wickham, 1994:6). However these arguments relate to strict mechanistic accounts which this thesis is not claiming to make. Instead the theoretical model is understood as an abstraction from reality in order to help make sense of this reality; not a reflection of it (see Pouliot 2015).

non-violent political expression. Chapter seven provides some tentative evidence from the case study of Belgium which would corroborate this, but it would require further research to refine its theoretical argument. This would be an area for future research and will be discussed in chapter seven in more depth.

Accordingly the relationship between CPE and conflict transformation is disaggregated according to the target – determined by formal criminalisation – which depending on its implementation and perceived effects - informal criminalisation – will contribute towards destructive or constructive patterns of conflict transformation. In other words, there are two distinctions which determine how CPE impacts conflict transformation: (1) the target(s) of formally criminalising a group through legislation; and (2) the informal social reality that this creates through the implementation of criminalisation embodied by law enforcement and resistance. Formal and informal criminalisation are, however, not measurable variables, but abstracted concepts contextually dependent – the practices of CPE. Furthermore, criminalisation is also co-constitutive of conflict transformation – hence the two-directional relationship – as they both change and contribute towards changes in each other. Figure 1 summarises this theoretical relationship.

Figure 1. Theoretical relationship between criminalising political expression and conflict transformation



Using the multilevel framework of conflict transformation enables these theoretical links to be understood across the three levels of transformation (Cochrane, 2012; Miall, 2004; Toros, 2012). The structural level represents the system which embeds violent forms of conflict where goals are no longer framed as incompatible, identities as polarised, and violence as the only - or most effective - means by which to address these (Cochrane, 2012; Miall, 2004; Väyrynen, 1991). This often involves a redistribution of

power between actors, addressing underlying grievances, and opening up peaceful political avenues to displace violent ones. Criminal justice has a considerable role in such transformations, in framing not only what is legitimate, but also in establishing sanctions, or in providing opportunities for compromise. For instance, CPV can increase the costs associated with political violence reducing its utility, but this depends on the effectiveness of CPV and its legitimacy. The sanctioning of violent behaviours may undermine them, but if the state does this inconsistently - targeting only those of a particular group - the process may become constitutive of the conflict itself becoming one of the structures which contributes towards the continuation of violence rather than addressing it (Bell, Campbell and Ní Aoláin, 2004). This is because behaviours become secondary to actors, as criminalisation is directed against a particular group. Such criminalised groups are then able to cultivate a counter-narrative of state repression because of its inconsistency, contributing towards a social reality of state 'criminality'.

CPA undermines structural transformation through establishing a number of structural barriers which restrict non-violent political expression. Because it is controlled by the state CPA will particularly inhibit criminalised actors from communicating their political views to those in the state's communal group, undermining measures which seek to encourage intergroup dialogue. The state accordingly frames these actors as the criminal problem, meaning dialogue is marginalised in favour of crime control measures. CPI embeds and reinforces this by reducing political identities to criminality. Consequently, criminalised groups may be forced to operate covertly restricting their ability to develop a non-violent political base or engage in dialogue as discussed in chapter three.

Issue transformation involves determining which issues are more salient, moving actors away from zero-sum conflictual positions to areas where commonality can be found (Cochrane, 2012; Miall, 2004; Väyrynen, 1991). Criminalising political expression is closely linked to such issue framing, representing both an issue itself, and a mechanism through which issues are framed. Firstly, CPI and CPA represent an important issue which will need to be addressed because of its negative implications on dialogue described above. Some form of decriminalisation may therefore be required for conflict transformation to take place, as discussed more extensively in chapters five and six. With respect to CPV, decriminalisation will be much more divisive and potentially

undermine wider issue transformation. This is because the implications of such decriminalisation are contingent on their informal outworking, as although actors may be granted some form of formal pardon or amnesty, this will not address the embedded discourse of the criminal narrative and may even cause harm to victims of political violence. Decriminalisation, therefore, will be interpreted differently across the various actors, fostering agreement and trust with some, while isolating others.

This is why the second aspect of issue transformation is so important, because when group identities are labelled as criminal this frames intergroup identities into dichotomies like victim/perpetrator (Bhatia, 2005). This is problematic for conflict transformation, because the polarised label will lead to polarised ways of addressing the issues themselves (Putnam, 2010), as issues are embedded in a zero-sum framework. Through the propagation of such terms in the media and political discourse – informal criminalisation - they take hold of the imagination of the public (Zulaika and Douglas, 1996:47; Jackson *et al.,* 2011), making it difficult to address. Re-orientating criminalisation away from political expression and onto violence alone may help address this, but this again depends on whether groups regard the criminal justice system as having legitimacy, as will be discussed in chapter five. Indeed, such an approach would likely only work if it is complemented by a much wider bottom-up process which ensures the support of all major groups.

Actor transformation refers to changes in leadership, goals, or power relations between groups in such a way that will change the nature of the conflict itself (Cochrane, 2012; Miall, 2004). While this may involve a change in the actors themselves, often it does not (Gormley-Heenan, 2006). Indeed criminalisation primarily impacts actors in terms of how they are perceived: their framing. Therefore individuals should be viewed not as isolated actors but as culturally embedded within multiple overlapping groups which together form a multilayered identity that "exists within a larger social system" (Kriesberg, 2008:404). Depending on group affiliations an individual will perceive criminalisation differently; some claiming it represents law and order, while others contending it to be a subversion of justice contributing towards intergroup polarisation. This is because the 'rules' of one group may actually operate in contention with those of another, particularly those instituted by criminalisation. In other words: "A person may break the rules of one group by the very act of abiding by the rules of another group"

(Becker, 1963:8). Identifying and analysing such dissonance is crucial in understanding how actor transformation occurs; how through framing actors as criminals, their wider communities may informally become subject to criminalisation. For example, criminalising a non-state actor as a criminal may delegitimise them internationally or amongst pro-state groups, but it often legitimises them within their own political community (Buntman and Huang, 2000; Gormally, 2001).

When this is understood through the typology of criminalising political expression these complexities become clearer. CPI frames the political ideologies of actors as illegitimate contributing towards the polarisation of intergroup relations. This relates to both the state and non-state actors, as an oppressive criminal justice system may undermine the legitimacy of the state within targeted communities, while the state's criminal framing may likewise undermine non-state actors. Furthermore, CPI reduces actor identities to simple characterisations as the criminal other, effectively contributing towards intergroup dehumanisation as it "reduces them to a single identity, erasing other key phases and aspects of their lives" (Toros, 2012:31); presenting a diverse array of political and criminal groups as one homogenous illegitimate category. These characterisations vary considerably between and within cases because they are contingent on the communities whom actors derive support from and their relationship with the state. This is where CPA has an important role because the legitimacy of criminal justice will depend on its extensiveness. As CPA targets the ability of actors to mobilise peacefully against the state its repression will effectively place law enforcement in a highly politicised role. Those subject to such repression may accordingly perceive the law enforcers as 'the enemy', and respond through their own form of reactive resistance.

CPV contrasts with these two other forms of criminalisation because it may actually facilitate actor transformation by raising the costs associated with destructive violent forms of political expression. However, this is dependent on the context because its ability to do so is constrained by the legitimacy of the state and the criminal justice system. Indeed, if CPV is implemented through repressive forms of law enforcement it may become a grievance around which actors mobilise against, thereby drawing the criminal justice system into the arena of contestation itself. Yet not criminalising political violence may result in the state being perceived as weak internationally –

unable to respond to violence – or be sidelined for more militaristic and violent approaches as discussed in chapter seven.

There are a number of further more general points which relate to all the levels of transformation and the relationship between formal and informal criminalisation. Firstly, because formal criminalisation operates as a top-down mechanism it will be limited in its ability to actually bring about conflict transformation on its own. Indeed it is usually implemented as a mechanism which embeds the existing social order (Quinney, 1977), rather than transform it. But taking a critical approach provides a framework which challenges "the social mechanisms which generate alienation" (Kennedy, 1986:214), meaning by taking a broader conceptualisation – as outlined above – these issues can possibly be overcome. For conflict transformation informal bottom-up processes have been recognised as essential to top-down mechanisms like criminalisation in order to build trust and support (Lundy, 2011; Mallinder, 2008). In other words, it is only through a more comprehensive approach involving bottom-up initiatives that informal criminalisation can be addressed to transform, not just the structures which give rise to violence, but also the very 'social reality' which does so too.

Conclusion

This chapter began by outlining the four predominant approaches towards researching crime in the context of political conflict: namely economic approaches to conflict, the crime-terror nexus, human rights approaches, and critical approaches. The first three of these are generally based in the same epistemological approach towards crime as a clearly defined and legitimate concept; implicitly ascribing to a positivist understanding of criminalisation as an instrumental process (Collier, 2000; Cornell, 2005; Keen, 1998; Lujala, Gleditsch and Gilmore, 2008; Sanín, 2004). In contrast, positioning itself firmly within the critical approaches, this chapter argued that criminalisation should be understood as a mechanism of state power used to regulate and control society to serve the interests of those determining what is criminal (Foucault, 1975, 1976). This is particularly the case for deeply divided societies due to their inherent intergroup divisions and power dynamics (Horowitz, 1985). In such contexts criminalisation can be

used to consolidate the power of one group over another, particularly when it is targeted against political expression. In other words, the assumptions of unit homogeneity and state legitimacy lead to an essentialised conceptualisation of crime, which when applied to deeply divided societies can embed the hegemonic power of states by replicating their dominant framing of criminality. It was for these reasons that the critical approach was used as it brings the state into the analytical framework because it is also an active (not neutral) political actor (McEvoy and Gormally, 1997).

Conceptualising criminalisation was done through an interdisciplinary approach which brought together critical criminological and legal research with that of conflict analysis. Taking 'crime' to be a social construct formally created by the state, it is important to evaluate how it also reflects the wider 'social reality' of crime and how these two processes – formal and informal criminalisation – interact with each other (Hulsman, 1986; Quinney, 1970). In other words, it both shapes and is shaped by the wider context – in this case the conflict – reflecting the nature of intergroup relations while simultaneously shaping them; it is co-constitutive. Analysing its impact on conflict, therefore, involves considering its experienced reality as well as its formal instrumental design: informal and formal criminalisation. This does not preclude the development of theoretical arguments as this chapter has outlined, just that these arguments are abstractions away from the reality in which they describe, not perfect reflections of it. Therefore, while the thesis argues that certain 'types' of CPE can have particular implications for conflict transformation, these arguments are qualified by their context, and recognise the numerous competing factors which likewise impact both CPE and conflict transformation. These points and how they are addressed will be considered in the next chapter on methodology.

Having outlined the critical conceptualisation of criminalisation, the chapter narrowed the focus specifically to the criminalisation of political expression. This is because, from the perspective of conflict transformation, conflict is inherently based in the ability to communicate, as actors seek to resolve their conflict through some form of political expression, whether violent or non-violent (Lederach, 2003). Criminalising political expression can, therefore, shape the nature of conflict undermining the ability of actors to find a peaceful resolution to their disagreement, or potentially enhance it depending on how it operates. To analyse how this operates the chapter developed an explanatory

typology of criminalising political expression which will be applied throughout the rest of the thesis, mapping it on to the three levels of conflict transformation: actor, structure, and issue. Criminalisation from this approach can both facilitate and inhibit the transformation of conflict depending on the conflict context and target. The typology enables the target to be distinguished and analysed, while the following chapters consider it in relation to specific conflict contexts. In this way this chapter establishes the conceptual and theoretical framework outlining the relationship between criminalising political expression and conflict transformation. The following chapters accordingly explain its empirical evidence and the methodological framework through which it was ascertained.

Chapter 2

Researching criminalisation: A methodological framework

Criminalisation poses a number of analytical challenges when it is understood from the critical approach outlined in chapter one due to its subjectivity and complexity. This is because it is conceptualised as the subjective construction of the criminal label, embodying a mechanism of state power, responding to and shaping conflict, varying depending on its target and context. As such, the interpretivist methodological approach will be applied as it is the most appropriate framework through which to assess and evaluate the central research question (Bueger and Gadinger, 2015; Leander, 2008; Pouliot, 2007, 2012, 2015). This chapter will explain why this is the case discussing its justification, challenges, and implementation.

Because criminalising political expression is done in a particular context and in response to a particular type of political expression, it first needs to be analysed according to these contextual factors. Non-violent political expression may result in a different type of criminalisation than collective political violence as the states' objectives behind it may be different. The state will be able to implement harsher security measures in the latter because the context will provide a clearer justification. Similarly as a conflict develops the process of criminalisation will change, evolving to account for transformations in the conflict context. Therefore, it should not be understood as an individual mechanism which responds to non-violent political expression in one way and collective political violence in another, but instead as a mechanism which is changed incrementally and used reactively in response to changes in the nature of a conflict. The first section of this chapter will explain how this thesis addresses these complexities through a two case comparative study of Northern Ireland and South Africa as in-depth typical case studies of this mechanism, comparing across the cases, but also across time to convey the evolving nature of criminalisation. Building on the theoretical framework developed in chapter one regarding practices, the thesis employs practice tracing (Pouliot, 2007, 2012, 2015), inductively analysing how the criminalisation of political expression operates in different conflict contexts within

and across the cases, and thereby providing new insights into practice tracing by extending it into the domain of domestic practices.[1]

The second section of this chapter outlines what practice tracing involves: the data sources it depended upon, and the analytical framework used to analyse these. Formal criminalisation was assessed through in-depth reading of academic and policy sources from both cases to consider what the prevailing legal norms, legislative instruments, and judicial practices were. Then poststructuralist discourse analysis of political debates and legislation was used to identify how practices differed according the target of criminalisation and the rationale behind it. To evaluate the subjective nature of informal criminalisation, interview data – both original and archival – was considered across a range of key actors, as well as archival political documents and biographies. The research therefore provides original empirical data on criminalisation building upon existing research.

The final section outlines the challenges of such a methodological approach. It discusses the legal and ethical issues of conducting interviews on such a controversial topic, and the practical challenges of fieldwork. Alongside engaging with other academic research on these challenges, the chapter outlines some personal experiences of how these challenges occurred and what steps were taken to address them.

Comparing criminalisation: A conflict transformation framework

Critical criminology analyses not only the behaviour of the criminalised, but also "the *interaction* among the state and elements of civil society" (McEvoy and Gormally, 1997:23, emphasis in original). This means that limiting analysis to the 'criminal' and their behaviour is insufficient. Instead it is necessary to broaden the analysis to encompass the structures which contribute towards such behaviour and the issues which define and interpret it. However, because the theoretical combination of conflict transformation and critical theory (McEvoy and Newburn, 2003; Toros, 2012) has not

[1] The 'practice' turn in International Relations theory has become a well established scholarly field (Bueger and Gadinger, 2015), but it predominantly focuses on the practices of states at the international level, whereas relatively less attention has been given to the significant role of practices within a state.

been previously applied to the process of criminalising political expression, there was no substantive theory to test or develop. It was not clear what relationship, if any, existed between the criminalisation of political expression and conflict transformation. This research, therefore, was designed as hypothesis generating contributing towards "the *process* of theory construction rather than to theory itself" (Levy, 2008:5, emphasis in original; Lijphart, 1971). Hence, following from the interpretativist epistemological approach the research design needed "to be inductive, interpretive, and historical" (Pouliot, 2007:360), in other words, close in-depth analysis, involving a wide range of data sources, with temporal variation.

In-depth case studies and practice tracing (Pouliot, 2015) were considered the most appropriate means through which to do this, enabling a close examination of the practices of criminalisation in context and controlling for other competing factors which impact upon conflict transformation (Beach and Rohlfing, 2015). Typical cases were chosen because they are selected on the basis of "a set of descriptive characteristics", namely the conflict context and criminalising political expression, which are then analysed to identify "causal relationships" (Gerring, 2007:91). Causal relationships, however, refer to "empirical relationships" which connect criminalisation with conflict transformation, as opposed to statistical ones, because the "number of cases it deals with is too small to permit systematic control by means of partial correlations" (Lijphart, 1971:683, 684). Moreover, according to the interpretivist approach identifying causal relationships "*follow[s] from* interpretative analysis" (Pouliot, 2015:252 emphasis in original), instead of preceding it, meaning case analysis precedes theorisation.

Furthermore, while individual cases provide important insights, "they do not *by themselves* provide clear guidance for generalisation to other cases" (Achen and Snidal, 1989:146, emphasis in original; Beach and Rohlfing, 2015). Indeed while in-depth case studies on their own provide valuable insights about how CPE impacts conflict transformation, when considered comparatively this facilitates the identification of patterns, whereby practices are analysed in relation to one another while still accounting for their context and subjectivity (Pouliot, 2015). Accordingly, a two case comparative framework was employed enabling a close in-depth analysis of the individual cases, but then also a wider comparison abstracting from these contexts in order to contribute towards theory building.

Selecting cases for this comparison was done through the most similar systems design where the cases were similar in all but one of the inputs,[2] which meant similar in terms of formal criminalisation but dissimilar in terms of informal criminalisation. The initial framework posited that these two inputs operated interactively affecting change in conflict transformation depending on the context. Therefore general mechanisms could be analysed within each case through practice tracing – as will be explained later - within the cases in order to consider what factors could be attributed to this variation. For these reasons chapters three to six involve a two case comparison of Northern Ireland (1922-present) and South Africa (1950-present). This is because the cases provide empirically rich accounts of CPE, with temporal variation as the conflicts developed, and spatial variation in the cross case comparison.

With reference to overcoming the 'many variables, few cases' problem, Lijphart (1971:687; 1975) argued that cases should be comparable, meaning they are "similar in a large number of important characteristics (variables) which one wants to treat as constants, but dissimilar as far as those variables are concerned which one wants to relate to each other". To ensure that cases were comparable the case selection needed to ensure that the cases had similar characteristics for a number of important constants – as outlined below - but variation in relation to the processes under evaluation – formal and informal criminalisation. Specifically, the cases met two important qualifications: firstly that they are deeply divided societies, and secondly that they have functioning legal systems (Horowitz, 1985).[3] These attributes are essential because the theoretical arguments made regarding criminalising political expression are contingent on these contexts, as without a functioning legal system criminalisation's legitimacy would be irrelevant, or at least much harder to identify. Likewise, in deeply divided societies which are experiencing political unrest, criminal justice is generally under the control of a single ethnonational group which may use criminal justice to consolidate its own hegemonic position at the expense of other groups (Horowitz, 1985:22). In such contexts, the state will often respond to unrest by criminalising political expression to

[2] The term 'inputs' is used in place of independent variable because of the interpretative approach adopted. The context and subjective nature of informal criminalisation makes it inaccurate to describe it as a variable due to its implicit variation.

[3] This refers to there being a legal system which held some legitimacy with the population domestically and/or internationally, albeit often contested. See chapter seven for a more substantive overview of this.

re-establish order, but in practice, it frequently becomes a form of repression (Jung, Lust-Okar and Shapiro, 2005). In other words, it is when disorder itself becomes associated with a certain political identity that such criminalisation takes on a particular meaning, whereby political expression becomes subject to the criminal law.

Beyond these necessary criteria there are a number of secondary factors which justify their comparison. Firstly, they had a number of similarities including similar temporal contexts (Cold War), British colonial legacies, relatively similar legal systems, and politicised law enforcement. Furthermore, both cases contain four conflict contexts which will be analysed – non-violent movements, collective political violence, negotiations, and peacebuilding – enabling them to be compared within and across the cases increasing the number of observations substantially. Within the case comparison it is also important to analyse the evolving nature of criminalisation to understand how it responds reactively as conflict develops. These similarities enable the complexity and contexts to be accounted for while then analysing the different outcomes and variation between the cases. Indeed because of these similarities – as well as others - the cases have been compared by other studies with respect to their political polarisation (Guelke, 2000), peace processes (Guelke, 1991; 1994; Sandal and Loizides, 2013), peace agreements (McGarry, 1998), criminal justice (Brewer *et al.*, 1996; McEvoy and Newburn, 2003), and transitional justice (Campbell and Connolly, 2012; Hamber, 2002). These similarities are summarised in Table 2.

In terms of the variation between the cases, while formal criminalisation had a number of important similarities, informal criminalisation varied considerably. The target of criminalisation (as defined by the typology in chapter one as identity, activity, or violence), the nature of law enforcement practices (along the spectrum of civil policing to militarisation), the perceived reality this criminalisation creates (whether it is regarded as legitimate or not), the response of actors towards it (nature of resistance), and a number of other contextual factors, embody the key variation being analysed between the case studies.

Table 2. Case comparison: Similarities and differences between Northern Ireland and South Africa

Similarities	Differences
Deeply divided societies with a single group hegemony	Nature of informal criminalisation (intervening variable)
Functioning legal systems which maintained some domestic and/or international legitimacy	Conflict transformation – constructive or destructive – varied over time
Conflicts included non-violent movements, collective political violence, negotiations, and peacebuilding	Criminalised groups represent both a majority and minority across the cases
Temporal contexts (Cold War)	The role of mainland British public and political elite
British colonial legacies	Constitutional status had significant implications for Northern Ireland
Politicised law enforcement	
'Primacy of the 'law and order' paradigm	

However, the methodological approach also constrained the generalisability of the research as a two case comparison only enables "*contingent empirical generalisations*" (Achen and Snidal, 1989:147, emphasis in original). Because of the similarities between the cases and the contextual contingency of the concepts – particularly informal criminalisation - findings drawn from them are not causal, but instead reflect generalised patterns regarding the practices of CPE and their implications for conflict transformation. To reinforce this, chapter seven considers typical, crucial, and counterfactual cases in a small-n analysis of Turkey, Sri Lanka, Canada, and Belgium. These cases provide further insights into the practices of CPE building upon the in-depth analysis developed in the rest of the and considering the evolution of criminalisation over the course of a conflict rather than in specific conflict contexts. But for the sake of clarity the specific methodological framework employed will be discussed in the chapter itself.

Analysing the variation between and within the cases meant accounting for the complex subjective experience and practices of informal criminalisation, which is why practice tracing was used. Practice tracing is distinct from the alternative of process tracing primarily due to its epistemological foundations. For instance process tracing "is an

analytic tool for drawing descriptive and causal inferences from diagnostic pieces of evidence – often understood as part of a temporal sequence of events or phenomena" (Collier, 2010:824), whereas practice tracing draws on Bourdieu's (1977, 1992) conceptualisation of practices outlined in chapter one, and developed into an interpretativist methodology (Bueger and Gadinger, 2015; Pouliot, 2007, 2012, 2015). This draws heavily on the 'practice turn' in International Relations theory and the work by Vincent Pouliot (2007, 2012, 2015) in particular.[4] In contrast to process tracing, it assumes that knowledge and social reality are socially constructed and mutually constitutive (Pouliot, 2007), meaning that analysing social practices such as criminalisation involves considering its "subjective (intentions, beliefs) and inter-subjective (norms, identities)" manifestations (Pouliot, 2015:241). Accordingly inductive case analysis still involves in-depth analysis of a temporal sequence of events, but interprets data differently placing a greater emphasis on the "insider meanings" which constitute social practices (Pouliot, 2015:244). There are two challenges with this approach which require methodological remedies – or at least partial remedies – due to the co-constitutive nature of the cause and effect; that criminalisation causes conflict transformation and is likewise caused by it; and identifying what the subjective social practices represent. Put differently, the research design needs to address possible endogeneity and validity.

For the first challenge, it should be noted that it is not necessarily possible to always identify a clear direction of causality due to the mutual constitution of practices – illustrated in Figure 1. This makes causal claims highly problematic as it will be unclear what the causal direction is or if it is linear. From this perspective it is necessary to have "extensive knowledge of the case in question" and it can be analysed in comparison with "a small number of cases" due to the importance of context (Hanson, 2006:10). More specifically, the relationship between CPE and conflict transformation is "established locally" whereby "meaningful contexts...give practices their social effectiveness" (Pouliot, 2015:237). The issue of endogeneity is therefore not necessarily important as it the direction of causality is assumed to be contextual and subjective as achieved through in-depth comparative analysis. Hence the thesis focused on four key contexts: non-violent movements, collective political violence, peace negotiations, and

[4] For a wider discussion of practice theory see Bueger and Gadinger (2015).

peacebuilding. This is because conflict is not a static process, and so responses to it will be similarly evolving. Therefore as the nature of a conflict changes so will the role of criminalisation as its target and objectives become reformed to address new contexts. In this way criminalising political expression will impact upon conflict transformation in a particular way specific to the context (as shown in figure 1 in chapter one), but as this leads to transformation this will have a corresponding impact on the context and criminalisation itself. The individual chapters considering each specific context will, therefore, focus on the particular implications of the context, whereas the seventh chapter and conclusion will discuss its wider complexity and interaction across four further cases.

There are a variety of theoretical models which categorise these various contexts (Ramsbotham, Woodhouse and Miall, 2011; Leatherman *et al.*, 1999)[5] but because criminalisation is in response to something it is more appropriate to focus on what it is responding towards. With respect to the case studies this meant each chapter considered the development of criminalisation over time as shown in Table 3. The justification for these specific timeframes is that they relate to changes in relation to formal criminalisation, primarily through the introduction, reform, or reversal of specific legislation. While there is obvious overlap between some of these contexts, such as non-violent movements and collective political violence, this can be accounted for through the in-depth approach. Each chapter therefore builds upon the analysis of the previous one, coming together in the final chapter, which considers all four contexts.

As a response to non-violent movements, criminalisation frames non-violent political expression as criminality, thereby delegitimising its political objectives, and providing the legal means to repress it. This is witnessed in the state responses during the Arab Spring in Tunisia, Libya, and Egypt where their respective criminal justice systems were all used as mechanisms of political power and subjugation to silence political dissent, criminalising political expression (Chertoff and Green, 2012). The objectives behind such criminalisation are often about enabling widened security powers,

[5] For instance Ramsbotham, Woodhouse and Miall (2011) outline the conflict life-cycle model which identifies the stages of conflict as: social change, conflict formation, violent conflict, conflict transformation. Similarly Leatherman *et al.* (1999:47) refer to pre-conflict, intra-conflict and post-conflict.

preventing foreign interference, and legitimising the state's counter-narrative of criminality. In this context criminalisation is focused on CPI and CPA, where CPI is used to delegitimise the criminalised identity of protesters, and deter others from joining a particular movement. CPA is implemented to limit the capacity of such movements directing the powers of law enforcement against political activities.

Table 3. Within-case comparison timeframes according to conflict context

	Northern Ireland	**South Africa**
Non-violent movements	1922-69[6]	1950-61
Collective political violence	1973-80	1962-89
Peace negotiations	1990-1998	1989-1994
Peacebuilding	1998-2017	1991-2017

As a conflict develops so too will criminalisation, and so following the onset of collective political violence states frequently utilise their criminal justice system to legitimise widened security powers, bringing the criminal justice system within a counter-insurgency framework through CPV (Boyle, Hadden, and Hillyard, 1980). Political violence is linked to a particular group or ideology, with states responding by criminalising this group and their associated activities because they engage in such violence – linking CPV with CPI. But the implications of this vary considerably across cases depending on the extensiveness and legitimacy of the process, and on informal criminalisation. For instance, research into the proscribing of the Kurdistan Workers' Party (PKK) by Germany highlighted how this restricted the wider Kurdish diasporas' political options by framing them as a security threat (Baser, 2015). But this contrasts acutely with criminalisation in Turkey which has led to extensive restrictions on Kurdish political expression (Somer, 2002). Therefore it is the context of informal criminalisation which determines the implications that the process has for conflict transformation.

[6] While the focus in chapter three is on the civil rights movement in the 1960s, this wider timeframe relates to the introduction of the legislation criminalisation political expression. Therefore it ensures that the civil rights movement is properly contextualised.

Criminalisation in the context of negotiations embodies an important incentive structure which can facilitate conflict transformation in particular contexts, but also undermines it depending on its target and implementation. For instance, the proscription of various Colombian 'terrorist' groups by the United Kingdom has restricted the ability of third-party actors in helping to facilitate intergroup dialogue as part of the wider peace process (Haspeslagh, 2013). Similar issues emerged in relation to Euskadi Ta Askatasuna (ETA) in Spain (Zulaika and Murua, 2017), or the Moro Islamic Liberation Front (MILF) and National Democratic Front (NDF) in the Philippines (Santos Jr, 2010). This is because CPA and CPI typically impede - or at least constrain - conflict transformation by restricting opportunities for dialogue, dehumanising actors, and embodying structural constraints. On the other hand, CPV may complement negotiations by delegitimising violence as an alternative form of political expression, although this will be dependent on the legitimacy of the criminal justice system. For instance, redirecting law enforcement to address specific forms of political violence, such as that between the Inkatha Freedom Party and African National Congress in South Africa during the peace negotiations, rather than focus attention on non-violent political expression (TRC Report 5, 1998).[7]

The final context is that of peacebuilding whereby the state will need to restore confidence in the institutions of criminal justice, addressing issues of historical crimes committed during the period of violent conflict while disconnecting the criminal narrative away from political expression. The prevailing narratives of culpability within a conflict will frame who is considered legitimate or not, polarising intergroup relations into polemic categories of victims and perpetrators, making their transformation integral to the wider peacebuilding process. However, if used as a mechanism of state power, reforms addressing criminalisation will likely embed intergroup polarisation and structural issues, potentially perpetuating the conflict.

These arguments all involve a level of abstraction away from the cases they refer to, but follow inductively from the practice tracing methodology applied in each context. Chapters three to six accordingly apply the practice tracing methodology to each context

[7] In this case this case such violence was highly destabilising to the negotiations, and there is evidence that the National Party Government sponsored a 'third force' highlighting the limitations underlying this approach (Ellis, 1998). These points are developed in chapter five.

to ascertain what relationship exists between CPE and conflict transformation while also considering what variations it takes across the various contexts. The issue of reifying these concepts is of importance, but it is possible to mitigate against this when they are understood within their contextual boundaries and defined to convey their fluidity. Understanding how these arguments developed requires considering the two main data sources which were used as outlined in the following section.

Analysing formal and informal criminalisation

Data sources and data analysis

Practice tracing involves considering a wide range of data sources which enable the researcher to analyse practices in their social context (Bueger and Gadinger, 2015; Leander, 2008; Pouliot, 2015). Poststructuralist discourse analysis (PDA) enables these practices to be critically analysed by considering "framings of meaning and lenses of interpretation, rather than objective historical truths" (Hansen, 2006:6), how 'criminal' labels are constructed through political discourse, implemented in policy, and how they are assimilated or resisted in the communities subject to them. In other words, according to PDA the representations of identity – criminal/terrorist, victims – are linked to policy through discourse, and so by analysing the discourse of criminalisation it is possible to analyse practices themselves (Hansen, 2006). This is because "it is only through the construction in language that 'things'...are given meaning" (Hansen, 2006:16); practices themselves only become meaningful when understood in relation to discourse.

Analysing formal criminalisation was primarily done through PDA which Neumann (2008)[8] summarises into three key steps: deliminating texts, mapping representations, and layering discourses. Deliminating texts involved identifying sources which conveyed the nature and purpose behind criminalisation which was done through considering academic research, primary legislation, case law, legal documents,

[8] While Neuman is not necessarily articulating a post-structuralist approach to discourse analysis, the framework still applies and helpfully summarises the key processes involved. For more on the distinctions between different types of discourse analysis see: Fairclough, Norman (2013) Critical discourse analysis and critical policy studies. *Critical Policy Studies* 7(2):177-197.

government reports,[9] and parliamentary Hansards.[10] Discourse "usually contains a dominating representation of reality" (Neumann, 2008:70), and so mapping representations involved analysing these sources to identify what representations they embodied, reproduced, or constructed. Narratives of criminality, dichotomies of perpetrators and victims, and languages of threat and order, all embody various examples of these representations. Layering discourses involved considering why some discourses remained embedded over time while others did not (Neumann, 2008). In other words, through practice tracing it was possible to analyse how the discourses of criminality constructed by criminalisation changed over time, and how counter-narratives interacted with these, likewise evolving over the course of a conflict.

This is where informal criminalisation was crucial to the analysis, identifying and understanding how hegemonic discourses of criminality constructed by the state become implemented, perceived, and resisted. Discourse analysis thus was applied again to informal criminalisation in relation to government reports, and court transcripts to convey the government practices which followed from it as well as memoirs, news articles, oral history records, previous interview data, and academic sources. Furthermore archived copies of the Republican and Loyalist publications, An Phoblacht and Combat respectively, were accessed from the Political Collection at the Linen Hall Library, and of the Africanist accessed from the University of Witwatersrand Historical Research Archive, all of which provided primary source material on the political rhetoric being propagated by proscribed groups and examples of censored material. In this way analysing informal criminalisation required using these sources as a starting point to develop a comprehensive reading of how criminalisation has been traditionally understood within existing academic research, policy documents, and political discourse. This then became applied through the second data source of semi-structured interviews to understand the perceived reality which criminalisation contributed towards, and the implications this had for conflict transformation.

[9] Various government documents, particularly from government inquiries in Northern Ireland and the annual prison reports, provided important information on the implementation of government policy

[10] The South African Parliamentary hansards were unavailable remotely and so were accessed directly from the South African Parliamentary Library in Cape Town.

Deducing how the subjective perceptions of individuals and groups correspond to wider processes of criminalisation positions these individuals at the centre of this research. This means their perceptions and experiences represent relational knowledge (Hastrup, 2004) rather than objective social facts, which can be understood through their re-telling of these experiences. Accordingly, the "thematic, topic-centred...approach" provided by semi-structured interviews was used because it involved a "relatively informal style...with the appearance in face-to-face interviewing of a conversation or discussion" (Mason, 1998:62). They were particularly well suited to the research goals because they aid in "reconstructing the practitioners' point of view" through "insider knowledge" (Pouliot, 2015:246; Bueger and Gadinger, 2015). Such an approach enables the researcher to ask "open-ended questions from a prepared list" and discuss key "topics in depth" (Wood, 2006:375). This involved discussing interviewees' experiences and perceptions of criminalisation, providing original insights into the social reality it created, the variable nature it had across and within groups, and the implications this held for conflict transformation. However, respondent perceptions were analysed with a "focus less on what interviewees talk *about* than what they talk *from*" (Pouliot, 2015:246, emphasis in original), meaning situating responses within their wider context and how they related to other respondents. The sources outlined above provide key source material to triangulate with interview data to check its reliability, while also informing the line of questioning, choice of interviewees, and the interpretation of interview data (Tansey, 2007). Indeed, concerning events which took place over fifty years ago there are obvious issues of recollection, so the interviews focused primarily on more recent events, while analysis on the early periods of conflict was based primarily on the discourse analysis of memoirs, policy reports, news articles, oral history records, previous interview data, and academic sources.

Semi-structured interviews

The design of the interviews was crucial to ensuring that the data collected was relevant to the research itself. This meant choosing who to interview, what questions to ask, how to analyse transcripts, and then how to disseminate this information, involving considerable planning before ever contacting the first interviewee. Following from the conceptualisation of criminalisation in chapter one it is clear that - for conflict

transformation - a broad range of actors have an important role, meaning that interviewees would likewise have to reflect as broad a cross-section of relevant groups as possible to triangulate their perspectives. This was also important to ensure that the results were as representative as possible so that the 'data' was not skewed to one particular viewpoint (Becker, 1967). Accordingly, the process for identifying interviewees was purposeful sampling wherein "the sample is always intentionally selected according to the needs of the study" (Coyne, 1997:629). This involved developing a classification of interviewee 'types' - defined according to their relationship with criminalisation - and interviewing as representative a sample of these as possible. The categorisation of interviewee types is summarised in Table 4 and the actual number interviewed according to each type in Table 5. As these groups are not mutually exclusive, their categorisation served as a framework rather than as a typology, many individuals having overlapping roles,[11] often changing over the course of time.

Of these groups a number of academic interviews were conducted before the others in order to discuss and refine the conceptual and theoretical concepts being analysed. This ensured that later interviews with each of the other categories were based on a coherent research framework with unifying thematic questions. As shown in Table 5 academics comprised a significant proportion of interviewees as they provided important feedback on the theoretical arguments, and frequently through these interviews further contacts would open up via their networks. This was particularly the case in South Africa where I had no pre-existing network before beginning the PhD.

The process of contacting individuals and organisations involved first identifying those who would be relevant to the research through purposive sampling. The identified 180 individuals and organisations were then contacted through a combination of emails, telephone calls, and letters depending on the recipient. This method of contact was very time consuming and unpredictable, but having established a number of contacts it was much easier to then build upon this. Of these a much smaller number responded, and an even smaller number again were willing to meet. Issues of access are problematic to overcome in conflict environments where actors often regard 'outsiders', as I was referred to on more than one occasion, with significant distrust and suspicion,

[11] For example many current political elites were former prisoners.

particularly in South Africa (Reed, 2012). Therefore, while purposive sampling involved the identification of key actors and groups, it only led to a small number of interviews. To address this, these initial interviews were used as part of the snowball sampling method whereby "the social networks of interviewees [is used] to expand the researcher's potential contacts" (Cohen and Arieli, 2011:427). Accordingly three trips were planned to Northern Ireland to allow for contacts to develop who could be interviewed during a later visit. In South Africa such a staggered approach was impractical because of logistical constraints, so instead a number of Skype and telephone interviews were set up in advance with a similar intention.

Table 4. Categorisation of interviewee types

Academic	Specialists in criminal justice, criminology, conflict analysis, political science, anthropology, and history, interviewed to discuss a number of the specific themes covered in the research and refine the theoretical framework.
Security	Senior representatives of the Police Service of Northern Ireland interviewed to understand the law enforcement perspective on criminalisation.
Political	Politicians in South Africa and Northern Ireland interviewed to understand the political narratives on why criminalisation was formally adopted, its intended purpose, and current challenges.
Civil Service	Separated from security because this relates to those involved in the civil government departments relating to justice, and the administration of justice.
Civil Society	This is a broad category including many organisations working on human rights' issues, prison rehabilitation, victim and survivor support, and legal services. These groups provided substantial input regarding how criminalisation operates, the challenges, and the wider implications this has.
Ex-prisoner	Individuals from the IRA, UDA, UVF, MK, and other organisations were interviewed. These actors discussed their experiences of being criminalised and how they resisted such criminalisation.

Table 5. Overview of interviewees by type

	Northern Ireland	South Africa	Archival	Total
Academic	12	5	0	17
Security	2	0[12]	16	18
Political	4	1	15	20
Civil Service	1	2	0	3
Civil Society	10	12	4	26
Ex-prisoner	11	3	26	40
Total	40	23	61	124

These issues of access, however, led to some sampling bias. Of the sixty-three original interviews, only eleven were female, skewing the gender demographics. In many cases this was simply due to access as those interviewed were the ones put forward as the representative of a particular organisation. The sample was more representative in terms of political affiliation as in Northern Ireland ten of those interviewed would identify with republicanism or nationalism, and eight with loyalism or unionism. Of the others interviewed it was not explicitly asked, known, or relevant what their political affiliation was. So while the issues of access inevitably led to some sampling bias, it also opened up research avenues which would have otherwise been unavailable. Indeed, acknowledging this bias meant steps could be taken to minimise its impact particularly through a triangulation of other data sources and cross referencing original interviews with archived ones.

As seen in Table 5 the number of interviews from South Africa is significantly lower than in Northern Ireland, which was due to the limited time period – three weeks – spent on fieldwork constraining the number of interviews that could be arranged. In order to address this and ensure the integrity of the research quality two archives were also visited which contained a substantial body of interviews themselves. The Historical Research Archive based at the University of Witwatersrand and the Mayibuye Archive

[12] No security personnel were interviewed because of issues of access, but the archival sources consulted had a wide range of interviews with security personnel to ensure their perspectives were still accounted for.

based at the University of Western Cape provided further sixty-one archival interviews related to the research. These interviews were selected due to their relevance with criminalisation providing a more balanced range of interviewees as shown in Table 5. Furthermore, these interviews were conducted with a range of political elites and security personnel who would otherwise have been very difficult to access, and completed much closer to the time of the events under analysis providing important sources to cross reference original interview data with.

The background of each interviewee was researched in advance, drawing particularly upon secondary interview material, to ensure that the line of questioning engaged with their experience. Every interview began with an explanation of the research project, how the interview data would be used, and what areas the interview would (not) cover, followed by going through the consent form (see appendix 1). From this point on the interview would be recorded, and an example of some interview questions from a cancelled interview is provided in appendix 2.

As interview transcripts are legally the interviewee's data this requires its usage in publications to be compliant with their initial consent (Israel, 2015). Following the interviews all recordings were therefore transcribed according to the agreed level of anonymity and stored securely as encrypted files. The original recording was then deleted to protect the identity of interviewees. Furthermore, only data relevant to the research project was transcribed to minimise data redundancy. Personal details of interviewees were recorded only when it was necessary and the interviewee had given their consent, otherwise a pseudonym was used. Importantly data will not be shared or used without the express consent of the interviewee in order to comply with the Data Protection Acts which govern data control in the United Kingdom.

Interview transcripts were analysed to identify recurring themes or perspectives related to criminalisation. These were contrasted in relation to different interviewee types, between cases, and across demographics. The analysis did not use coding methods because these rely on a level of consistency across interviews which when interviewing such a range of actors on such a range of themes is problematic. Instead, the interviews were analysed according to answers on key themes covered in the thesis relating to the aspects of conflict, conceptualisation of criminalisation, and the perceived implications

of it. This provided insights into how perceptions of criminalisation differed according to political affiliation, cultural identity, and whether actors were the target of it or implementing it, contributing original primary evidence regarding CPE.

Fieldwork challenges and limitations

Conducting interviews and fieldwork poses a number of challenges to the researcher and is bound by several important limitations. This section will outline these in three categories: practical, legal, and ethical. The practical challenges relate to the logistical issues of doing research in a foreign country, with unknown participants, on controversial themes. Legal challenges arise from the topics under discussion and their relationship with previous crimes committed, terrorist offences, and issues of confidentiality. Ethical constraints inform both the practical and legal issues, but also relate to the wellbeing of the researcher, interviewees, and the integrity of the research project.

Practical challenges of fieldwork

My experiences of fieldwork differed significantly between the two cases. As I have lived the majority of my life in Northern Ireland I already had considerable local knowledge and support from family, colleagues, and friends. I had no issues at all with safety, and generally the fieldwork was straightforward to organise and carry out. In contrast, South Africa has one of the highest levels of ordinary crime, and on my first day of fieldwork in South Africa I found myself in a South African police station filing a crime report having just had my car's hub-caps stolen. On the second day a police-officer stopped my car asking for a 'fine', which, when pressed for the reason, was dropped. While I had done extensive training on the practical challenges of fieldwork before setting off, this did not stop such challenges emerging. Plans were changed. Interviews were cancelled, re-arranged, and re-directed. Finances and its corresponding effect on time posed an ever-pressing constraint on what could feasibly be achieved.

Indeed, Ganiel (2013:171) recounts how by failing to properly prepare for an interview in South Africa - entering an unknown neighbourhood, having no support and no contingency plan - she narrowly escaped a mugging due to a passing stranger's intervention. Knox and Monaghan (2003) refer to how they sought to address such risks by holding interviews in secure, neutral locations where they and the interviewees would feel safe, such as government or NGO buildings. Indeed, precautions taken through completing risk assessments (see appendix 3), establishing local contacts, conducting interviews in 'safe' locations, and doing background research on interviewees inevitably saved me from many potential issues. While taking these precautions limited the range of potential interviews, they were supplemented by the archival sources outlined above and secondary interview data in existing academic research.

Interview fatigue posed a further challenge for this research as many individuals who were contacted had undergone interviews before, albeit on different topics. This meant many interviewees had (negative) preconceived ideas about the interview process and may have been sceptical of *another* researcher coming to interview them again. For instance Clark (2008:965) conducted research on such fatigue finding that there are a number of precursors to it, including a "lack of perceptible change attributable to [previous] engagement; increasing apathy and indifference toward engagement; and practical barriers such as cost, time and organisation". To mitigate against these, the research project's themes, objectives, and focus were all clearly explained to interviewees in the initial contact email or letter, and then reiterated before the interview began. This was to ensure that the interviewee was aware they could end the interview at any stage - that it was voluntary - and that their role in the research was clear. Doing so was important also because the reasons behind why individuals will engage in qualitative research have been found to include at an individual level "subjective interest, enjoyment, curiosity, introspective interest, social comparison, therapeutic interest, material interest and economic interest", and at a collective level "representation, political empowerment, and informing 'change'" (Clark, 2010:399). Clearly establishing the purpose, design, and intent of interviews meant that the data was relevant to the research aims, and the engagement with interviewees was reciprocal. Specifically, any published material which is based upon a particular interview will be sent to the interview so that they are aware of the research output and included

throughout the research process. In this way the interviewee is not regarded simply as the 'product' and 'data', but as an integral participant in the research itself thereby "democratising" the research process (Smyth, 2001:11).

Following the advice of previous researchers (Browne, 2013; Browne and Moffett, 2014), I kept a fieldwork diary recording the day-to-day experiences of conducting interviews. One of the most pressing challenges recorded was the overwhelming experience of conducting dozens of interviews, with such a variety of actors, and in such a short time period of time. Interviewing a victim of political violence, a senior police officer, a former political prisoner, and polarised political elites all within a couple of days meant it was very difficult to engage in proper reflective analysis. Indeed it has taken months of analysis and reflection to actually begin to understand how these polarised perspectives intersect. But at the time this led to a sense of paralysis and was overwhelming as the project felt like it was impossible to complete. Inexperience in conducting interviews was largely to blame for this, because as the interviews went on these issues largely subsided. Concerns over what the data meant were set aside until after the interviews were completed so that they could be analysed as a collection.

Legal Considerations

There is currently an ongoing debate regarding the legal implications of conducting interview research and questions of confidentiality particularly following the high profile case of the Boston College tapes (Israel, 2004; Murray, 2013; Sampson, 2016). A number of researchers in this case interviewed forty-six individuals who were engaged in the Northern Ireland conflict on the condition that all interview data would remain sealed until after the interviewee's death (Sampson, 2016). Confidentiality was, therefore, crucial to the entire process enabling participants to be more open with interviewers. However, the Police Service of Northern Ireland subpoenaed the tapes on the grounds that they held important information relevant to a murder investigation under the UK-US treaty, the Crime (International Co-operation) Act 2003 (Murray, 2013). The legal case challenged the confidentiality of sensitive data on the grounds of it providing evidence for an ongoing murder investigation. While this case illustrates how promises of confidentiality need to be qualified according to the wider legal

framework, similar cases preceded it and will likely also continue to emerge due to the tension between research integrity and legality (Israel, 2004). To account for this all interviews with ex-prisoners began where possible by explaining that confessions of criminal offences can be subpoenaed and disclosure of terrorist activities must be disclosed to the police. The justification behind such a precaution was based in the legislative framework which the research had to navigate and to pre-empt a number of legal issues from emerging (Murray, 2013; Sampson, 2016).

In researching an area such as criminalisation where past offences will be discussed, there is a high chance of 'guilty knowledge' being disclosed.[13] This is where an interviewee discloses the details of an offence they or someone else committed which has not been prosecuted previously. The current legislative framework in the United Kingdom legally obligates the researcher to disclose any cases of such 'guilty knowledge':

> "[Section five of the Criminal Law Act (N.I.) 1967] imposes a duty on a person who knows or believes that an arrestable offence has been committed and who has information about the offence which 'is likely to secure, or be of material assistance' in securing, the arrest of any person to give the information to the police unless they have a reasonable excuse" (Fennan, 2002:160).

Similarly under the section 19 of the Terrorism Act 2000 an individual is legally required to disclose to the police if they have information regarding a terrorist offence. This is problematic considering that many interviewees may wish to discuss prior offences which they believe to be inconsequential following the Good Friday Agreement or the Truth and Reconciliation Commission, but may still be subject to prosecution. By clearly explaining the purpose and nature of the research project interviewees were made aware that such disclosure was irrelevant and inappropriate to the project. In cases where the interviewee appeared to begin to discuss such information the line of questioning was diverted to forestall any incriminating details. These issues also apply similarly to South Africa, meaning that the same precautions were undertaken.

[13] See for example the legal definition of guilty knowledge as the "knowledge of facts or circumstances required for a person to have *mens rea* for a particular crime", that they have the mental knowledge regarding a criminal act, as found in J. Law and E.A. Martin (2009) *A Dictionary of Law*. Oxford University Press.

Ethical considerations

The legal and practical challenges outlined above are only indicative of a range of broader challenges facing such a research project, as addressing them all would take an entire thesis itself. But underpinning and guiding these decisions were four key principles defined by the Economic and Social Research Council (ESRC) guidelines and my own school's ethics process. These are non-malfeasance (not causing harm), autonomy (treating people with respect and enabling them to make their own choices), beneficence (doing good), and justice (who will be advantaged and disadvantaged by the research). Together these principles seek to ensure that the research is conducted in a way which does no harm to the participants, the researcher, and wider society, and that its overall purpose will be for the wider beneficence of society.

With regards to the first principle of non-malfeasance, in conducting interviews on criminalisation there arise the issues of secondary traumatisation and retraumatisation. The former refers to the traumatisation of the researcher from having repeatedly interviewed individuals who have undergone serious emotional or disturbing experiences. This can happen while on fieldwork conducting the interviews, or afterwards through their transcription and analysis. Having a strong support network was of great importance in preventing such issues, particularly being able to discuss the content without disclosing confidential information. Retraumatisation refers to how interviewees may find themselves re-experiencing the trauma of their experience through the retelling of it (McConville and Bryson, 2014:15). For many of those interviewed they had undergone long periods of imprisonment, were estranged from families, and even undergone torture in a few cases. Ensuring that the interviewee was discussing only topics they were comfortable with and being clear what was not to be discussed helped prevent such harm. Furthermore, those interviewed had been identified primarily through 'gatekeepers'[14] who should have ensured that only those with good mental health were interviewed. These steps were taken to reduce the risk of

[14] These are "people who can control the access which the researchers are permitted to have to the subjects of research" which in this case was the interviewees (Jupp, 1989:134).

retraumatisation, albeit imperfectly. Ideally I would have undergone further training in how to conduct interviews on such sensitive topics from health professionals.

The second principle of autonomy means ensuring that all interviewees are treated as people rather than subjects, recognising their own emotions, interests, and values. Outlining the voluntary nature of the interviews and the interview's purpose was important to ensure interviewees were given autonomy over their participation in the process (Smyth, 2001). Furthermore, because the background of the interviewer shapes the answers respondents give (Finlay, 2001), if the autonomy of the interviewee is not properly established they will be more likely to either give answers they think the interviewer would want to hear, or else they may become evasive (McEvoy, 2006).

Engaging in "critical and analytically accountable forms of reflexivity" enables the researcher to anticipate and acknowledge this perceived identity, and reduce the impact it has on the interviews themselves (Finlay, 2001:71; Kezar, 2005). Yet eliminating these perceptions altogether is unlikely, particularly in contexts such as Northern Ireland where, coming from a Protestant Northern Irish family, my name alone gives away my communal background. This meant, at least in part, that Loyalist participants were much more open to meet and discuss the research, perceiving me as an insider who would be sympathetic, whereas Republican actors were initially more reticent and cautious, but when they discovered I was from Northern Ireland they likewise were quite open perceiving that I 'understood' the context. Moreover, in South Africa respondents perceived my identity as being an Irish researcher, leading some to emphasise their shared colonial past and history. These multiple perceived identities reflect the wider complexity of my positionality in relation to those being researched (Bourke, 2014). In this way interview responses will have been at least partially shaped by their perception of who I was.

In anticipation and response to these challenges four steps were taken: firstly, from the first point of contact the independence of the research and its impartiality were emphasised in the research outline and communication; secondly, in interviews I

avoided questions regarding my own identity and focused on the research subject;[15] thirdly, all interviews were cross referenced with secondary interview material and other sources; and fourthly, I established my bona fides through working with key stakeholders who could then introduce me to others (Knox, 2002). While such measures cannot eliminate the challenges of positionality because of the relational nature of interview sources (Kezar, 2005), they at least mitigated against its most obvious problems (McEvoy, 2006).

The third and fourth principles of beneficence and justice are closely related with regards to this research as it based on the new ethics approach to research: whereby "the goal is taken to be bringing about particular sorts of change in the world" (Hammersley and Traianou, 2014:3.1). In analysing how criminalisation impacts upon conflict transformation, the research is seeking to contribute towards our understanding of how to bring about conflict transformation. The critical approach adopted is based in a normative framework which seeks to reduce all forms of violence including structures of violence such as those embodied in certain aspects of criminalisation (Lederach, 2003). Furthermore, because of the key importance of informal criminalisation, interviewee responses shaped the wider research project albeit within a defined theoretical framework. Through such "participatory forms of inquiry" (Hammersley and Traianou, 2014:6.2), interviewees contributed towards the research findings. Not only did the interviews provide data which formed a central evidential component of the research, but as the interviews progressed certain themes increased in prominence while others were sidelined. For instance criminalisation in general was refined into the criminalisation of political expression, and then further into specific types of political expression. The distinctions between the experiences of different interviewees meant that the original broad conceptualisation was insufficient to account for the variable impact it had.

In addressing these above challenges the overall integrity of the research was greatly improved. Setting up safeguards in anticipation of the practical challenges minimised their potential to disrupt carrying out the research. Risk assessments, insurance, local contacts, secure interview locations, all helped reduce stress and protect against harm to

[15] Most of the time this was not problematic as interviewees wanted to discuss the topic and generally made their own assumptions about my background rather than enquiring after it.

the researcher. Addressing the legal issues refined the research focus away from areas which would unnecessarily present further ethical issues with respect to disclosure of guilty knowledge. By identifying and responding to the ethical issues outlined above the quality of the research was greatly improved, as interviewees were given autonomy over their role in the project, the research parameters were clearly defined, and the normative framework was made explicit.

Conclusion

This chapter has outlined the thesis' methodological framework, explaining the research design, data sources, and the practical implications of conducting fieldwork. Building on the conceptual and theoretical framework established in chapter one, the methodology analyses the relationship between criminalising political expression and conflict transformation from the interpretivist approach (Bueger and Gadinger, 2015; Leander, 2008; Pouliot, 2007, 2012, 2015). As this relationship has not been previously studied the research was designed as theory building, which is why in-depth case studies were considered to be the most appropriate, as they enable a close and contextualised examination of the processes to identify how they operated. The case studies of Northern Ireland and South Africa were selected as typical cases of this process illustrating the evolving nature of criminalisation over time. Moreover they were analysed through a comparative framework based on the most similar systems design, as although the case studies enabled an inductive examination of the processes, the comparative framework meant these could be abstracted in order to identify general mechanisms (Pouliot, 2015). This chapter, accordingly, established the justification for the case selection, outlining their comparability in relation to their similarities and differences (summarised in Table 3), extending the interpretativist methodological approach to consider the domestic practices of criminalisation.

In assessing these cases the research employed practice tracing, using discourse analysis and semi-structured interviews to analyse the subjective and inter-subjective meanings embodied in formal and informal criminalisation. Formal criminalisation was analysed through the discourse analysis of current academic research, historical records, legal documents, government reports, parliamentary Hansards, legislation, and media

sources. Informal criminalisation was analysed through discourse analysis as well but considered biographies, archived interview transcripts, oral history records, and archived publications; alongside new semi-structured interviews collected as part of the research. In this way the research combines a wide range of data sources, primary and secondary, triangulating their findings to develop new insights into the process of criminalisation and its implications for conflict transformation.

The chapter then outlined the process of planning, implementing, and analysing the semi-structured interviews. Interviewees were identified according to their relationship with criminalisation, and the interviews were designed to discuss a number of key themes derived from the established understandings of criminalisation within previous research. The interviews were conducted with a wide range of different types of actors to ensure as representative a sample of perceptions as possible (summarised in Tables 4 and 5). The logistics behind the interviews were then discussed, outlining the range of individuals interviewed and how this mapped across the cases.

Despite careful planning fieldwork in areas experiencing high levels of crime and on topics of a sensitive nature pose a range of different challenges. These broadly fell under three categories: practical, legal, and ethical. The practical issues related to personal safety, logistics, and interview fatigue; the legal challenges related to issues of confidentiality and the disclosure of 'guilty knowledge'; and the ethical issues related to the principles of 'do no harm', autonomy, beneficence, and justice. The steps taken to address these were discussed as were the limitations with these measures.

In summary this chapter has set out the methodological framework through which the research questions and theoretical issues raised in chapter one are addressed. The following four chapters – chapters three to six – will consider each specific aspect of conflict outlined above to understand how criminalisation impacts upon conflict transformation, while chapter seven extends and develops these findings through a further small-n analysis.

Chapter 3

Criminalising conflict: Non-violent movements and the criminalisation of non-violent political expression

This chapter considers the first of the four conflict contexts analysed in this thesis: non-violent movements. Its overarching aim is to understand what relationship exists between criminalising non-violent political expression and the development of non-violent movements; thereby providing insights into the wider theoretical question of the thesis concerning how CPE impacts conflict transformation. Therefore this chapter develops specific insights into CPE in the specific conflict context of non-violent movements which will be brought together with those of chapters four, five, and six in the final chapter.

In response to non-violent movements, states frequently criminalise non-violent political expression. In such cases criminal justice is used to consolidate the power of the state by reducing or eliminating the capacity to challenge the state through non-violent political means. For instance, in 2001 in the Syrian Arab Republic the Government implemented the Legislative Decree 50 on the 'freedom of publications and libraries' providing for extensive measures repressing any political expression challenging the state under the pretexts of "national security" and "national unity" (Human Rights Watch, 2002; UNHCR, 2005). In this context the label of crime was used to legitimise state repression, consolidating the power of the state. Drawing on the critical conceptualisation of criminalisation developed in chapter one, this chapter accordingly argues that CPI and CPA create a social reality of 'crime' which embeds violent forms of conflict rather than transforms them. This is because just as criminalisation constructs social reality, violence responds to this "as a reflection of the underlying social reality" (Väyrynen, 1991:3). In other words, actors may engage in violence in response to their perceived social reality, reacting against their criminalisation in order to protect or fight for their interests.

Yet while criminalising non-violent political expression may impact motivations to engage in political violence, it remains unclear why this is the case in some cases and

not others[1]. This chapter will address this puzzle arguing that such criminalisation impacts upon actor motivations to engage in political violence for three interrelated reasons: (1) it contributes towards intergroup polarisation; (2) it collectivises repression; and (3) it increases the cost of non-violent collective action. These factors, however, depend on the specific nature of criminalisation - its target and implementation. In other words, applying the typology of criminalising non-violent political expression in chapter one, criminalisation needs to be disaggregated into the criminalisation of political activities (CPA) and criminalisation of political identity (CPI). While these are interrelated, their distinction is important in terms of the impact on actor motivations to engage in political violence and the implications for conflict transformation.

Table 6. Implications of criminalising political expression on NVMs, group identity and repression

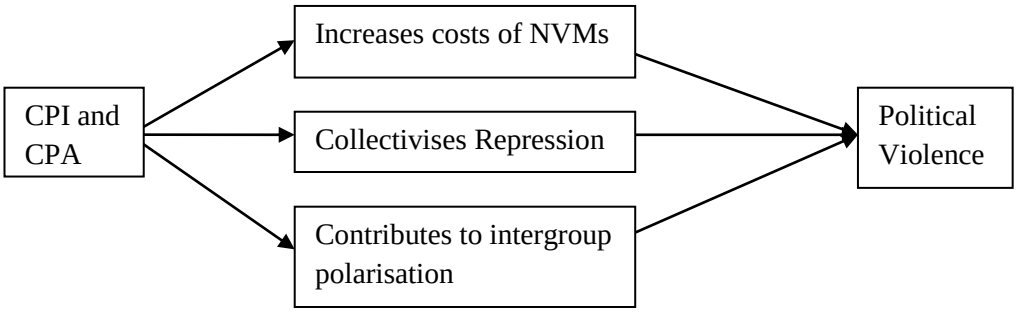
	1. Polarises intergroup identity	**2. Collectivises repression**	**3. Increased costs of NVM**
Criminalising Political Identity (CPI)	Criminal/victim narratives contribute towards intergroup polarisation	Criminalised identity becomes the target of law enforcement	Frames non-violent movements as criminal
Criminalising Political Activities (CPA)	Can create distinct law enforcement practices for different communal groups	Political strikes, protests, and meetings are met with state repression	The banning of communications, events, and funding pushes actors to operate covertly

CPI frames groups as perpetrators and victims, displacing underlying political motivations, contributing towards intergroup polarisation. As a result, repression is seen to be targeting a political identity as opposed to individuals, thereby becoming a collective grievance around which actors may mobilise. Furthermore, non-violent movements (NVMs) may come under the criminal label simply because of their

[1] The Arab Spring is one examples of this, as in Tunisia, Libya, and Egypt their respective criminal justice systems were all used to varying degrees as mechanisms of political power to silence political dissent, criminalising political expression (Chertoff and Green, 2012). However in some of these cases non-violent protests escalated into political violence, whereas in others it remained non-violent.

association with a criminalised identity, undermining their credibility and potential efficaciousness. On the other hand, CPA itself embodies a form of state repression which can contribute towards distinct law enforcement practices and varying according to the communal group; potentially escalating intergroup tensions. Likewise the cost of non-violent collective action increases when it is criminalised because resources are harder to mobilise, communication becomes restricted, and penalties become prohibitive (Tarrow, 1998; Tilly, 1978). These increased costs of non-violent mobilisation then coincide with increased costs of inaction due to collectivised repression, and can encourage some actors to transition into political violence. Therefore, both forms of criminalising political expression have an important impact upon actor motivations to engage in political violence, albeit depending on their extensiveness. These arguments are summarised in Table 6 and Figure 2.

Figure 2. Theoretical relationship between CPI/CPA and actor motivations to engage in political violence



The first section of this chapter will develop and illustrate these conceptual distinctions through discussing their manifestation in the case studies of Northern Ireland (1922-1969) and South Africa (1950-1961) prior to the outbreak of collective political violence.[2] This section will show how CPI was evident in both cases, whereas CPA was much more extensive in South Africa. The significance of this is demonstrated in how many of the key political leaders of the South African liberation movements all pointed directly towards CPA as a central motivating factor behind their violent mobilisation, whereas in Northern Ireland it was considered as secondary to other factors. Focussing specifically on the context of deeply divided societies which have functioning legal

[2] These dates link to the primary legislation criminalising non-violent political expression.

systems is necessary in terms of the comparability of cases (Horowitz, 1985). This is because, in deeply divided societies which are experiencing political unrest, criminal justice is generally under the control of a single ethnonational group, which uses criminal justice, *inter alia*, to consolidate its own hegemonic position at the expense of other groups (Horowitz, 1985:22). In such contexts, the state will often respond to unrest by criminalising political expression to re-establish order, but in practice, it frequently becomes a form of repression (Jung, Lust-Okar and Shapiro, 2005). It is when disorder itself becomes associated with a certain political identity that such criminalisation takes on a particular meaning; instead of simply criminalising violent acts, political acts become subject to the criminal law as well. The second section of this chapter will therefore analyse the three processes summarised in Table 6, drawing on evidence from the two case studies. The case study analysis will then be followed by some concluding remarks and suggestions for future research.

Criminalising non-violent political expression: Northern Ireland and South Africa

Understanding the importance of criminalising political expression first requires it being disaggregated into both CPI and CPA because, while interrelated, they can have different implications for conflict transformation as explained in chapter one. CPI is distinct in that it is inherently based on delegitimising the criminalised identity through targeting particular ideologies, cultural practices, political views, or symbols, whereas CPA seeks to undermine the capacity to mobilise against the state and accordingly involves proscribing specific behaviours of expression including protest, strikes, publications and political meetings. In both cases criminalisation was directed against a political identity, whereas in South Africa the extensiveness of CPA was much greater than in Northern Ireland, as summarised in Table 7. Outlining the distinctions between these cases therefore provides an important comparison of the two processes.

Table 7. CPI/CPA in Northern Ireland and South Africa

	Political Identity	Political Activities
Northern Ireland	Republicanism and loyalism	- Limited restrictions on specific events[3] - General surveillance of political activity
South Africa	Communism and later all anti-state activity	- All activity promoting any proscribed group (anti-state) ideology was banned

CPI in South Africa related primarily to three laws,[4] the first being the Suppression of Communism Amendment Act No.50 which granted the State President the power to proscribe any organisation which sought to further "any of the objects of communism" (Mathews, 1972:55). In announcing the legislation in Parliament the Minister of Justice explained its purpose was "to cope with the deadly menace of Communism" (S. African Parliament, 1950b). Framing "subversive elements" as "Communist" provided a simplistic, yet highly effective, out-group classification through which all political opposition to the state could fall under (Ibid). The legitimacy of opposition to the Government, therefore, did not matter, so long as the person could be classified as a Communist agitator. This is important because of the permanence of this representation, as even following the peace settlement, the former Minister of Law and Order Adriaan Vlok (1986-91) explained to the Truth and Reconciliation Commission: "[T]he ANC-PAC, were seen with justification as fronts and tools of the Marxist-Communist threat against the country...I saw it as part of my duty to fight against such thoughts, programmes or initiatives" (TRC Report 5, 1998:278). The very thoughts of communism were considered as the enemy, as Vlok clearly links these political groups including their ideological basis with a security threat. Criminalising the communist ideology was part of the wider delegitimisation of the identity.

[3] This escalated in the 1960s as described in the section on collectivised repression.

[4] While there were others they largely complemented these or expressed similar traits and therefore are not discussed here. For more detail on these see: John Dugard, *Human Rights and the South African Legal Order* (Princeton: Princeton University Press, 1978); Anthony S Mathews, *Law, Order and Liberty in South Africa* (London: University of California Press, 1972).

However, this criminalisation needs to be understood as part of the wider process of racial regulation, subordinating non-Whites to inferior political, social, and economic positions within society; undermining their very "capacity for self-determination" (Glaser, 2010:301). This was codified through the Population Registration Act 1950 which required all persons to be arbitrarily designated into racial categories based upon descent and skin pigmentation as well as "the extent to which one's hair, fingernails, lips, and other physical features incline towards caucasian or negroid" (Dugard, 1972:63).[5] In practice its arbitrary approach led to families becoming divided between Coloureds and Africans due to variations in the colour of their skin, leading to displacement, social exclusion, eviction, and forced unemployment (Brooks, 1968). Introducing the Bill the Minister of the Interior explained that it would enable better "detection of and the control over crime", but the problem with this is that it meant the regulation and control of non-White communities, reflecting their wider informal criminalisation (S. African Parliament, 1950a).

The third pivotal legislative change during this period was the Unlawful Organisations Act 1960 which explicitly banned the African National Congress (ANC), Pan-Africanist Congress (PAC), and the South African Communist Party (SACP). While the Government argued that this justified to ensure the "maintenance of public order" (Unlawful Organisations Act, 1960) it embodied the complete criminalisation of the political identities associated with these groups ensuring that "[t]he transition from semi-legality to illegality was complete" (Magubane *et al.*, 2005:70). The language used again by the Minister of Justice announcing the Bill is illustrative of this referring to the groups as "terrorists" and "an abomination" who are engaging in a "barbaric and merciless reign of terror" (S. African Parliament, 1960). Likewise, the Minister of Bantu Administration and Development placed the blame with "that group of agitators – and it is a small group – [who] want to have the control of the country in their hands" (S. African Parliament, 1960). He later clarified this explaining:

> "[T]hese agitators are playing the diabolical role of inciting these people to revolt and then they issue pious statements in which they say that they are not in favour of violence, but behind the scenes the 'spoilers' and similar people are encouraged to commit violence" (S. African Parliament, 1960).

[5] While racial discrimination predated this law, this Bill was the "cornerstone" of apartheid's system of racial discrimination (Dugard, 1978:60).

Once again the representation in the legislation and political discourse is centred on the illegitimacy of these groups, linking their political activities directly with the terms terrorism and barbarism and the threat to the South African state itself. The political goals and identity of these actors are marginalised and framed according to the threat that they pose to the state.

A similar case is evident in Northern Ireland which was placed under emergency rule in 1922 through the Civil Authorities (Special Powers) Act (SPA). This took place in a heightened security context with the newly established Free State of Ireland emerging out of the civil war (Boyle, Hadden, and Hillyard, 1975; Donohue, 1998; McConville, 2014). In the introduction to the Act its purpose is stated as being "to take steps for preserving the peace and maintaining order" (Special Powers Act, 1922). Yet it has subsequently been described as "an almost perfect instrument of dictatorship" (McConville, 2014:87) because of the widespread powers it granted. Specifically, restrictions included measures banning "the flying of the tricolour, the wearing of the Easter Lily, the circulation of newspapers, the printing of nationalist or republican documents, the erection of republican monuments, the singing of republican songs, and specific organisations" demonstrating the extensive discretionary powers granted throughout this period (Donohue, 1998:1113). Republican activities normally considered to be political were criminalised to ensure the delegitimisation of these actors and their political agenda. For instance, in announcing this Bill before the House of Commons Robert Megaw MP, who was the Parliamentary Secretary to the Minister of Home Affairs at this time, outlined the Bill's purpose as being to "enable us to cope with the terrible conspiracy with which we are confronted at present" (UK Parliament, 1922), and similarly Ulster Unionist MP Samuel McGuffin referred to "the widespread character of crime and outrage" (UK Parliament, 1922). Initially used in the immediate aftermath of partition to address the security threat posed by militant republicanism (Donohue, 1998:1092) their continuation reflects an perpetual Unionist fear towards Irish republicanism, as although 'crime' was the justifying language, the targets were the Republican symbols, ceremonies, and organisations even long after the initial militant threat de-escalated (Donohue, 1998).

Through these laws republicanism and communism are clearly linked to disorder and criminality, whether explicitly or implicitly, to delegitimise the actors they represented.

The political discourse surrounding their introduction reflects these representations, linking the political identities to 'criminal' threats. Yet their wider implications are interrelated with CPA, because although criminalised, identity may still be expressed. For example, while there were some restrictions placed on certain Republican events in Northern Ireland under the SPA (Donohue, 1998), these were primarily focussed on undermining their efficaciousness, rather than eradicating their identity. Indeed CPA was enforced primarily in relation to nationalists living in Protestant towns and communities, largely leaving Catholic rural and urban areas alone, effectively restricting these political symbols to their own communities (Ó Dochartaigh, 2013:127). This reflects the important role of criminalisation in responding to the fears of a particular communal group.

Exceptions would possibly relate to the proscription of certain Republican organisations whereby the state criminalised specific actors for membership of an illegal organisation (Calle and Sanchez-Cuenca, 2011); however this was primarily directed primarily against those engaged in political violence, not non-violent political expression at least until the mid-1960s. Likewise, criminalisation was extended to more explicitly cover restrictions on parades, commemorations, flags, and emblems which may disrupt the peace through the Flags and Emblems (Display) Act (Northern Ireland) 1954 (FEA) and the Public Order Acts (Northern Ireland) 1936, 1951. Together these laws prohibited tampering with or removing the British Union Jack, providing that any other flag may be removed if it threatened the peace, effectively restricting the flying of the Irish tricolour in certain areas, as well enabling the Home Secretary to ban parades which threatened the peace (Bryan, 2004). However the police appear to have initially enforced this law infrequently and the introduction of the FEA was primarily the result of divisions within unionism during the 1950s rather than in response to republicanism (Ó Dochartaigh, 2013; Patterson, 1999). That said, during the Bill's second reading the Minister for Home Affairs justified the FEA explaining: "It is directed solely to restraining the lawlessness of a few people who have endeavoured to ride roughshod over the cherished symbol of Northern Ireland's carefully chosen way of life" later referring to the Irish tricolour stating "that flag has no standing in Northern Ireland" (NIA, 1954). In other words, CPA was predominantly directed against political expression deemed threatening to unionism, and while the measures did not explicitly

ban republican political expression, it placed significant restrictions on it representing a wider informal criminalisation of their identity.

The contrast however with South Africa is significant, for under the Unlawful Organisations Act 1960 all persons, whether a member of a banned organisation or not, were banned from "engaging in activities which may be designated, broadly speaking, as activities which further the aims of the unlawful organisation" (Mathews, 1972:59). Other contributing legislation included the Black (Native) Administration Act No38 which prohibited the fomenting of racial hatred against Whites; the Riotous Assemblies (Amendment) Act No19 which prohibited the publication of material which incited racial hatred towards Europeans; the Criminal Law Amendment Act No.8 which made civil disobedience a criminal offence; the Riotous Assemblies Act No.17 which prohibited open-air public meetings if deemed to endanger public peace; and the Group Areas Act No 41 1950 which made it compulsory to live in the designated classification area.[6] Essentially all forms of political activity deemed to be subversive by the state were proscribed meaning any communist or anti-state activity whether violent or not (Dugard, 1978; Mathews, 1972). The Minister of Justice, for instance, in introducing the Suppression of Communism Bill, explained that the state needed to take "drastic action and to apply more severe means to safeguard the security of the State and of the citizens" later going on to explain: "It has become absolutely necessary to oppose [Communism] and if possible to eradicate it" (S. African Parliament, 1950b). In this case, therefore, CPA was designed to not only regulate or place restrictions on political activity as was the case in Northern Ireland, but to 'eradicate' it altogether. This reflects the link between CPI and CPA, whereby the representations of republicanism or communism as criminality enabled the state to justify expanded security boundaries (Dugard, 1978; Ellison and Smyth, 2000), although this point will be expanded upon in chapter four.

[6] For more see Dugard, *Human Rights and the South African Legal Order*, or see the TRC Report Volume 1.

Constructing social realities and motivations for political violence

Having explained what CPI and CPA refers to, it is necessary to understand what implications it may have for conflict transformation, because while it pertains to a particular legal framework as outlined above, it is the perceived reality that this creates which can have implications for actor motivations to engage in political violence. In other words, criminalisation needs to understood "as a social practice"; its implications depend on "who criminalises" and "on what assumptions and according to what processes" (Lacey, 2009:943). The above representations of republicanism and communism construct a particular social reality through political discourse and legislation whereby "language is viewed as a social practice, and discourse is seen as contributing to the construction of the social world" (Bartolucci, 2015:120). The South African and Northern Ireland Governments used criminalisation to help facilitate the construction of a particular hegemonic discourse which reflected and shaped intergroup relations through the enforcement of these discourses. In this way there was "policing of statements" whereby the state determined "where and when it was not possible to talk about such things...in which circumstances, among which speakers, and with which social relationships" (Foucault, 1976:18).

Understanding the implications of this for political violence then requires analysing how it contributed towards a particular social reality, because violence itself acts "as a reflection of the underlying social reality" (Väyrynen , 1991:3) which is – at least in part - constructed through criminalisation. Therefore, the implications of CPI and CPA for actor motivations to engage in political violence require considering the social conditions which generated them and those in which it was implemented (Bourdieu, 1990:56, 1977). Put differently, analysing the social reality of crime involves considering how CPI and CPA in the cases became implemented and how this was perceived by those subject to it. From this perspective three interrelated arguments can be identified which outline how criminalising non-violent political expression impacts upon actor motivations to engage in political violence (summarised in Table 6 and Figure 2): contributing to intergroup polarisation, collectivising repression, and increasing the associated costs of non-violent political action. It is through the combination of these three processes that CPI and CPA will shape actor motivations.

Table 8. Implications of criminalising non-violent political expression in Northern Ireland and South Africa

		Polarises intergroup identity	Collectivises repression	Increased costs of NVM
CPI	Northern Ireland	Non-violent expressions of republicanism are informally framed as 'criminal' expressions by some loyalist actors	Enforcing CPI leads to a wider regulation of republicanism and nationalism creating a perceived 'enemy' in the form of law enforcement	Protests are framed as fronts for criminality informally legitimising certain repressive police practices
	South Africa	All activities associated with anti-state identities are framed as criminality, embedding a wider perception of the threatening 'other'	Repression perceived to be targeted against the identity of the liberation movement, not just individuals, providing a grievance and out-group to mobilise against	Due to repression targeting the identity of actors, inaction becomes increasingly costly through pass laws and their enforcement
CPA	Northern Ireland	CPA is predominantly targeted against republicanism politicising policing practices	Law enforcement perceived as repressive due to police practices and communal composition	Costs NVM perceived as increasing due to informal CPA by policing and pro-state actors
	South Africa	Policing practices are legitimised through the defining of the Communist threat	The expansive boundaries of CPA facilitated practices of repression by law enforcement	Increased repression of NVM reduces its strategic utility relative to political violence for some actors

But how they operate in practice is complex because of the distinctions between formal and informal criminalisation. While both cases had relatively similar legal systems and laws governing political expression, their enforcement differed significantly, as did the way they were perceived. The case comparison is therefore important in deducing how

CPI and CPA can operate together across differing contexts. Table 8 summarises this displaying how the two targets of criminalisation map onto the cases. Therefore the second section of this chapter will explain how each of these factors develops, applying them to original and archival evidence from the two case studies.

Polarised identities: victims or perpetrators

Research on intergroup conflict has demonstrated the importance of polarised and conflictual identities in terms of how they can be used by political leaders to consolidate in-group hegemony through the collective threat of the out-group (Horowitz, 1985; Lake and Rothchild, 1996), and how a common identity and shared interests are essential characteristics for collection action (Tilly, 1978:84). Fears of the other, in this case, the criminalised, become used to consolidate group hegemony and securitise intergroup interactions. But as a political identity becomes associated with a narrative of criminality, the criminalised may begin to perceive the state's communal group as the repressive criminaliser (Mandela, 1994a). In contrast, this criminalisation contributes towards the state's communal group perceiving the criminalised as the perpetrators threatening the stability of the state and their identity (Brooks, 1968; Todd, 1987). In these ways identities are further reduced to one-dimensional characterisations masking the political beliefs and motivations of the other group and defining their own in oppositional terms. While these dynamics are often the manifestation of "longstanding distrust, fear, and paranoia" (Lederach, 2002:13), criminalising political expression embeds and normalises this fear.

Because identities are framed in opposition to another group, any concessions to that group can be perceived – or at least framed - as a threat to their own identity. In-group cohesion may become fragmented over those who may wish to moderate their relations with the out-group. In other words, the criminal label facilitates a more hard-line narrative through which to outbid the moderate centre, reforms aimed at improving intergroup relations can accordingly be framed as undermining intra-group power (Moore *et al.*, 2014). For instance in Northern Ireland during the early 1960s, Ian Paisley and the movement he stood as the figurehead of, sought to undermine the Ulster Unionist Party (UUP) leader O'Neill and his brand of liberal unionism (O'Callaghan and O'Donnell, 2006; Walker, 2004:158); political overtures made by O'Neill in the 1960s

were accordingly framed as undermining unionism and Protestantism; such as his meeting with the Irish President in 1965 which was framed by Paisley as 'treason' (Tonge *et al.,* 2014:11). The framing of criminalisation is important here because Paisley frequently used such discourse to refer to nationalism and symbols of nationalism; such as referring to the Irish tricolour as the "murderers' flag" (Taylor, 1999b:32) and to the Irish Taoiseach as a gunman and a murderer due to his former role in the IRA during Irish War of Independence (O'Callaghan and O'Donnell, 2006:211; Tonge *et al.,* 2014). The movement sought to force the Stormont Government to halt any reforms aimed at appeasing the so-called criminal Nationalists, as the language of criminalisation was used to reduce the Nationalist out-group to a criminal identity. For example, Social Democratic Labour Party (SDLP) MP John Hume stated in the Assembly: "Listening to honourable Members opposite one would think that it [the pursuit of Irish unity] was a crime" (NIA, 1969 quoted in McLoughlin, 2006:164). In this way the distinctions between militant Republicans and moderate Nationalists were ignored by certain Unionists who perceived the collective goal of a United Ireland as sufficient evidence of criminal intent.

The implications were of great significance, however, in terms of destabilising the political context. For instance, a police report from 1966 stated: "[T]he fact is that an equal or even great threat is posed at present by extremist Protestant groups [than the IRA]" (O'Callaghan and O'Donnell, 2006:210). The development of a salient out-group threat in the form of Irish nationalism increased the perception of certain Loyalist groups that they needed to defend their identity, even if this meant engaging in political violence. For instance in 1966 the Ulster Volunteer Force (UVF) issued a proclamation stating: "[W]e solemnly warn the authorities to make no more speeches of appeasement. We are heavily armed Protestants dedicated to this cause" (Quoted in Mulvenna, 2016:35).The speeches of appeasement referred to here relate to the policies being initiated by the Prime Minister Terrence O'Neill as these were "perceived as liberal and in many senses as threatening to Protestantism and Northern Ireland in general" (O'Callaghan and O'Donnell, 2006:219). CPI was at least an expression, if not contributing factor, of these perceptions, framing concessions to Nationalists as threats to unionism. The significance of this is evident in how shortly after this proclamation the UVF was proscribed following the shooting of three Catholic civilians (NIA, 1966 c777). Moreover, the UVF was later involved in the bombing of a power station in

1969, which was wrongly attributed to the Irish Republican Army (IRA), and contributed to bringing down the O'Neill Government.

Paisley's minority faction of unionism[7] was however not alone in adopting the discourse of criminality in relation to nationalism, as such views were held also by some of those within the UUP leadership at this time. For example, the non-violent civil rights movement the Northern Ireland Civil Rights Association (NICRA), which was founded in 1967, was described by the Home Affairs Minister (1966-8) William Craig as a cover for the IRA: "[The civil rights marches were] organised entirely by the IRA...it was a deliberate effort by the IRA to play a bigger part in the politics of Northern Ireland and the Irish Republic" (Taylor, 1999a). Similarly, UUP Member of Parliament John Taylor stated: "It was seen as a Nationalist plot to overthrow the state" (Ibid). NICRA was considered a threat to the peace and order of Northern Ireland, an organisation which served only as a cover for criminals intent on political violence. Although it is clear that the IRA were represented and involved in NICRA and undoubtedly sought to manipulate it for its own ends, reducing the organisation to the IRA was reductive for failing to appreciate the many organisations involved and the genuine grievances they represented (Purdie, 1988; Taylor, 1999b:51).

Because NICRA and the wider civil rights movement it was part of were considered as criminals intent on the overthrow of the Stormont Government, concessions granted by O'Neill were perceived by Unionists – or at least framed by some Unionists - as acquiescing to criminality and a threat to their very identity (Patterson, 2008:508; Walker, 2004:163). This, in turn, contributed towards a dehumanisation; expressed in a more recent interview with the former Home Affairs Minister William Craig (1966-8), who when questioned about "police beating demonstrators over the head" responded saying: "They were a few that caught the attention of the media. I didn't see anything wrong with it" (Taylor, 1999b:53). Because the police represented law and order and because these protests were organised by at least some suspected criminals, such views followed. Viewing protesters as criminals rather than political actors securitised state responses which exacerbated tensions and failed to address the underlying socio-

[7] It is not clear what link existed, if any, between Paisleyites and militant loyalism at this time. While Paisley consistently contested the existence of any formal link, a number of UVF ex-prisoners all pointed to the discourse of Paisley as a factor behind their mobilisation (Taylor, 1999a, 1999b).

economic concerns (Farrington, 2008:530). This, in turn, contributed towards the dehumanisation of the out-group, as an IRA ex-prisoner reflected: "[T]hey seen us as criminal, as scum, or as filth and dirt" (IRA ex-prisoner A, 2016). As will be discussed, this dehumanisation and intergroup polarisation embedded identities, which when enforced through repression, became a collective grievance to mobilise around and an obstacle to non-violent alternatives.

In South Africa, such polarisation took place again creating a sense of the criminal other. While intergroup polarisation cannot be solely attributed to CPI, this process at least embedded and legitimised it for some, particularly those within Afrikaner communities. For instance, there was a deep sense of fear and the need to defend the state against the threat of so-called criminality, such as that expressed by the Minister of Justice: "The barbaric and merciless reign of terror....[of the ANC/PAC seeks] to bring the White Government of South Africa to its knees....what they want is our country" (SA Parliament, 1960). The in-group - the 'White' Government - is contrasted with the out-group – the 'barbaric and merciless reign of terror' – as intergroup relations are inherently tied up in the discourse of legitimacy and order. A memorandum of the state security council illustrates this stating: "Where it is not practically possible to refer to specific common law crimes, descriptions such as 'rioters', 'boycotters', 'protesters' should rather be avoided and replaced where applicable with descriptions such as: hooligans, vandals, thugs" (State Security Council Memorandum, 1984). Even though this is from a later period it still reveals the fundamental importance of the criminal paradigm. The state was deliberately avoiding political terms which could potentially legitimise the out-group, instead using language associated with the criminalised identity. So CPI at least provided a framework through which intergroup polarisation could become embedded. For example, the White anti-apartheid activist Bernard Gosschalk referred to the "climate of terror which the government introduced and induced...in the white community" through implementing these measures (Gosschalk, 1995).

Moreover the wider implications of this are important, because the state narrative was part of the wider process of regulation; a process which established the "factors of segregation and social hierarchization...guaranteeing relations of domination and effects of hegemony" (Foucault, 1976:141). For example, former serviceman Anthony Turton

referred to being socialised into such attitudes and how this isolated groups from each other: "[S]ociety was training us, bringing us up to eventually serve society's purposes...to fight for a cause that we didn't understand" (Turton, 2008). The implementation of criminalisation had contributed towards the wider socialisation and regulation of society in such a way that those on the 'other side' were framed and understood only in terms of the state narrative, dehumanising them and reducing them to criminals. Mike Huxtable, an Afrikaner who used to work in Military Intelligence, explained: "[Y]ou listen to what the authority of the day says and that's just it. There's no option of questioning it" (Huxtable, 2008). The authority of the state, and its representation of communism, was accordingly regarded as legitimate and unquestioned by such individuals, or at least this is how they have framed it. A former Officer in the National Intelligence Service, Steve Smit, similarly referred to his socialisation and upbringing as being crucial in why he joined the state services: "I grew up in a house where I could have quite easily have justified being a racist...I grew up in that environment, so the whole thing of discipline and law enforcement was part of my life" (Smit, 2007). As there is likely an element of self-legitimisation it is unclear to what extend criminalisation itself determined such attitudes and practices directly, but it at least reflected and embedded them due to the wider social acceptance of the legitimacy of legal system within Afrikaner communities.

On the other hand, a counter-narrative of state criminality often develops in opposition to the state, embedding a sense of victimhood, such as that expressed by a Republican community worker who stated: "[The Special Powers Act was] used mainly against people who would have come from a nationalist/catholic/republican background" and that "within that period of time the laws had been set up to suit the state" (Community Worker B, 2016). Also, the Republican publication An Phoblacht [*Republican News*] refers repeatedly to the SPA as repressive and unjust; one extract stated: "Its purpose is to suspend all freedom and create a police state in which the Government is allowed to suppress all civil liberties" (An Phoblacht, 1972:6). This was likewise the case in South Africa, as the PAC publication Africanist expressed the view of being "criminally oppressed, ruthlessly exploited and inhumanly degraded" (Africanist, 1959:10), and earlier stating: "They all aim at creating a feeling of insecurity among the oppressed and thus making them a docile labour force which accepts resignedly its inferior status" (Africanist, 1957:6). This was echoed by Nelson Mandela who referred to these as

“racist laws and regulations that cripple [African’s]...growth, dim his potential and stunt his life” (Mandela, 1994a:109). An uMkhonto weSizwe (MK) ex-prisoner echoed this stating: “[Apartheid] was declared a crime against humanity and these people were defending what has been declared a crime. So...I was fighting against a crime” (MK ex-prisoner A, 2016). Resisting criminalisation itself became an essential component of these movements by attempting to use the state's own narrative against itself (Mandela, 1994a; McEvoy, 2000). Therefore, the relationship between groups became framed and subject to the criminal narrative, whether through the state discourse or the counter-narrative of resistance.

These cases demonstrate the implications which criminalising a political identity can have, as the state's communal group defines itself in opposition to that of the so-called criminals and as defenders against criminality, embedding incompatible and conflicting narratives. In practice, this can result in any attempts at reform being perceived as acquiescing to criminality itself and to be resisted (O'Callaghan and O'Donnell, 2006). On the other hand, when mobilised, the criminalised will seek to overturn and counter such criminalisation, bringing them into conflict with the state and the state's supporters. The outworking of this then is closely related to the second process of collectivising repression, because by linking a political identity to criminality it collectivises it to that group, not just individuals.

Collectivised repression

Criminalising political expression collectivises an offence, so that all those who hold a particular belief or identify with a criminalised political identity are regarded as criminals regardless of whether they engaged - or plan to engage - in any form of proscribed activity. For example, expressions of republicanism/loyalism, communism, or African nationalism become criminal expressions even if they are never formally acted upon. This matters for actor motivation because this collectivisation becomes realised through law enforcement, meaning the police become the criminalisers of a particular political identity (Brewer, 1994; Ellison and Smyth., 2000; Hornberger, 2011). Frequently used to justify security powers, this suppression of an identity can easily become the repression of a community, or at least perceived as such. It is because

of the legitimacy that law holds which makes it particularly appealing to states, differentiating it from violent repression - though the two can obviously coexist. But this chapter is adding an extra layer to this argument to say it is not necessarily the presence of state repression alone that encourages actors to engage in political violence, but the perception that it is being targeted against their community, and in direct response to non-violent political expression.

The alternative to collectivised repression is not necessarily individualised forms, but it is a generalised form of repression. In contrast to being directed against a political identity, it is either indiscriminate, undirected, or undefined in terms of its target. This is the case when political identities are not salient in terms of non-violent movements or are deemed irrelevant to the movement's objectives. In contrast, collectivised repression has a legislated target through the criminalisation of political identity. What constitutes an act of state repression is itself theoretically problematic as different forms can have very different outcomes (Davenport, 2007). Yet there is important evidence that repression may increase the likelihood of some non-violent actors transitioning into political violence (Lichbach, 1987; Mason, 1989). For example, White and White (1995:332) distinguish between legitimate repression - state sanctioned - and illegitimate repression - informal and spontaneous - but these distinctions often break down when applied, because the legitimate or legalised repression may provide an informal legitimacy to the so-called illegitimate repression. The documented evidence of state collusion in both cases with pro-state armed groups is illustrative of this (Ellis, 1998; McGovern, 2015). Indeed, when considered at the level of perceptions these categorisations become problematic as they represent the interaction between the formal and informal, the legal framework and its implementation. In other words, because collectivised repression is not necessarily based on the type of repression, but its interpretation by those who identify as the repressed, it regards repression as a perceptual reality. Therefore this chapter is concerned only with a specific form of repression, whereby actors must perceive repression to be directed against their identity, because this then can become a collective grievance to mobilise around.

In Northern Ireland the powers of the SPA have been argued as being used primarily "for the suppression of nationalist dissent" (Ellison and Smyth, 2000:24). For example, the police's role in charging individuals meant that Catholics were typically charged

with more serious offences than Protestants (Boyle, Hadden, and Hillyard, 1975), because when these laws were applied to Unionists it "was often tempered by discretion and political considerations" (Buckland, 1979:206). Furthermore, the Royal Ulster Constabulary (RUC) submitted regular reports to the Ministry of Home Affairs documenting the proceedings of Nationalist meetings which had not been banned (Donohue, 1998:1100); demonstrating a level of surveillance of moderate nationalism. It is this day-to-day surveillance and monitoring that Professor Walsh highlighted when interviewed explaining: "The minority community were effectively subjugated through de facto criminalisation as part of the mechanisms of control" (Walsh, 2016). Therefore, CPI resulted in law enforcement being directed against the identity of Nationalists monitoring and regulating their political activities. While the extent of such Nationalist discrimination is contested, a 1968 survey reported that 74% of Catholics perceived that Catholics in Northern Ireland were treated unfairly (Rose, 1971:272). Moreover during 1922-1950 "more than ninety meetings, assemblies, and processions in the province" were banned, the vast majority being Republican (Donohue, 1998:1093); whereas anecdotally, when trying the cases of Protestants who had attacked a Catholic processions on their way to the International Eucharistic Congress in Dublin in 1932, Magistrates predominantly granted bail rather than prison sentences because the latter would have negative political repercussions (Buckland, 1979:219-220). In other words, CPI contributed towards a wider politicisation of law enforcement, whereby political opposition to the state was regulated through the powers granted to the police. This is not to say CPI led to politicisation, but that it will have enabled, and at the very least given expression to it.

Moreover, as the political identity of nationalism and republicanism were criminalised it followed that in its enforcement, so too would be Nationalist and Republican communities. For example an IRA ex-prisoner explained: "I perceived a particular sector of society as being oppressed" (IRA ex-prisoner B, 2016). Not only did this individual link law enforcement with repression, but that they perceived this repression as being targeted against their identity and community (Shirlow, Tonge and McAuley, 2008). Indeed another IRA ex-prisoner explained:

> "[Y]ou start to question and wonder why I am living like this. What am I growing up in a community like this for?....Why are they treating my parents,

> and my grandparents, and my community differently than the way they treat their own people?" (IRA ex-prisoner A, 2016)

As perceptions of repression being targeted against a community develop, these individuals argue that they then started to question the whether they could do anything about it.

These perceptions of repression being directed against an identity are then exacerbated by the communal composition of law enforcement. For instance in Northern Ireland the RUC was almost completely Protestant (Ellison and Smyth, 2000), and augmenting the RUC role were the auxiliary force - Ulster Special Constabulary (USC) - who were considered "notoriously anti-Catholic" (Weitzer, 1985:42). Indeed the Republican publication An Phoblacht refers to "the brutal violence of the official agents of the Stormont regime" in response to the "peace activities of the Civil Rights movement" (An Phoblacht, 1970). The perception of state repression was therefore connected to the term "Stormont regime", as an IRA ex-prisoner likewise referred to the "Stormont Government" as "the main oppressors" (IRA ex-prisoner B, 2016). Therefore, CPI contributed towards the perception that repression was being both targeted against their identity, but also perpetrated by the out-group.

Furthermore, the perception of the courts and judiciary within certain Nationalist and Republican communities was that "they were part and parcel of the Unionist power structure and therefore unlikely to uphold any serious challenge to the regime" (Boyle, Hadden, and Hillyard, 1975:12). This was because many judges in the judiciary were from Unionist backgrounds, often with close ties to the Stormont regime, reinforcing the perception of political control. Moreover, in Northern Ireland "cases were dealt with on the basis of very precise and often highly technical points rather than the broad issues underlying the dispute" enabling judges to "sidestep the main issues" (Boyle, Hadden, and Hillyard, 1975:23). While this raises a wider question of the role of the judiciary in a conflict, its significance here is how it reinforced the power of the status quo, embedding the narrative of criminality which was contributing towards intergroup polarisation. The legal culture itself was "permeated by symbols of exaggerated Britishness" through various prominent displays, ranging from the flying of the Union Flag at courts, to declaring "'God Save the Queen' when a judge entered the court" (McEvoy, 2011:380-1). This reinforces the perception that law enforcement is targeted

against the criminalised identity, as it is those in the out-group who are perceived as the repressors, embedding the intergroup polarisation discussed above.

Not only was political identity criminalised in South Africa, but so too was political activities, and whereas the enforcement in Northern Ireland held some credibility even in Nationalist communities in the early 1960s (Prince, 2012), in South Africa law enforcement was highly politicised and complicit in "the monitoring, control, and regulation of race relations, specifically Black South Africans, [which] remained a necessity in order for political power and economic wealth to continue as the preserve of the Whites" (Brewer, 1994:11). In other words, the state utilised a complex system of social control based on racial classifications and enforced by law enforcement as a means of consolidating the power of Whites: "Pass laws (like other comprehensive regulatory schemes) constantly criminalize everyone, subjecting them to autocratic whim and power" (Abel, 1994:64). The extensiveness of this is witnessed by the dramatic increase in the number of prosecutions during this period as in 1948 214,000 Africans were prosecuted "for curfew, passbook, and 'native pass law' violations" rising to 418,000 in 1959 (Greenberg, 1987:42). Freedom of movement and expression were severely restricted and enforced then through violence: "Fostering fear of the police was seen as the easiest way to impose regulations on civilians" (Hornberger, 2011:36). For instance, a community practitioner with The Centre for the Study of Violence and Reconciliation in South Africa explained: "[The SAP] relied not on evidence but on confession, and these confessions came out because people were forced to confess through torture" (Community Practitioner, 2016). By having a broader remit in terms of criminalisation, law enforcement was granted correspondingly wider powers in terms of its enforcement. The distinction between CPI and CPA is therefore important in terms of the implications of collectivising repression, with CPA enabling much greater powers and corresponding law enforcement practices.

Evidence of such police brutality and repression has been well documented (Brooks, 1968; Mandela, 1994a; TRC Report 5, 1998), but again it was its targeted nature against a political identity which was important for actor motivation to engage in political violence. For example Sipho Binda, who was an MK ex-prisoner, explained: "[T]hose were the days of repression, harsh repression, I must say. I remember at home we were not even allowed to sing Nkosi sikelela, our national anthem" (Binda, 1993). The

repression of the state is linked directly here with the expression of political identity. In this way repression framed what would be considered legitimate political identity and led to normalising practices even within these communities as Sipho goes on to explain: "When you do that [sing the anthem], your mother will shout you down, you know, and give you a spank for doing that, saying that you'll call the police. The walls have ears and so on" (Binda, 1993). However on the other hand this repression also contributed towards the perception of state illegitimacy relative to that of the liberation movement as ex-political prisoner in South Africa explained: "[The] state was illegitimate. It was using violent means to oppress and suppress, and what we were doing was a just cause. [Political violence] was a defensive response to state violence" (South African political ex-prisoner, 2016). The language used here attributes the illegitimacy of the state to the repressive actions carried out by law enforcement, but does so by contrasting this violence with the "just cause" of the liberation forces. In this way, political violence was argued to have become the only effective way of defending their identity. An MK ex-prisoner similarly argued: "We had no other avenue to express our feelings so that is why there was the formation of these organisations" (MK ex-prisoner A, 2016). By repressing their identity this instilled in the criminalised a collective grievance to mobilise around.

By linking repression to the criminalisation of an identity the state embeds a sense of collective victimisation as law enforcement becomes synonymous with the suppressing or defeat of this identity. In both cases this was evident, albeit to varying extents, as the police were used as an extension of the state's communal group to uphold their hegemonic position. This provides the criminalised with a highly salient issue contributing towards actor motivation to engage in political violence, as actors seek to resist the repression of *their group identity*, not simply their own. Despite intergroup polarisation and the collectivisation of repression, the question remains of why actors would take on the high risks associated with political violence as opposed to the alternative of non-violent political action. This is where the final process is crucial as it relates directly to the cost-benefit analysis which criminalising political expression can affect.

Costs of non-violent collective action

Non-violent movement literature emphasises the importance of social networks for mobilisation in terms of trust, communication, and resources (Butcher and Svensson, 2016; Stephan and Chenoweth, 2008; Tarrow, 1998; Tilly, 1978). CPA raises the costs which these networks have to mobilise, whereby political communication may be restrained or completely proscribed, political demonstrations may lead to mass arrests and criminal charges, funding sources will become harder to secure domestically, and external support may diminish depending on the effectiveness of that state's criminal narrative (Tarrow, 1998; Tilly, 1978:100). Together these issues will compound the collective action problem as individuals will be increasingly less likely to mobilise in the face of increased costs (Butcher and Svensson, 2016; Tarrow, 1998). By criminalising political activity the costs associated with non-violent mobilisation will reduce the numbers willing to participate, and because movements require mass participation to be effective, this criminalisation can contribute towards their overall decline (Chenoweth and Ulfelder, 2017). Furthermore, those who are engaging in peaceful activities often find themselves marginalised as its efficaciousness is eroded, whether formally through the laws, or informally in how they are enforced. Indeed the informal practices of CPA are of great importance because while certain forms of political activity will be proscribed, they may be enforced only in relation to one communal group. For CPI the formal process will signify a wider message of political illegitimacy domestically and internationally, though the salience of this message will depend on its informal implementation and reception. Together CPI and CPA, therefore, have important implications undermining the efficaciousness of NVMs.

However, the collective action problem is often overcome because while engaging in political action can be costly, so too can inaction (Kalyvas and Kocher, 2007). While formal CPA will target groups and particular forms of expression, the implementation of this in law enforcement often means communities will be criminalised whether politically mobilised or not, as outlined above in relation to collectivised repression. So as there is a decline in non-violent mobilisation, other actors will perceive that the increased cost of non-violence means it is no longer effective, and see political violence as preferable to achieve their objectives. Now, this is not to say violent or non-violent

action is more or less effective, but that criminalising non-violent action through CPI and CPA results in some actors perceiving the increased costs as a motivation to make the transition into collective political violence.

This was particularly evident in South Africa where the extensiveness of CPA and CPI effectively proscribed all forms of potentially destabilising non-violent political activities. As the previous sections have outlined, this created a collective grievance and defined out-group to mobilise against. But the decision to mobilise through violence appears to have ultimately come done to a number of factors directly related to the costs of NVM and the other factors outlined above. For instance Joe Matthews from the ANC explained how there was a growing realisation after the non-violent Defiance Campaign in 1952 that non-violence was no longer effective, because "there was a steady illegalisation of our activities, step by step and the penalties were high" (Matthews, 1994). ANC Chairperson at the time, Alfred Nzo, likewise remarked: "It was at that point that it became clear that...the era of peaceful struggle had come to a close" (Nzo, 1994). Oliver Tambo also referred to this criminalisation necessitating the move from non-violent mobilisation to political violence saying: "[T]he armed struggle was imposed upon us by the violence of the apartheid regime" (Mandela, 1994a:618).[8] Such views were also held by those who later joined the MK (Orkin, 1992), and were shared by members of the PAC; as PAC veteran Vuyani Mgaza explained: "[W]e did not see any other way of fighting except to use the very weapons they were using against us" (Maaba, 2004:259). Likewise PAC leader Robert Sobukwe stated: "We didn't have any faith in non-violence because the penalties had become too high. It was no longer a useful technique" (Sobekwe, 1970). The associated costs of non-violent collective action were perceived as too high, in comparison to the alternative of collective political violence. Not only were actors prohibited from meeting, communicating, and resourcing their political activities, but the penalties for doing so meant many key activists were facing long prison sentences, exile, and violence (Lissoni, 2009; Mandela, 1994a).

These arguments are also linked to the previous points regarding collectivised repression, as the Walter Sisulu of the ANC/MK explained: "[T]he regime was becoming desperate in its effort to suppress the movement. And that [was] why there

[8] Mandela here is referring to Oliver Tambo saying this at the time of the bombing of the Koeberg nuclear power plant in December 1982.

was no difficulty deciding that now, let's take up arms" (Sisulu, 1993). Here Sisulu directly links the repression of the state with the decision to make the transition into political violence, but does so linking it also to the costs of non-violence. Indeed he states this explicitly later in the interview: "[T]he arguments of peaceful struggle was[sic] no longer really suitable" (Sisulu, 1993). In other words, it was not only that he perceived non-violence as ineffective, but also that it was costly due to repression. Therefore it was only after "the government undertook to destroy them" that political violence really became perceived as strategically necessary for the main leaders of the MK and SACP (Landau, 2012:562).[9] Moreover, it was the repression of "the movement", reinforcing the importance of collectivised repression and informal criminalisation. Similarly, Rusty Bernstein who was a former member of the SACP referred to the policing of protests in 1960 as a central mobilising factor, expressing the point that cost of inaction can also act as a mobilising factor, as it "started people saying well look we can't carry on forever in this way using unarmed people against an armed police" (Bernstein, 1993). In this way, criminalising political activity was of significant importance to these actors both in terms of directing law enforcement against their identity, as well as reducing the strategy effectiveness of non-violent political activities through its implementation.

In Northern Ireland the transition into collective political violence was dissimilar, as although the IRA were involved in the civil rights campaign (Purdie, 1989), it was predominantly perceived as secondary to political violence (McEvoy, 2000:545). A police report from 1966, for instance, referred to the IRA as being "ready to seize any opportunity to disturb the peace" (O'Callaghan and O'Donnell, 2006:210), and so when non-violent collective action was met with violence, this was reciprocated, escalating into collective political violence. For example, one IRA ex-prisoner explained: "The state...reacted with violence. They could not countenance this idea of people taking to the streets and...they attacked with venom the peaceful protesters"; later going on to say how "that then draws its own reaction from those people" alluding to political violence (IRA ex-prisoner C, 2016). The ineffectiveness of non-violence is implied, but it is the enforcement of criminalisation rather than the laws themselves, which are pointed to as

[9] There is no exact point necessarily of when violence suddenly outweighed nonviolence just that, as state repression intensified over this period, the calls for political violence became more frequent and persuasive due to the reasons outlined.

the crucial mobilising factor for responding with political violence. Another IRA ex-prisoner reinforced this stating: "[T]hat was the goal, the removal of the British Army. All the stuff around the Special Powers Act...[they] were the issues that propped up what they were doing, what they were allowed to do" (IRA ex-prisoner D, 2016), and another IRA ex-prisoner succinctly explained: "Whether it was the Emergency Powers Act or Special Powers Act, who gave a toss? It's them" (IRA ex-prisoner B, 2016). While such views cannot necessarily be generalised to broader communities, they are indicative of a least a cross-section of the population who chose to take up arms. Indeed the reference to the British Army (who did not arrive until August 1969) illustrates how the response to the civil rights movement was secondary to the later actions by army, paramilitaries, and police personnel in the early 70s.

This also relates to the assumption outlined at the beginning that criminalisation needs to be perceived as a response to non-violent collective action, and in this case, criminalisation itself long preceded non-violent mobilisation, which may explain why it is not particularly relevant. Instead, criminalisation's enforcement – the perception of collectivised repression – in response to non-violent action was directly linked to mobilisation by these IRA ex-prisoners. Therefore, although there was no formal CPA as was the case in South Africa – at least not to the same extend – the perception articulated by these IRA ex-prisoners was that it still was informally implemented.

This is reinforced by accounts from Loyalist ex-prisoners, who while generally not involved in civil rights marches, pointed to the ineffectiveness of the state in protecting their identity. Again it was not the ineffectiveness of non-violent political expression which mobilised them, but the perception that non-violence was not an option against the perceived threat of violence. For instance, one UVF ex-prisoner explained: "I believed my community, my culture, my way of life was under attack and the powers that be who were charged with the responsibility of protecting my community, for whatever reasons, were failing to do it" (UVF ex-prisoner B, 2016). The UVF publication Combat similarly cited a UVF member explaining his motivation derived from this belief in being a defender of his community: "We aimed at defending our areas from the threat of organised attack by the IRA" (Combat, 1977). Political violence was perceived to be the most effective, indeed the only option, by many who engaged in it. Non-violence from this perspective was made redundant not by criminalisation, but

by the transition to violence by the other side. The UVF ex-prisoner Billy Mitchell explained this stating: "We didn't go to bed one night as ordinary family men and wake up the next morning as killers. Conditions were created in this country whereby people did things they shouldn't have done" (Quoted in Taylor, 1999b:46). These statements are also undoubtedly attempts to justify their position in terms of acting out of defense, and so their validity must be qualified as such. Therefore, to say that these individuals chose political violence as an alternative to non-violent mobilisation was at most a minority position. It was not the increased costs associated with non-violent political expression which provided the motivation, but perceptions of threat which were firmly rooted in polarised identities. Indeed, the British Government did grant certain concessions to Nationalists (Patterson, 2008), but the problem was in how these were perceived by Unionist/Loyalist actors and Republicans. Republicans regarded these as too little too late, whereas certain Unionist and Loyalist actors perceived them as a threat to their own position and identity.

The contrast between these cases is instructive then as the distinctions suggest that it is the combination of formal and informal CPA and CPI which will have a significant impact on non-violent movements. This would explain why in South Africa many of the leaders who formed armed political groups all pointed to criminalisation specifically as one of the integral reasons behind their decision to form these groups, whereas in Northern Ireland, because non-violent political activities were still legal, formal CPA was less important, although informally CPA was significant because of the perceptions of collectivised repression and politicised law enforcement. This is because these findings are also dependent upon the other two processes, as motivations to engage in political violence are based on the interaction between them.

Conclusion

This chapter contributes to the literature on conflict analysis by challenging the prevailing assumption of crime as "taken-for-granted construct" (Cohen, 1996:3), arguing that the process of criminalisation is itself a crucial process impacting actor motivation to engage in political violence. Specifically, criminalising political expression can potentially affect actor motivation to engage in political violence –

undermining conflict transformation - for three inter-related reasons: (1) by contributing towards intergroup polarisation; (2) collectivising repression; and (3) raising the costs associated with non-violent collective action. By applying the theoretical typology of political expression developed in chapter one, distinguishing between CPI and CPA, the chapter explained how these contribute towards different state responses, albeit interlinked, varying in their target and implementation. These are summarised in Table 8, displaying the how the three arguments map onto CPI and CPA across the two cases.

When violence is understood "as a reflection of the underlying social reality" (Väyrynen, 1991:3) CPI has important implications for this by regulating and embedding conflicting intergroup identities. State actors and the state's communal group frame each other as criminal, thereby securitising their political objectives as a threat to their own position and identity. In response, the criminalised developed a counter-narrative of state criminality regarding the state's communal group in like terms. In practice, this contributed towards a wider dehumanisation of the out-group and meant any attempts to address the political concerns of the non-state group could be framed as acquiescing to criminality limiting options for peaceful conflict resolution. In South Africa – and to a lesser extent in Northern Ireland – this was used to legitimise widened security practices to defend against the defined 'criminal' threat.

Building on this, because criminalisation targets an identity its enforcement involves the suppression of that identity, embedding perceptions of state repression. But instead of repression being generalised across the population, it is perceived as being targeted against a specific group, contributing towards an embedding of the 'us and them' characterisation, and creating a tangible enemy in the form of law enforcement. This collectivised repression creates a shared sense of victimhood instilling in some a collective grievance around which to mobilise. The criminalising of political identity, therefore, can provide certain conditions which may increase the likelihood of actors engaging in political violence. Therefore the importance of collectivised repression depends on CPA because this determines what the legal boundaries are governing law enforcement. This is illustrated by the comparison between the cases as in South Africa the extensiveness of CPA corresponded with a much more repressive system of law enforcement in contrast to that of Northern Ireland. However, in Northern Ireland collectivised repression still applied, because while formal CPA was considerably less

pervasive, there was a perception within certain Republican communities that their ability to express political grievances was being undermined through the informal practices of law enforcement and non-state actors. But understanding why actors pursue political violence as opposed to non-violent alternatives relates to the final aspect of criminalisation: the criminalising of political activities.

Criminalising political activities itself represents a form of state repression, and will accordingly embody a collective grievance to mobilise around. But it also has a significant impact on actor motivations by raising the costs associated with non-violent political expression. For instance in South Africa, the banning of meetings, protests, strikes, and publications, meant actors were preventing from communicating their objectives and mobilising dissent. The costs of non-violence were perceived as prohibitively high because of increasing difficulty to mobilise alongside the threat of criminal sanctions and the increasing costs of inaction. In contrast, in Northern Ireland the extent of CPA was much less significant, because political activities were largely not criminalised, and because criminalisation preceded non-violent collective action. Therefore, as CPA was more pervasive in South Africa so too was its significance, demonstrated by how many of the key political leaders of the liberation movements all pointed directly towards it as a central motivating factor behind their mobilisation into political violence, whereas in Northern Ireland it was regarded as secondary to intergroup aggression. This said, ex-prisoners in Northern Ireland pointed to criminalisation as a central factor for their mobilisation, indicating that formal CPA was not necessary for it to be informally implemented, and to similar effect.

Together these three explanations contribute to research on political violence and conflict transformation with the two case studies providing insights into the implications of criminalisation for non-violent political expression. By applying criminalisation to non-violent political expression it contributes towards a wider social reality which actors respond towards, reacting against their criminalisation in order to protect or fight for their interests. But the distinctions between CPI/CPA and formal/informal criminalisation convey the complexities in how this can take effect providing new insights into the understanding of criminalisation. Indeed, issues around criminalising political expression today are of great importance in cases such as Turkey, Syria, Russia, amongst others, and these findings would inform wider debates on the

implications of state repression, regarding the implications of state practices of CPE. Furthermore, this chapter has focused on criminalisation domestically, but the international level is also important, such as when the UN General Assembly declared apartheid a crime against humanity in 1966. Understanding these distinctions would be important in determining the potential impact international law and legal norms may have either in preventing or responding to repression. The following chapters build upon these arguments to consider the implications of CPE beyond this initial conflict context.

Chapter 4

Politicising crime to criminalise politics: Responding to collective political violence

Conflict from the perspective of conflict transformation is necessary for change to occur (Lederach, 2003); it only becomes problematic when it involves the use of violence to bring about this change (Miall, 2004).[1] In such a context, following the onset of collective political violence, states frequently implement counter-insurgency (COIN) measures, whereby the criminal justice system is used to legalise certain emergency powers (Bonner, 1992; Neal, 2012). In this sense COIN is not necessarily in contradiction with conflict transformation as it involves a range of strategic initiatives aimed at bringing an end to insurgency; the tensions are in relation to how this takes place and the goals behind it. Indeed, a legitimate criminal justice system is regarded as integral to COIN because if a state does not respond in accordance to its own law it "forfeits the right to be called a government and cannot then expect its people to obey the law" (Thompson, 1966:52); meaning that while a legal system may undergo changes to adapt to a conflict situation, it must still ensure "that each new law...be effective and must be fairly applied" (Thompson, 1966:53); that the changes contribute towards conflict transformation, not further violence. Yet while a substantial body of research has highlighted the many tensions which exist between COIN and conflict transformation due to issues of state violence, the focus on defeating insurgents, and compromises in the rule of law (Cochrane, 2013a; Neal, 2012; Zedner, 2005), this chapter considers the underlying reasons behind why this is the case linked to the target of CPE.

The politicisation of crime embodies this tension whereby ordinary criminal offences are linked to a political motivation, creating a criminal 'other' to normalise and justify expanded security powers. In other words, ordinary crimes of political violence – such as murder, theft or arson - are politicised to criminalise the political actors and as well

[1] However, some would argue that violence may be necessary at certain points when confronting an even greater form of violence such as the liberation movement in South Africa. For example see Ramio Väyrynen (1991) To Settle or to Transform? Perspectives on the Resolution of National and International Conflicts. In: R. Väyrynen (ed.) *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation*. London: Sage, 1-25.

as their motivations; politicising crimes to de-politicise the motivations. In other words, the criminalisation of political violence (CPV) conjoins with the criminalisation of political identity (CPI) by linking crimes, even implicitly, to a political motivation. But doing this specifically through the politicisation of crime is problematic for conflict transformation, as instead of deterring or reducing the likelihood of violence, it embeds certain types of violence and frequently embodies a form of violence itself. This is because the predominant objectives (Hart, 2008) of criminal justice - deterrence, retribution, and reform – become directed against an 'enemy' of the state as opposed to independently administering justice. This consequently undermines conflict transformation for three reasons directly linked to each of the principles of criminal justice: (1) it is ineffective at deterring violence because political actors perceive the costs of criminal sanctions differently from ordinary offenders (McEvoy and Mallinder, 2012; Sarkin and Daly, 2004); (2) that reform becomes a site of resistance for political actors, as it becomes designed to break their political resolve (Buntman, 1998; McEvoy, 2001); and (3) that punishment for offences directs moral outrage against both the acts of political violence, and the motivations as well (Bonner, 1992). The politicising of crimes, therefore, results in a miscalculation regarding the motivations behind political violence, the embedding of these motivations, and a further erosion of state legitimacy. The delivery of justice becomes compromised for wider security objectives undermining trust in its independence and efficiency in general. These issues can then continue even after their reform, as actors continue to perceive the reformed institutions through their historical experiences.

Chapter two justified the case selection of Northern Ireland and South Africa, but it is worth specifying here how it relates to COIN because both represent cases of such politicisation, as the state responded to collective political violence by implementing legislation to enable concurrent COIN strategies. However the two cases vary in terms of extensiveness of this criminalisation and the outcomes, with variation between pro/anti-state paramilitaries, the exact composition of the laws, and the nature of their enforcement. Therefore, the similarities in terms of the politicisation of crime enable an effective comparison between the cases, while the differences provide an important contrast in terms of the potential implications. This is summarised in Table 9 to show the rationale behind the comparative framework for this chapter. The first section of the chapter accordingly conceptualises what the politicisation of crime is and its

relationship with COIN through a consideration of the two cases studies of Northern Ireland (1973-1980) and South Africa (1962-1989).[2] This framework provides an initial theoretical investigation into the tensions between conflict transformation and COIN due to the politicisation of crime.

Table 9. The comparison of CPV in Northern Ireland and South Africa

Similarities	Differences
1. Criminalised political violence through counter-terrorism legislation 2. Re-orientated policing on to a COIN framework 3. Functioning legal systems 4. Deeply divided societies 5. Colonial contexts	1. The extensiveness of criminalisation, as in South Africa it covered non-violent political expression as well 2. The level of state violence through law enforcement 3. Distinctions between pro/anti non-state actors

The second section of this chapter discusses the three central arguments regarding deterrence, reform, and retribution, exploring the tensions between their cooption into the COIN framework - through the politicisation of crime - and conflict transformation. Table 10 illustrates these tensions by contrasting the primary assumptions behind each of these objectives and how they differ for ordinary crime and political violence. For deterrence, increasing the certainty of the sanction is regarded as essential in deterring potential perpetrators from ordinary crime, but this does not apply effectively to those engaging in political violence. By engaging in such acts these individuals are already taking on significant risks, and so custodial sentences - or other criminal sanctions - will be very unlikely to act as an effective deterrent (Sarkin and Daly, 2004; McEvoy and Mallinder, 2012). Indeed, the attempt to deter through criminal sanctions is regarded as ineffective by many of these actors who see their 'time served' as part of their wider political mobilisation (Shirlow *et al.*, 2010).

[2] These dates were chosen due to them coincided with the introduction of legislation in each case politicising crime.

Table 10. Relationship between the objectives of criminal justice and the politicisation of crime

	Ordinary Crime	Political Violence
Deterrence	• Increase the certainty of the sanction to deter actors committing a particular behaviour	• Political actors calculate the costs differently and are much more willing to take on high risks
Reform	• Correct deviant behaviour to prevent criminals from re-offending post-release	• Political actors regard reform as a new site of resistance • Reform political actors often involves breaking their will which may result in forms of state violence
Retribution	• The criminal sanction is designed as a moral punishment for the criminal act committed • The punishment is part of justice being seen to be done to combat impunity	• Politicising crime applies the moral punishment to the political motivation as well thereby informally criminalising the community who hold such political views

Following the conviction of an individual, reform seeks to correct their deviant behaviour to prevent them from re-offending. But again political actors perceive such attempts at 'correction' as a form of repression directed against their political identity. This can result in prison becoming a new site of resistance against any attempts at reform. Substantial research has documented how in the absence of a political agreement this resistance continues even long after release illustrating the embedded nature of such resistance and why reform in prison is very unlikely (Dwyer, 2012; Gear, 2002; Shirlow *et al.*, 2010).

The final objective of retribution is designed to combat impunity and ensure that crimes are punished as a moral requirement. But politicising crime applies this moral condemnation to both the actor's behaviour and motivation, resulting in the wider

informal criminalisation of all those who share their political identity, even if they condemn their violent actions. Law enforcement accordingly becomes directed against a political identity - if it had not already been so – leading to wider issues of surveillance and informal criminalisation. Furthermore, by applying moral condemnation to this wider political community this can contribute towards their alienation from the state and intergroup polarisation.

The chapter will conclude with a discussion of how these arguments relate to the framework of conflict transformation and the problems they present. These challenges are, however, not based in the criminal justice system necessarily, but in the politicisation of crime. The final section will outline potential areas for future and the possible implications for contemporary counter-terrorist legislation, although these are discussed more extensively in the thesis' conclusion.

Politicising crime: State responses to collective political violence

An insurgency refers to an asymmetric civil war where the non-state actor(s) adopts guerrilla tactics to counter-balance the power of the state (Mack, 1975). As a strategic response to this, counter-insurgency refers to a military strategy designed at winning the battle of 'hearts and minds' so that the 'fish' would be left with no 'water' (Dixon, 2009). It is distinct from counter-terrorism as it not only seeks to defeat 'terrorist' groups, but also to establish a legitimate form of governance and address the motivations behind the population's support for insurgents,[3] although this is discussed in greater detail in the thesis' conclusion. In this context, the politicisation of crime enables the state to delegitimise insurgents and legitimise itself while staving off international scrutiny by framing the insurgency as a domestic security issue. From this perspective and as outlined in chapter one, politicising crime is "one of the many ways to construct social reality" with crime being "not the *object* but the *product* of criminal policy" (Hulsman, 1986:71, emphasis in original). Linking a political motivation to the criminal offence is seen as a means of framing political violence as a negative and damaging social reality as identified by the legal system. The insurgent is characterised

[3] For more on these distinctions see Michael Boyle (2010) Do counterterrorism and counterinsurgency go together? *International Affairs* 86(2):333-353.

as the criminal other, while the state is characterised as the protector. Accordingly "legal rules are often written in such a way as to permit rather than to disallow state deviance" (Brogden and Nijhar, 1998:90), so that the creation of a particular social reality - 'the threat of crime' - legitimises extensive security powers which are seemingly necessary. Having defined the criminal threat, all associated issues become subsumed under the criminal paradigm: war becomes criminality; insurgents become hooligans, gangsters, and bandits; political violence becomes criminal predation and pathological. As a result, the complexity of a conflict becomes reduced to a criminal issue which requires a strong security response. How this works in practice can be seen through considering some of the key legislation and political discourse from the two case studies.

The social reality of crime: Political criminals

There is an inherent tension in politicising crime between its method and purpose, as it seeks to de-politicise the motivations of a criminal act, by criminalising both. This means taking offences which are already criminal offences and linking them in legislation explicitly to a political motivation (Brewer *et al.*, 1996). For instance in South Africa the National Party (NP) introduced the General Law Amendment Act (Sabotage Act) in 1962 in direct response to the armed campaigns of the uMkhonto weSizwe (MK), and Poqo (Feit, 1970; Johns, 1973). The Act created a new offence of sabotage which was essentially already criminalised under previous laws, but what is important is that it linked the offence to a political motivation: "to further or encourage the achievement of any political aim, including the bringing about of any social or economic change in the Republic" (General Law Amendment Act 1962, subsection 2e). Likewise, the Government later introduced the Terrorism Act 1967 linking the criminal act of terror to a political motivation: "to further or encourage the achievement of any political aim, including the bringing about of any social or economic change, by violence or forcible means" (Terrorism Act 1967, subsection 2(2f)). While these laws defined offences so broadly they effectively criminalised all anti-state behaviour whether peaceful or not (Mathews, 1972:165), they demonstrate the inherent tension in terms of politicising crime to de-politicise the motivations. This tension is particularly evident in the second reading of the Terrorism Act 1967 before the South African

parliament, where the Minister of Justice refers to terrorists as “political adventurers” whose “actions are aimed principally at the overthrow of the rule of law in our country” (S. African Parliament, 1967), yet still maintaining that they were “mere criminals” (Filippi, 2011:638). Moreover the political ‘threat’ is framed in existential terms by the Minister of Justice who argued that “the price which we are being asked to pay for peace” was to “surrender our heritage” (S. African Parliament, 1967). Therefore tension of politicising crimes is framed in the wider context of intergroup conflict which threatened the very existence of Afrikaner ‘heritage’, not criminality.

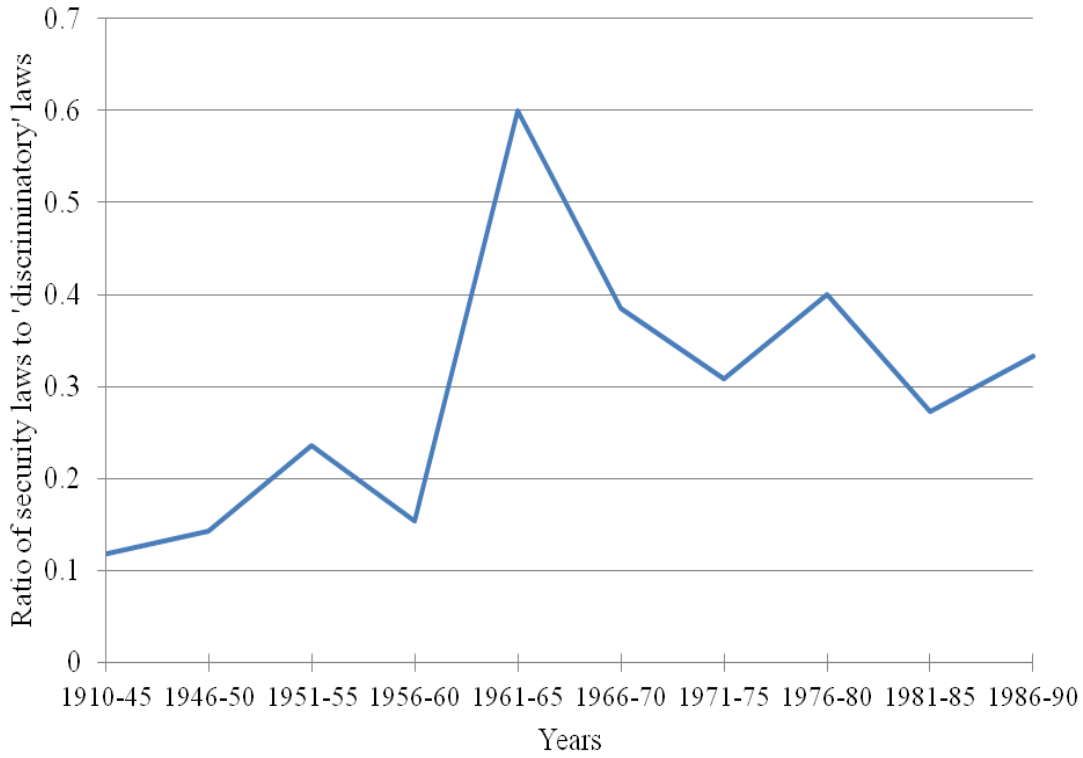


Figure 3. Ratio of security laws to 'discriminatory' legislation

The importance of this is evident in the Government's reliance on such laws as displayed in Figure 3. This shows the proportion of security laws to all discriminatory legislation as defined in the Truth and Reconciliation Commissions’ conclusions (TRC Report 1, 1998:449). During the period 1961-65 this proportion dramatically increases as six security laws are codified; a dramatic change considering that only nine had been codified in the preceding five decades. Although this does not capture the content and breadth of these laws, just their proportion, it demonstrates the legislative agenda of the Government during this period. The outbreak of collective violence clearly aligned with

an increased reliance on such security legislation as described above, linking political motivation directly to criminal offences.

Similarly, in Northern Ireland the British Government passed The Northern Ireland (Emergency Provisions) Act 1973 (EPA) and The Prevention of Terrorism (Temporary Provisions) Act 1974 (PTA) to address political violence, defining terrorism in both as "the use of violence for political ends". The Secretary of State for Northern Ireland, William Whitelaw, in the announcing the EPA before Parliament explained its purpose being "the restoration of the rule of law in Northern Ireland" to stop "a small number of vicious killers" (UK Parliament, 1973a). Indeed, the Secretary of State for the Home Department, Merlyn Rees stated in 1978:

> "We are dealing with a form of terrorism which has driven us to move marginally from the sorts of freedoms to which we are accustomed in this country. It is the price that we have to pay" (UK Parliament, 1978).

Accordingly, the EPA listed "certain offences commonly committed by terrorists" (UK Parliament, 1973a) known as scheduled offences. These were criminal offences connected to proscribed organisations including: murder, manslaughter, arson, rioting, possession of firearms, robbery, intimidation, *inter alia*. Their introduction was then used to justify amended rules on admissible evidence, juryless courts (Diplock courts), and the reversal of political status in prisons (Special Category status),[4] alongside widespread security sector reforms (Walsh, 2000). The EPA proscribed various organisations, while the PTA made it an offence to assist or advance the goals of these organisations, and extended the mechanisms to the British mainland. While the exceptional nature of these laws was discussed at length during their initial introduction with the end goal of returning to normality, the problem was that the state's conception of normality differed fundamentally from that of many Nationalists (Taylor, 1980).[5] So

[4] Special category status (SCS) granted convicted Loyalists and Republicans "the *de facto* status of prisoners of war" (Ellison and Smyth, 2000:81) meaning they were "held in self organised compounds at HMP Maze...away from 'ordinary' prisoners and from prisoners of opposing paramilitary factions….[and] had free association, wore their own clothes and were not required to do prison work" (Wahidin, Moore and Convery, 2012:460). The Gardiner Committee regarded such status as "a serious mistake" for legitimising certain criminal offences as political, reinforcing the war narrative (Gardiner Committee Report, 1975:53). Thus after March 1976 SCS was no longer granted to anyone, leaving former SCS prisoners imprisoned alongside non-SCS ones.

[5] The Gardiner report stated that the "emergency powers should be limited both in scope and duration...they can, if prolonged, damage the fabric of the community and they do not provide lasting solutions" (Gardiner Report, 1975:7).

although the breadth and enforcement of these offences differed fundamentally between the cases, their purpose was essentially the same: to delegitimise collective political violence, legitimise the state and facilitate expanded security powers (Dugard, 1978; Hall, 1988).

Politicising crime enables the state to enhance its relative legitimacy to that of insurgents domestically and internationally, thereby justifying expanded security powers. But beyond these political gains - albeit important - there are further implications for the administration of justice in relation to deterrence, reform, and retribution. The fundamental principles which underpin criminal justice become stretched beyond their ordinary context, meaning criminal justice becomes constitutive of the conflict itself (Bell, Campbell and Ní Aoláin, 2004), rather than transcending it as an independent mechanism. The following sections discuss these points drawing on evidence from the case studies.

Deterrence: Calculating the costs?

Criminalising an offence is generally done - at least in according to positivist legal theory - to "announce to society that these actions are not to be done and to secure that fewer of them are done" (Hart, 2008:6); in other words to deter actors from committing them. Deterrence theory distinguishes between specific deterrence - directed against an individual - and general deterrence - directed against a wider audience than those immediately affected (McEvoy and Mallinder, 2012:10). The effectiveness of both types depends on the likelihood of an actor facing the sanction, and the ability of an actor to calculate this. In other words, the chance of being caught, convicted, and punished, fits into a cost-benefit analysis determining whether an actor will commit a crime or not. Likewise, this assumes that actors are calculating and evaluating the costs and benefits. For COIN this means security powers need to be enhanced to facilitate a higher likelihood of convicting insurgents thereby affecting both direct and general deterrence. The rationale is that actors will be discouraged from joining non-state armed groups if they perceive that they will likely end up imprisoned (or otherwise sanctioned), and those who are in armed groups may be less likely to engage in actions which would result in higher penalties. But while increasing the likelihood of conviction

addresses the first aspect of deterrence, this is contingent on the second. Without addressing both, politicising offences may fall into what Hart (2008:7) refers to as "forms of undesirable behaviour which it would be foolish (because ineffective or too costly) to attempt to inhibit by use of the law"; and this is the very challenge which politicising offences often fails to address.

Increasing the cost: The certainty of the criminal sanction

The politicisation of crime was implemented in Northern Ireland concurrently with the security transformation known as Ulsterisation - transitioning from an army led to police led counter-insurgency, the so-called "primacy of the police" model (Wright and Bryett., 1991:34-5; Jeffery, 1990). This operated as the practical outworking of the legislative changes legitimised through the politicisation of criminal offences. For instance the EPA granted the British Army the powers to arrest and detain suspected terrorists for up to four hours, following which the person would either be handed over to the police to be formerly charged or released (Boyle, Hadden, and Hillyard, 1975:40). Furthermore, it gave the Royal Ulster Constabulary (RUC) the power to arrest without warrant anyone suspected of being a terrorist and detain them for up to 72 hours (Walsh, 1983:25). Moreover, the PTA "created a system with the potential to bring into custody and interrogate *anyone*, irrespective of whether or not there was any evidence against them" (Hillyard, 1993:4-5, emphasis in original). This provided the police with broad discretionary powers particularly because it was based upon "the subjective judgement of the [arresting] constable" (Bennett Report, 1979:22).

The powers granted by the PTA and EPA, therefore, formed the basis of the COIN strategy (Feldman, 1991:85) and initially proved highly effective in incarcerating high numbers of 'criminals' for scheduled offences. Between 1975 and 1979 there was "an average of about 1000 individuals...charged [annually] with scheduled offences" 90% of whom were "convicted either on a plea of guilty or after a trial in the Diplock Courts" (Walsh, 2000:239). Following the introduction of this strategy there was a clear correlation between the politicisation of crime, and its corresponding security transformation, with a decline in fatalities. This is depicted on Figure 4; from a high of 480 annual conflict related deaths in 1972 to 110 in 1979.

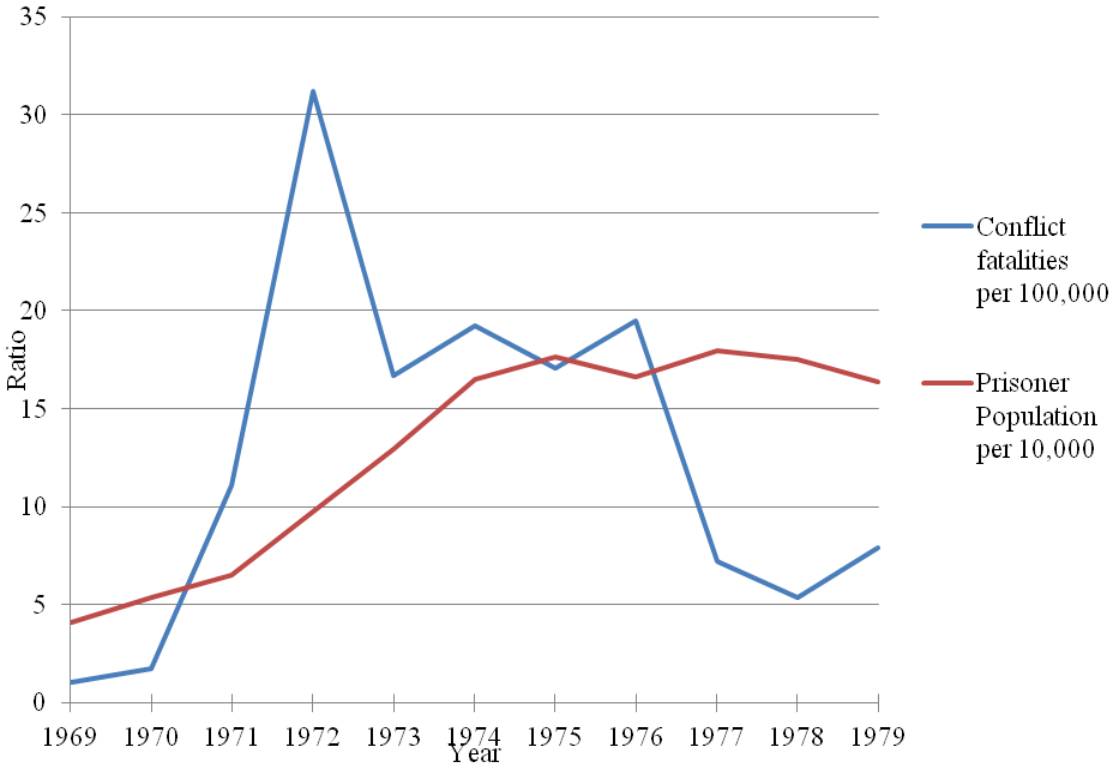


Figure 4. Ratio of conflict deaths and prison populations in Northern Ireland 1969-1979

From the perspective of deterrence and COIN it could be argued that politicising crime was, therefore, effective in addressing the certainty of the criminal sanction by increasing the likelihood of a conviction through enhanced security apparatus' and amended rules on evidence. Indeed, in 1978 the Secretary of State for Northern Ireland, Roy Mason, cited the decline in fatalities and increase in convictions as the central factors justifying the renewal of the EPA (HC Deb 06 December 1978 vol 959 cc1499-585), and would announce monthly to the British Parliament how many convictions they had achieved in the previous month (O'Dowd, Rolston, and Tomlinson, 1980:186). Yet because crimes became politicised, responses were likewise; resulting in the criminal justice system increasingly embodying the conflict itself (Bell, Campbell and Ní Aoláin, 2004). This meant the potential gains in increasing the number of convictions were undermined by a flawed understanding of the motivations of political actors as will be explained below.

In South Africa the South African Police (SAP) likewise invested resources "to reinforce its weaponry, equipment, and skill in fire-power" (Brewer, 1994:250); police officers were given training in new weapons, riot-control and later in COIN tactics; new

riot-control equipment was purchased including water-cannons, riot trucks, riot landrovers and helicopters (Ibid). Furthermore, the SAP underwent extensive militarisation with increasing coordination being established with the South African Defence Force (SADF), increased military service for White youths, and the enhancement of the intelligence service - Special Branch (Ibid:251). Under the 1953 Public Safety Act the Government could declare a state of emergency, which the Government did for the first time following the Sharpeville massacre in 1960, during which 11,503 people were detained and whereby "the Government [was] given a completely free hand" (Dugard, 1978:110).

The creation of political crimes and the associated security powers caught the African National Congress (ANC), South African Communist Party (SACP), and Pan Africanist Congress (PAC) by surprise not giving them the chance to properly prepare for the transition to full illegality. The Government benefited from the intelligence gathered during the 'semi-legal' period, identifying and profiling many of the key actors within these organisations (Johns, 1973:297). These reforms facilitated the arrest of the MK's National High Command at their headquarters in Rivonia during July 1963 followed by their subsequent conviction and imprisonment, leading "to the smashing of virtually the whole of the underground network" (Lissoni, 2009:293) as the "leadership of Umkhonto was decapitated" (Johns, 1973:274). Similarly "[b]y June 1963, about 3,246 PAC members had been arrested nationally and 124 had been found guilty of murder" (Maaba, 2004:295). Violence was sporadic and poorly planned; cells were widely infiltrated by informers; and the overall strategy was based on the flawed assumption that the masses of oppressed Africans would join up in resistance against the state (Plaatjie, 2006). By politicising crimes the state was able to implement widespread security powers, increase resources, and - as was the case in Northern Ireland - increase significantly the likelihood of political actors facing the criminal sanction. The Minister of Justice stated as much in justifying the Terrorism Act 1967 as he explained: "[I]t is...undesirable that there should be even the slightest possibility of a legal uncertainty. We cannot afford to stand and argue in the courts" (S. African Parliament, 1967). Politicising crime, therefore, was done with the direct intention of creating as expedient a legal process as possible, greatly increasing the likelihood of facing the criminal sanction even if it meant subverting due process.

What costs? Personal versus political gain

Whether the likelihood of facing the criminal sanction actually impacts deterrence is dependent on whether actors factor it into their cost-benefit calculation, or indeed make such calculations in the first place. This is problematic for COIN and has serious implications for the criminal justice system both in the immediate context, but also in the longer-term. Specifically, previous research has argued that the motivations behind political violence are fundamentally different than ordinary criminal acts, depending on "an idiosyncratic concatenation of social, political, and economic factors" as opposed to a calculation of personal gain versus cost (Sarkin and Daly, 2004:715; McEvoy and Mallinder, 2012). Politicising crimes runs in direct contradiction to this as it seeks to de-politicise the motivation, thereby bringing it under the simplistic cost benefit framework. In other words, dealing with political violence as a form of 'extreme' crime can embed the political motivations and counteract the deterrent effects outlined above.

The motivations for engaging in political violence were complex and cannot be reduced simply to a single variable, but a unifying theme across ex-prisoners was that they nearly always rejected that their actions were criminal, or were motivated by an individual cost-benefit analysis (Gear, 2002; Shirlow *et al.,* 2010). For instance a UVF ex-prisoner explained:

> [Ex-prisoners] that I know didn't consider themselves criminal. They didn't even consider their actions a crime, and I say this personally too. Of course you could say: 'Actually look you broke the law', but the rationale for carrying out the act in the first place isn't comparative to going and robbing a bank. (UVF ex-prisoner C, 2016)

This ex-prisoner maintained that his conviction was for a political offence and was motivated by political reasons, as opposed to personal gain. The ordinary crime of robbery is referred to symbolically as an example of ordinary criminality committed for personal gain, which this actor distinguishes from their own acts of political violence. Likewise, another UVF ex-prisoner stated:

> "I didn't view myself as a criminal...[and] a lot of people were going to jail who, other than what we call the Troubles, would never have seen the inside of a police station or a prison" (UVF ex-prisoner B, 2016).

Again, motivation is attributed to the political context, and not to any individual cost-benefit calculations. An IRA ex-prisoner referred to political violence as "legitimate warfare" emphasising that it was "not criminal" despite what the state said (IRA ex-prisoner B, 2016), and a South African political ex-prisoner explained how when asked to get the police to verify that he has no record he said: "I'm not going to go and ask anybody to say that I'm not a criminal anymore. I was never one." (South African political ex-prisoner, 2016). Indeed an IRA ex-prisoner referred to how it was his "occupation" which "got me put in jail" (Morrison, 1999:229). In eulogising an IRA member who died carrying out an attack, the Republican publication An Phoblacht explained: "[H]e died fighting for his nation's freedom, died in the ranks of Óglaigh na h-Éireann [Irish volunteers], fighting the self-same Huns who came to 'keep the peace'" (An Phoblacht, 1976:3). The language emphasises the wider political goal of 'freedom' contrasting this with the invading power of British colonialism. Accordingly, the cost-benefit analysis underpinning ordinary crime breaks down when applied to these actors. They adamantly rejected any claims that their motivations were in any way guided by personal gain, instead emphasising their political goals whether these were ideological or more often about protecting their identity.

Furthermore, politicising crime can lead to the development of a counter-narrative, as actors not only resist their criminalisation but ascribe 'criminal' illegitimacy to the state. For instance, an MK ex-prisoner explained: "I was fighting against a crime against crime. The justice system of this country under apartheid was rotten and controlled by the military" (MK ex-prisoner A, 2016). In this context not only was the legitimacy of the label rejected, but so to was the sanction. An IRA ex-prisoner explained: "You know a blind man on a galloping horse wouldn't have stopped me from doing what I wanted to do at that particular time" (IRA ex-prisoner A, 2016), referring here to how, no matter what the deterrent, this individual would have committed the offence regardless of the sanctions. This is because these actors understood that by engaging in political violence they were already taking on the greater risk of being killed. For example "all new recruits to the IRA were told that the most likely consequences of joining up were either prison or death" (McEvoy and Mallinder, 2012:12); and a UVF ex-prisoner explained: "if you're prepared to go out and bomb, to get shot or blown up...I don't think going to prison is going to deter you" (UVF ex-prisoner B, 2016).

Moreover in South Africa, because of the level of repression that actors were already experiencing many did not even consider the criminal sanction to be relevant. For example Martin Ramokgadi, an MK ex-prisoner, referred to how many were willing to die rather than suffer:

> "Just now when we look [back]...you'll find that people had decided to die....[The police] come to the location, children stone them, and they are being shot, killed, but they don't retreat....You can see one would call it a suicide on the side of the black people" (Ramokgadi, N.D)

For these individuals the costs of criminal sanctions were almost irrelevant because they already faced widespread repression as outlined in chapter three. Instead of deterring these individuals this repression had the opposite effect for at least some, such as the former MK member, Cornick Ndlovu, who explained:

> "[I]f [the police] find you, they were using these knobkerries, sticks, and then bash your head and arrest you. So that is [the] situation that made me...realise that living under these conditions was really unbearable...So that's what made me get into...defying all these unjust laws" (Ndlovu, 1994).

From this perspective, the extensiveness of the politicisation of crime meant that simply being of a particular skin colour put you at risk. In other words, the criminal justice system itself was regarded as repressive, meaning that regardless of whether you actually committed a crime or not you were at risk of the sanction. For instance a former gang leader explained: "Because of our colour we were always guilty until you can prove you're not guilty" (Former gang leader, 2016).

Although the security powers increased the likelihood of being caught for political offences, because of the level of repression, actors had already taken on a cost. Inaction in such contexts is perceived as just as costly, perhaps even more so, than action (Kalyvas and Kocher, 2007). Therefore increasing the likelihood of being caught and imprisoned – the certainty of the criminal sanction - is considerably less important for these actors than it would be for ordinary criminals. Politicising crime may facilitate the certainty of a conviction by increasing security powers, but its potential as a deterrent is based on a flawed understanding of the motivation for acts of political violence. Instead of contributing towards conflict transformation, dialogue itself which becomes deterred, as the security objectives of catching 'criminals' supplanted the complex political motivations underpinning the conflict.

Reform: Correcting political deviance

For those who do commit an offence they will then face the two other objectives of reform and retribution. While reform "as an objective is no doubt very vague" (Hart, 2008:26), it essentially refers to measures which seek to correct the deviant behaviour of criminals to decrease the likelihood of them reoffending. It accordingly includes a wide range of measures such as "the inducement of states of repentance, or recognition of moral guilt, or greater awareness of the character and demands of society, the provision of education in a broad sense, vocational training, and psychological treatment" (Hart, 2008:26). Indeed from a critical perspective these practices apply the categorisation of "the normal and abnormal" as defined by the state, applied through the carceral system, and determined by a judge, with the goal of "curing or rehabilitating" the perpetrator (Foucault, 1977:304). The abnormal behaviour of political crime is used to identify delinquency, justify corrective measures, and cure the threat it poses to the established political order. Prison is the main institution through which this takes place, whereby the intention is "to supervise the individual, to neutralise his dangerous state of mind, to alter his criminal tendencies" (Foucault, 1977:18). Having entered prison as a perpetrator the aim is that the criminal will leave eschewing such behaviours.[6]

However, politically motivated prisoners challenge the assumptions of reform because their motivations are distinct from those of ordinary prisoners as outlined above. Politicising crime means reform is directed against not only the criminal behaviour, but also the political identity behind it. Accordingly the very system of reform is identified as an extension of state power to be resisted, meaning political prisoners will often not engage with the process of reform. As a result, the state through their prison services frequently attempts to break the political resolve of prisoners using other – usually violent - means. But doing so ensures that prison itself becomes a further site of political resistance, as prisoners regard the correctional system as an embodiment of state repression. Moreover, as their identity is threatened this can actually foster the politicisation of prisoners as a form of counter-resistance increasing, rather than correcting, their 'deviance'.

[6] While this summary emphasises individual criminal responsibility not structural, and reduces reform to the carceral system, this is because it relates to the objectives adopted within the two cases.

Imprisoning resistance, resisting imprisonment

In Northern Ireland the reversal of Special Category Status (SCS) in March 1976 represented a clear rejection of the political nature of the violence committed by Republican and Loyalist paramilitaries. Whereas previously political prisoners enjoyed 'special' privileges and freedoms even to the extent that propitious dialogue was taking effect between the paramilitaries (Crawford, 1999:47-8); this all changed with the replacement of the compound system by a more traditional penitentiary. Indeed, under the politicisation of crime as engineered through the Criminalisation[7] strategy of the British Government, imprisonment became "an attempt to systematically undermine the very characteristics that determined a political motive and ethos" (Moen, 2000:5). By incarcerating paramilitary actors and removing their sense of identity, the Government sought to both punish and reform actors of their political violence. However, as the prison service was increasingly being stretched to manage extensive political violence, its founding principles became eroded; as McEvoy (2001:249) explained: "The increasingly rigid adherence to the principles of criminalisation as the prisoners stepped up their protest in the late 1970s obscured the origins of the policy as a means of managing political violence". The dual system of ordinary decent criminals (ODCs) and scheduled offence prisoners, the rapid increase in prisoner numbers, the politicisation of prisoners, and the lack of prison resources, together undermined criminalisation within the prisons and enabled prisoners to effectively continue their political campaign from behind the prison walls.

By imposing reform onto these prisoners the British had played into their hands, as this enhanced the narrative of Republican victimhood, providing them with a fresh political platform. Initially, however, this was not the case, when many Republican and a minority of Loyalist prisoners[8] opposed the withdrawal of SCS as a symbolic denial of their political campaigns (Walsh, 2000:242), protesting the change by refusing to wear

[7] Criminalisation strategy was directly linked to the politicisation of crime and the corresponding security changes. However this chapter does not discuss it at length because the term itself refers to a discursive framing of the conflict and reproduces a narrative of the British state. Instead this chapter focuses on the mechanisms that the strategy consisted of to consider their implications.

[8] Loyalist prisoners were in the complex position of being a pro-state militia, and so resistance within the prisons from their perspective was based on issues regarding personal safety due to integration of Republican and Loyalist prisoners (Page, 1998:61).

prison clothes. These protests – subsequently named the blanket and dirty protests – were largely unsuccessful as they were ignored by the British Government and failed to garner substantial beyond certain Republican and Nationalist communities. As a result, Sinn Fein and the IRA did not prioritise these protests in their overall campaign, instead focusing on the primacy of military operations (Ross, 2006:339).

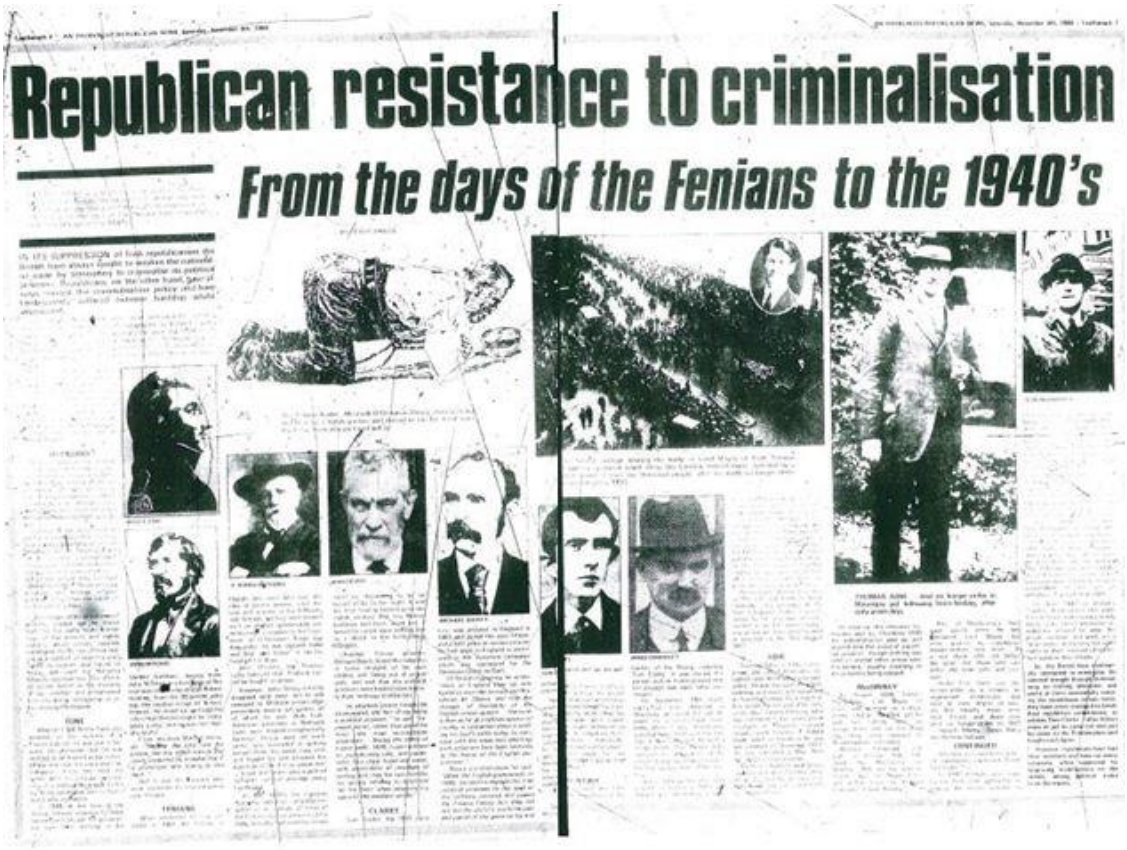
Recognising that these protests were ineffectual Republican prisoners embarked upon a number of hunger strikes[9] with the first strike in 1980 ending without any concessions and accusations of British "deceit and double-dealing" (Ross, 2006:344; O'Rawe, 2005). Changing tactics so that only one prisoner would strike at a time – rather than all concurrently – the prisoners began a second hunger strike with the first striker being Bobby Sands. Seeking to maximise the potential of this strike, Sinn Fein and the IRA emphasised the prison conditions and abuse to create a platform of humanitarianism with a large political base across Nationalists (Wright and Bryett, 1991:33). Indeed, Bobby Sands' election victory - elected as the Member of Parliament for Fermanagh and South Tyrone days before his death – greatly undermined the legitimacy of the British policy towards Northern Ireland within many Nationalist communities. Through mobilising support for a Republican 'criminal' the IRA were able to continue their political activities from within the prisons and unite a broad coalition of republican, Socialist, and Nationalist organisations represented on the National H-Block/Armagh Committee. These individuals became symbolic representations of resistance, and such themes were then propagated through murals and graffiti, and used to facilitate further recruitment, as noted by a community worker: "[Following the hunger strikes the] murals portrayed...defenders, freedom fighters, rebels, or Loyalists. It's a dark image, but it's almost for some young people...an aspiration" (Community worker C, 2016). Whereas reform sought to transform the political motivations of these actors, in practice it provided new opportunities for it to be developed. Its significance was summarised by a former Prison Governor: "[The prison system] became inextricably bound up in the political difficulties of Northern Ireland. It didn't cause the Troubles but, it became part of them and it contributed to them" (Duncan McLaughlin quoted in Irwin, 2003:473). By politicising the prison system it became fixed as a central component of the wider conflict instead of isolating and reforming the political 'criminals'.

[9] Though these were not the first hunger strikes by political prisoners they were arguably the most significant.

The reasons behind the political success of these campaigns are complex, but using the prison system to break the political resolve of prisoners was certainly an important factor. This is evident in interview transcripts with former prisoner officers and ex-prisoners who give disturbing accounts of a culture of brutality amongst certain prison officers, linking it specifically to the logic of criminalisation (Crawford, 1999: 163-175; O'Rawe, 2005; Wahidin, 2012). In seeking to dehumanise prisoners, these particular prison officers seemingly relied on brutality to inspire fear and discipline. This played into the narratives of British oppression, exhibiting the very thing Republicans were fighting to overthrow; providing the IRA with "its most nourishing and rich propaganda themes" (Wright and Bryett, 1991:26), and "sustaining one of [their] most important psychological weapons" (Hadden, Boyle and Campbell, 1988:12). Indeed, the Republican movement's history is steeped in political resistance in the prisons (Moloney, 2007; McConville, 2014) and the IRA capitalised on this through propaganda. For instance its weekly publication *An Phoblacht* [Republican News] drew direct parallels from historical Republican figures from the "days of the Fenians" as depicted in Figure 5.

Interestingly Loyalist prisoners likewise sought to resist criminalisation as well, albeit to a much lesser extent, as one explained: "The problem for us with the wider Unionist population was you couldn't have engaged in a protest because you would have been seen to be sharing a Republican objective" (UVF ex-prisoner A, 2016). Because prison protests were predominantly considered as a Republican political strategy Loyalist parallel protests were regarded in like terms by many within Unionist communities. Despite this extracts from the UVF publication Combat are indicative of their political rationale referring to how the termination of SCS would not "force us to surrender our rights as prisoners of war" (Combat, 1976a:16). The system of reform was unable to address the political motivations underpinning political violence, and so by adopting violent alternatives the state incorporated the prison system into the wider COIN framework as well. But this created a contradiction between the rhetoric of politicising crime, and the practice of politicising criminal justice. It is this contradiction which continues to have long-term implications which will be explained in the final section of this chapter.

Figure 5. An Phoblacht *[Republican News]* November 8 1980



Source: Linen Hall Library Political Collection

In South Africa reform was synonymous with repression as order was maintained through "the use of dogs, teargas and *tonfas* (short batons of wood or rubber)" (Filippi, 2011:633, emphasis in original). Punishments took place through a denial of access to news, no remission of sentence or parole, and poor classification (Gready, 1993:498).[10] Just as was the case in Northern Ireland each political group regarded prison as another arena for resistance as: "The white regime was personified by the warders and the militarised prison hierarchy and therefore, in the logic of this political identity, had to be confronted at every turn" (Buntman, 1998:433). As was the case in Northern Ireland, prison was considered part of the political oppression to be overcome, so by resisting it personally and collectively political prisoners were able to serve as a symbols of the resistance to those on the outside. For example, a former political prisoner explained:

> So we turned the whole thing against them saying: 'Okay these are your laws. We want these conditions to prevail in the prison. We want access to study; to

[10] The prisoner classification system split prisoners into one of four groups from D to A. It was designed to encourage 'good' behaviour as prisoners would receive additional privileges as the moved from D to A.

> do sports'...You turn their own laws to further your own struggle" (South African political ex-prisoner, 2016).

Because reform was directed against political identity these individuals were not included in the ordinary rehabilitation programmes and discriminated against within the prisons, thereby providing an opportunity for resistance. Using the legal system to campaign for fairer treatment these prisoners could still resist the state even while imprisoned.

However, in contrast to Northern Ireland 'political' crimes were defined so expansively that the boundaries between ordinary and political offences became increasingly blurred (Gready, 1993:492). This meant that many ordinary criminals adopted the narrative of politically motivated prisoners framing their crimes as a form of political resistance against apartheid, manifesting itself through prison gangs such as The Number with the objective being "to attack the prison system...to challenge apartheid's economic and racial injustice" (Filippi, 2011:634). However, political prisoners were careful to try and distance themselves from such parallels maintaining that there were clear boundaries between their political resistance and ordinary crime (Filippi, 2011:639). Indeed, a former anti-apartheid lawyer stated this explicitly: "There was no blurring whatsoever in my view and there still isn't" (Daniels, 2016). Those in the liberation movement, accordingly, were careful to distinguish themselves from criminal actors, although there is evidence of some convergence (Gear, 2002; Kynoch, 2005; TRC Report 5, 1998). Despite this prisons functioned as important political arenas where the politicisation of crime expanded the battlefield of political violence into the prison system as "the boundaries between crime, normality, politics and insanity shifted and were constantly reshaped to be used against the very authorities that had originally defined them" (Filippi, 2011:643). Politicising crime reframed the boundaries of resistance bringing the state into further contestation with the same actors it sought to undermine.

Alongside these new opportunities for resistance, the attempt to 'reform' the political identity of these actors actually had the opposite effect in at least some cases. For instance Lerumo Kalako from the ANC explained: "[W]hat kept us...not to break there was mostly politics and that was a very big motivating factor for us on Robben Island" (Kalako, 1993). The political identity of prisoners was important in resisting the wider system of reform. Indeed Nelson Mandela refers to how his resistance in prison served

an important psychological purpose of believing that there was still hope that their struggle could achieve its goal (Mandela, 1994a). In order to facilitate this, political prisoners developed a political education system within the prisons, as the MK ex-prisoner Sipho Binda explained:

> "We [had] political classes...from Monday to Saturday...and those political classes [were] conducted by experienced comrades. We deal with issues that have been raised by our leadership in prison. There were articles that were written...on our struggle, our history, political economy, on Marxism-Leninism, you name it, trade unionism and so on" (Binda, 1993).

Instead of depoliticising them, the system of reform therefore increased the political resolve of at least a section of political prisoners as they developed their own political education system (Gready, 1993). Similarly in Northern Ireland prison debates amongst Republican prisoners "provided a vocabulary that explained grievances and anti-state activities" and helped nurture "identities of resistance" (Shirlow *et al.,* 2010:15). For Loyalist prisoners such politicisation also occurred, albeit to a lesser extent, particularly for those within the UVF, as one ex-prisoner explained:

> "[T]he regime created by Gusty Spence within prison to oppose criminalisation made it easier for young men like myself coming in at 17 years of age to think differently about your incarceration, because he encouraged self-reflection and he encouraged being self-directed to learn...And all that was about opposing this regime of criminalisation" (UVF ex-prisoner C, 2016).

Here again political education within prison is directly linked to resisting reform. By having reform directed against their political identity these actors began to question the reasons behind it, seeking answers to the wider political context. Therefore, rather than reforming the political identity of these actors, politicising crimes actually helped consolidate and embed it for at least some prisoners.

Retribution: Punishing deviance

If deterrence fails to prevent an offence being committed, the objective of retribution is then applied following from the understanding that the offence results in an imperative to punish because of its moral cost. From this perspective retribution refers to "[t]he application of the pains of punishment to an offender who is morally guilty" (Hart,

2008:10). Punishment is based on a moral requirement, that if an individual commits an offence of the "cognitive and volitional conditions of mens rea" there is a moral requirement to enforce a punishment against them (Sterba, 1977:355). Punishing offenders is regarded as necessary to prevent impunity, ensuring that justice is *seen* to be done (Clark, 2008). This goes beyond deterrence by not only ensuring the likelihood of a sanction, but also satisfying the moral requirement whereby criminals are held to account for their criminal behaviour. The importance of this should not be marginalised due to the harm caused to victims of crime and the desire of many to see that harm punished. But when applied through the politicisation of crime this objective takes on a number of characteristics which are problematic for conflict transformation. This is because politicising criminal offences applies this moral outrage to both the acts of violence and the *motivations* as well. This has an impact on the enforcement of such laws as policing becomes directed not only against criminal acts, but also the political communities these actors come from. Hillyard (1993) and Breen-Smyth (2014) refer to such practices as creating suspect communities, but it is this politicisation of crime which legalises and normalises such practices. The contrast between the two cases is particularly insightful in understanding this complexity, demonstrating how the implications of the politicisation of crimes are dependent on informal criminalisation (Lacey, 2009).

Furthermore, by broadening moral outrage on to the motivations it undermines many of those who may hold similar political beliefs, but reject the resort to violence. Alongside the formal criminalisation of the 'criminal' there is, therefore, a corresponding informal criminalisation of those espouse the political motivation regardless of whether they are engaged in any form of proscribed behaviour. This is highly problematic for conflict transformation due to how this then leads to a wider dehumanisation of these individuals and their respective communities (Bastian, Denson, and Haslam, 2013). Because the criminal motivation is understood through the prism of retributive justice, the moral condemnation is applied to a much broader political community.

Informal criminalisation and law enforcement

In implementing the politicisation of crime in Northern Ireland the RUC were not simply concerned with convictions, but rather were utilised as part of the wider counter-insurgency strategy in intelligence gathering.[11] From November 1974 until 1991, of those arrested under the PTA, 86% were subsequently released without charge (Hillyard, 1993:86). In interviews conducted by Walsh (1983:39) he found that the majority of those arrested under this power were questioned not about an offence but "about their personal lives, members of their family, associates and sometimes their political views". Likewise, under the EPA the police used their powers primarily for intelligence gathering: "In a twelve-month period during 1977–78, 2,800 people were arrested under the three-day detention powers, of which 35 per cent were subsequently charged, usually on the basis of confessions extracted during interrogation" (Ellison and Smyth, 2000:99). However, being arrested and detained often resulted in individuals losing jobs or benefits as they would have unexplained absences which would be difficult and socially incriminating to justify, thereby affecting their wider families and communities (Walsh, 1983:63). These practices consequently served to reinforce the discourse of victimisation within these communities further undermining the legitimacy of state. For instance the Committee on the Administration of Justice concluded that the emergency powers were "alienating and disproportionate to the problem" (Committee on the Administration of Justice, 1983:3), with widespread social and political consequences for these communities (Irwin, 2003:473). The former Sinn Fein Chairman Mitchel McLaughlin likewise referred to this describing the role that proscription had in "corrupting the judicial process" because by broadening the criminal label to all those associated with republicanism "**[**the British Government] criminalised an entire community. Ultimately it had the seeds of its own destruction built into it because the community wasn't going to be criminalised...whilst the IRA...were simply feeding from it and getting stronger and stronger" (McLaughlin, 2016). Instead of applying moral condemnation solely to criminal behaviour, politicising crime broadened its target, informally criminalising an entire political identity.

[11] The Chief Constable stated in 1985 that counter-insurgency consumed 80% of police time (Weitzer, 1985:48).

Moreover IRA ex-prisoners referred to how these practices served to confirm their political narrative of a colonial occupation. For instance, one referred to it as "a method, just another weapon in their arsenal to defeat...the Republican movement" (IRA ex-prisoner A, 2016), and another IRA ex-prisoner explained: "[F]or them it's part of their war arsenal....I mean they set the rules in a sense, so they decide what's breaking the law and what isn't breaking the law" (IRA ex-prisoner D, 2016). For these IRA ex-prisoners law is viewed as a strategic pillar of the British state, one which held little, if any, legitimacy at all (McEvoy, 2000). An IRA ex-prisoner explicitly stated this: "The justice system was already undermined from the foundation of the state" (IRA ex-prisoner A, 2016). Therefore the politicisation of crime only served to embed the illegitimacy of the criminal justice system as it existed.

Whereas for Loyalist ex-prisoners they referred to their respect for the rule of law and the legitimacy of the legal system, as one UVF ex-prisoner explained: "Apart from whatever laws I broke in the conflict, other than that I was upstanding, law-abiding citizen" (UVF ex-prisoner B, 2016) and a UDA ex-prisoner stated: "I'm no threat to anybody in a criminal way and never was before hand" (UDA ex-prisoner B, 2016). Yet on the other hand they were highly critical of the politicisation of crimes as a UVF ex-prisoner referred to it being "about the dehumanisation of individuals" (UVF ex-prisoner C, 2016), another UVF ex-prisoner explained how "[i]t was to...break the will of paramilitaries" (UVF ex-prisoner B, 2016), and a UDA ex-prisoner stated that its purpose was "to delegitimise the authority that the paramilitaries had first and foremost within the community and to water that down and contaminate [it]" (UDA ex-prisoner A, 2016). By applying the moral condemnation associated with ordinary crime to political violence this politicised the criminal justice system and undermined its legitimacy even with those who supported the state. For example the UVF publication Combat ran the headline "British Justice v. Diplock Injustice" (Combat, 1976b) arguing against the politicisation of crime, later stating in another publication: "The ending of Special Category or the hangman's rope will not deter or hinder our fight for Ulster" (Combat, 1976a:16).

This politicisation, however, also had longer term implications as a former UVF ex-prisoner argued:

> "[T]he problem that I see is that they tried to treat the conflict as a massive crime wave, and it's coming back to haunt them now because really what they succeeded in doing was corrupting the criminal justice system" (UVF ex-prisoner A, 2016).

Determining exactly what implications this has had in the longer-term context is problematic considering the range of competing factors, but at the very least it undermined the legitimacy of criminal justice for some of these actors and continued to do so until its reform. For instance Brian Gormally - Director of the Committee on the Administration of Justice - explained: "[T]he repair job on the rule of law was that much more extensive because of the discrediting of the normal criminal justice system" (Gormally, 2016). By politicising crime the criminal justice system was politicised itself, and continued to be perceived as such even after the peace agreement. A Republican community worker similarly referred to how "the style, the method, and the delivery of policing actually exacerbated problems", later going on to say "all of which done irreparable damage to the rule of law, and confidence in the rule of law...particularly in the Republican community" (Community worker A, 2016). Because policing and criminal justice applied this moral condemnation against a political identity this led to practices which isolated and marginalised the very communities they needed to build trust with. Even following the reform of these institutions and practices, they leave a legacy of distrust which will need to be addressed in order to ensure its legitimacy: "You see it's also about that historical memory that goes with it because...context becomes very important, and the context is one that is handed down through families" (Community worker A, 2016). Instead of transforming relationships and building trust this politicisation of crime and its corresponding practices in law enforcement exacerbated them.

In contrast in South Africa politicising offences facilitated a legal veneer over what were otherwise highly repressive practices. In other words, "law...had [an] instrumental utility" playing to an international business and political audience alongside an internal White elite ensuring "...that South Africa was a country distinguished from much of the rest of Africa by its much vaunted commitment to the rule of law" (McEvoy and Rebouche, 2007:301). The Truth and Reconciliation report reinforces this stating: "Part

of the reason for the longevity of apartheid was the superficial adherence to 'rule by law' by the National Party" (TRC Report 4, 1998:101). Abiding by a legal system served to detract from otherwise oppressive practices in law enforcement and delegitimise non-state resistance. Political resistance was framed as criminal to prevent condemnation from the international audience and the Afrikaner community as legal norms were seen to be respected. Indeed the former SADF General Constand Viljoen explained the significance of this stating: "I think you must bear in mind that the rank and file Afrikaner people were politically inactive. They sort of trusted unconditionally, the National Party in this regard" (Viljoen, 1993).

This legal veneer enabled repressive policing practices to continue (or develop) justified on the basis of the moral threat of criminality. But this obviously posed direct issues for conflict transformation, as rather than the police seeking to prevent criminal acts, their role increasingly became part of the problem, as they "deliberately reproduced traditional social cleavages rather than [attempt]...to mediate them impartially" (Brewer, 1994:334). Unrest was met with police brutality due to poor training, equipment, and under-staffing stretching the capacity of the SAP in handling public order situations. This led to a reliance on lethal force to foster an environment of fear as the best means of imposing regulations (Hornberger, 2011:36). What had previously been isolated incidents of excessive violence, developed into "systematic brutality" (Brewer, 1994: 217) meaning "brutality was a deficiency made into a de facto strategy, legitimised and normalised by the law and the legal system" (Hornberger, 2011:38). For instance an MK ex-prisoner outlined his own experiences of arrest and detention: "I was then arrested. I was severely tortured...they kept kicking and beating...put me against the wall, threatening to shoot me with their live pistol" (MK ex-prisoner A, 2016). Such accounts are corroborated by the findings of the Truth and Reconciliation Commission which documented and investigated many of these claims concluding that "gross violations of human rights were perpetrated or facilitated by" the state security and law enforcement agencies (TRC Report 5, 1998:209). For instance in referring to public order policing the TRC remarked that it "displayed a gross disregard for the lives and/or physical well-being of both those engaged in political activity as well as the general public" (TRC Report 2, 1998:182). This is evident in how non-violent actors were often made explicit targets in the use of lethal force (Haysom, 1987), the extent and nature of

detentions,[12] and the use of fear and torture (Hornberger, 2011; TRC Report 2, 1998). In practice many subject to such criminalisation never made to the courts, were detained for prolonged lengths of time, or tortured into giving confessions.

Politicising crime underpinned these practices by broadening the legal boundaries of what such agencies could do, whereby being of a particular skin colour itself made you a suspect. This same MK ex-prisoner explained: "The system was so bad that if any crime has been committed in that area and they saw a black women or black man passing [they would say]: 'They're the criminal'" (MK ex-prisoner A, 2016). Such practices were not necessarily caused by politicising crime, but it became constitutive of them with distinctions between political actors and criminals being blurred. This is witnessed particularly in political trials, such as the Rivonia Treason Trial, where George Bizos explained: "The propaganda of the State at the time...was that these were gangsters [and] terrorists" (Bizos, 2007). Such views contrast acutely with that of the Minister of Justice who, when introducing the Terrorism Bill 1967, stated: "[We] are going to try [the terrorists] in our courts in accordance with the norms of a civilised community" (Hansard, 1 June 1967, col 7024). So the politicisation of crimes in South Africa was not really about creating new offences, but legitimising widened security powers, further embedding the illegitimacy of the criminal justice system for those outside of the state's communal group.

Conclusion

Politicising ordinary crimes – linking CPV with CPI - is often done by states in response to the onset of collective political violence in order to broaden the legal boundaries and enable expanded security powers. This chapter has argued that this politicisation is problematic for conflict transformation because of the cooption of criminal justice into the COIN framework. Considering each of the three main objectives of criminal justice – deterrence, reform, and retribution - demonstrates this,

[12] It has been estimated that 80,000 were detained at some point during 1960-1990 as it "represented the first line of defence of the security forces" (TRC Report 2, 1998:187). Deaths in police custody were not uncommon with the most famous being that of Steve Biko who had been "kept naked in his cell in leg-irons chained to a grille" (Brewer, 1994:273).

as the way in which they apply to ordinary offenders breaks down when applied to political actors for three reasons: (1) it is ineffective at deterring violence because political actors perceive the costs of criminal sanctions differently from ordinary offenders; (2) that reform becomes a site of resistance for political actors, as it becomes designed to break their political resolve; and (3) that punishment for offences directs moral outrage against both the acts of political violence, but also the motivations as well. Table 10 summarises this by contrasting how these approaches fundamentally differed for ordinary crime and political violence.

While increasing the certainty of the criminal sanction increases deterrence for ordinary crime, for those engaging in political violence they are already taking on significant risks, and so custodial sentences - or other criminal sanctions - will be very unlikely to act as an effective deterrent (Sarkin and Daly, 2004; McEvoy and Mallinder, 2012). Attempts to reform political actors are often perceived by them (and their political community) as a form of repression directed against their political identity, and may lead to prison becoming a new site of resistance. Retribution involves preventing impunity and responding to the moral imperative to punish criminal acts. But when applied to both the actor's behaviour and motivation this can result in an informal criminalisation of all those who share their political identity. Furthermore, law enforcement consequently becomes directed against this criminalised political identity - if it had not already been so – and the moral condemnation of the criminal act becomes applied to this wider political community.

These issues do not challenge the fundamental importance of criminal justice in responding to political violence, indeed for conflict transformation peace is "embedded in justice" (Lederach, 2003:10). But this chapter specifically problematises the assumptions underlying the politicisation of crime because it undermines conflict transformation. This is based on the understanding that state responses towards political violence can be just as problematic for the transformation of a conflict as the political violence itself (Toros, 2012). Instead of promoting justice, politicising crime can become a form of structural injustice for all the reasons outlined above, and accordingly operate against conflict transformation (Lederach, 2003; Maddison, 2017). Violent conflict will not be resolved by such an approach, only reproduced. It will only be once "the needs and interests of the parties in conflict are legitimised and the relationships are

restructured towards increased equality and justice" (Lloyd, 2001:304) that the underlying root causes will not perpetuate violence. Linking political motivation to crimes undermines this by closing down opportunities for dialogue and framing the political issues as a 'criminal' problem.

These findings have a number of important implications for contemporary cases. Firstly many contemporary responses towards 'terrorism' are developed implicitly from this COIN framework in the UK, the USA, and many other states (Cochrane, 2013; Dixon, 2009). Indeed the convergence between COIN and counter-terrorism has been the subject of academic debate (Boyle, 2010). If conflict transformation is to occur in these contexts the continuing reliance on politicising crime runs the risk of reproducing these same issues. While important changes have been made to address the issues of human rights abuses (Dickson, 2012), there continues to be research documenting the informal criminalisation (McGovern and Tobin, 2010. It is important, therefore, that further research applies this theoretical framework to contemporary cases to evaluate the extent to which these same problems are emerging. Also it would be important to consider to what extend criminal justice could or should be used to bring about conflict transformation. This chapter has focussed on the challenges and not directly provided solutions. The following chapters build upon this to provide examples of where this may be possible.

Chapter 5

Why negotiate when you can criminalise? Criminalising political expression and peace negotiations

While the previous chapters have focused on criminalising political expression during a violent conflict, it is unclear how it operates when transitioning away from collective political violence. While there are various processes in this phase of a conflict, peace negotiations are closely interlinked with criminalisation due to their focus on the legitimacy of actors and their ability to communicate with each other. Therefore this chapter develops the theoretical arguments already established to consider how they relate to decriminalisation and how this may impact upon conflict transformation.

Research on negotiating with the criminalised has predominantly accepted the criminal or terrorist label as a given even while the problems of definition and heterogeneity are acknowledged (Bapat, 2006; Dolnik and Fitzgerald, 2011; Pruitt, 2006; Zartman, 2003).[1] However these labels represent a much broader and under-researched process of (de-)criminalisation shaping actor relationships, structural constraints, and issue salience with direct implications for negotiations. Likewise, research on conflict transformation has discussed the potential for negotiations to facilitate possible transformation whereby "parties reach new understandings of their situation" (Putnam, 2004:276) and move towards resolving the "root causes" (Lloyd, 2001:303); yet it is not particularly clear what the mechanisms are which brings this about. This chapter seeks to draw together these bodies of research to explore how (de)criminalisation in the context of negotiations can facilitate conflict transformation. The intersection between these processes is important because they initially appear to be in tension. By negotiating with criminalised actors the state's "high symbolic capital" may enhance the "national and international" legitimacy of a criminalised group (Toros, 2012:46; Toros, 2008), whereas criminalisation is inherently a process designed to delegitimise these same actors (Gormally, McEvoy and Wall, 1993; Super, 2010). Furthermore, conflict

[1] In terms of those criminalised as terrorists and those as political criminals, the distinctions between these labels can often be more of design rather than substance, because whether it is done specifically under counter-terrorist legislation or other 'security' laws, the implications in terms of negotiation are of similar effect. What this chapter is discussing then is not the specific labels themselves, but the process through which these labels become applied.

transformation advocates for the resolution of underlying causes whereas negotiations often involve parties seeking to maximise their bargaining power and achieve the best outcome for their interests (Walter, 1997; Putnam, 1988). Therefore understanding where these processes intersect is important to understand how criminalisation affects negotiations and conflict transformation.

This chapter accordingly argues that criminalisation embodies an important incentive structure which can facilitate conflict transformation in particular contexts, but also undermines it depending on its target and implementation. Specifically, focusing on the criminalisation of non-violent political expression, this typically impedes, or at least constrains, conflict transformation. This is because it undermines dialogue, dehumanises actors, and embodies structural constraints. Therefore conflict transformation may be facilitated through some form of decriminalisation; the timing and nature of which varies depending on the wider context. However, this needs to be qualified, because decriminalisation can contribute towards intergroup polarisation, alienating actors who perceive justice as being compromised. In other words, what is needed for conflict transformation to occur is not necessarily decriminalisation or criminalisation in general, but a reorientation of criminalisation away from actors and on to specific acts, thereby legitimising non-violent political expression and negotiations. Of course, while this may help facilitate wider conflict transformation, on its own it will have limited impact on a peace process unless it is accompanied by the bottom-up buy-in of communities into the reorientation itself.

Building on the typology of criminalising political expression developed in chapter one, non-violent political expression[2] needs to be disaggregated into two categories: (1) the criminalisation of political identity (CPI); and (2) the criminalisation of political activities (CPA). This is because, while interrelated, they can have different implications for negotiations. This focus is also important to distinguish the criminalisation of political expression from ordinary crime, because criminalising political expression collectivises an offence beyond those who commit it, both formally and informally, criminalising the political ideology itself and those who support it (Breen-Smyth, 2014). Because of the subjective and informal nature of such a process,

[2] This chapter is not discussing the criminalisation of political violence (CPV) because the implications of this are different to non-violence and would extend the discussion beyond the limits of the chapter.

this chapter utilises the multilevel framework of conflict transformation to understand the "complex and evolving conflict relationships" which characterise peace negotiations (Cochrane, 2012:184). This is done across the three primary levels of transformation within a conflict (actor, issue, and structure) discussing how criminalisation constrained or facilitated transformation for each of these levels.[3] From this perspective negotiations are part of a wider process of transformation. This chapter is evaluating what impact criminalisation may have in the transformation of the underlying causes of violent conflict across these levels. This is summarised in Table 11 and broken down across each of the levels of transformation for CPI and CPA.

The first section of this chapter will, therefore, explain the relationship between criminalisation and negotiations through the framework of conflict transformation. The following sections will then apply this for each of the levels of conflict transformation through a two case comparative study of Northern Ireland and South Africa building upon the analysis of chapters three and four. This is specifically in terms of the formal negotiations leading up to the 1998 Good Friday Agreement and the 1994 South African elections. These periods and peace negotiations were chosen because they relate to key changes in terms of CPI and CPA whether through de-proscribing organisations or prisoner releases. They therefore represent important typical cases of how CPE can impact upon peace negotiations. The variation between the two cases in terms of the extensiveness of criminalisation/decriminalisation enables the formal legal processes to be contrasted in relation to their distinct implementation and consequences (see Table 12 for more). This analysis will be followed by a discussion of possible policy implications, and suggested areas for future research.

[3] Context has not been included because criminalisation is contingent upon changes in the context and so these will be taken into account in analysing the other three levels of transformation.

Table 11. Relationship between CPI/CPA and negotiations across the levels of conflict transformation

	Criminalisation of Identity (CPI)	Criminalisation of Activity (CPA)
Structure	- Intergroup interaction is restricted as the communities associated with criminalised groups are alienated from the state	- Forces groups underground, restricting opportunities to develop a political base - Exacerbates the credible commitment problem due to ongoing sanctions for 'political' acts
Issue	- Contributes towards issue polarisation along polemic 'criminal' narratives which in turn leads to challenges of audience costs	- (De-)Criminalisation embodies an issue itself to be negotiated in terms of political prisoners, reform of criminal justice and decriminalisation
Actor	- Frames actor legitimacy for both state and non-state actors - Contributes towards actor dehumanisation whereby reforms are framed as giving in to criminality creating opportunities for ethnic outbidding	- The enforcement of such criminalisation may alienate law enforcement from targeted communities as they are perceived as repressing their political identity

Labelling crime or the crime of labelling

Negotiation at its most fundamental level is a process whereby multiple actors engage in communication to resolve one or more issues. In the context of civil conflicts this may be over any number of issues, but this chapter is solely concerned about formal negotiations over a peace settlement. For such negotiations to be 'successful' from a conflict transformation approach it has been argued they must address "root causes" (Lloyd, 2001:303), rather than simply the immediate causes of the conflict. Setting aside

the challenge of identifying root causes, this arguably places too much responsibility on negotiations alone, and arguably a more effective framework would be that negotiations simply contribute towards a wider process of transformation. Single processes such as negotiations do not themselves complete conflict transformation, only contribute towards it. Table 10 summarises how such interactions take place, but it is worth explaining first how this theoretical link is developed, before then considering it through the discussion of the case studies.

The structural level represents the system which embeds violent forms of conflict, where goals are no longer framed as incompatible, identities as polarised, and violence as the only - or most effective - means by which to address these (Cochrane, 2012; Miall, 2004; Väyrynen, 1991). This often involves a redistribution of power between actors, addressing underlying grievances, and opening up peaceful political avenues to displace violent ones. Criminal justice has a considerable role in such transformations, in framing not only what is legitimate, but also in establishing sanctions, or in providing opportunities for compromise. Yet the criminalising of non-violent political expression, particularly CPA, embeds a number of structural barriers to negotiations, such as censorship and restrictions on movement, which may require some form of decriminalisation before actors may be willing, or even able, to engage in negotiations. CPI embeds and reinforces this by restricting opportunities for intergroup dialogue as expressions of political identities are reduced to criminality.

Moreover, so long as non-state actors face the threat of sanctions for non-violent political expression, they will be unlikely to trust the state's commitment to negotiations (Kirschner, 2010; Lake and Rothchild, 1996). This embodies the issue of credible commitment as "combatants are unsure whether their opponent will uphold the terms of a peace deal if future circumstances change" as it requires actors being able to "convince their opponents that they will remain trustworthy in the future" (Kirschner, 2010:747). CPI and CPA together exacerbate these credible commitment issues as they signal an unwillingness or incapability – due to audience costs as will be explained below – to commit to the terms of a peace negotiation. Accordingly, criminalised groups may be forced to operate covertly restricting their ability to develop a non-violent political base or communicate their political objectives. Furthermore, it relates to the importance of enabling actors to return from exile or to be released from prison in

order to engage in the negotiations themselves. However, while this may facilitate a more equitable distribution of power, it can also undermine the bargaining power of the state by giving away important concessions. Therefore, on the one hand providing concessions in terms of CPI and CPA can foster necessary trust and cooperation for negotiations, on the other it represents an important bargaining device. Understanding how these two challenges are reconciled relates to the level of issue transformation.

Issue transformation involves determining which issues are more salient, moving actors away from conflictual positions to issues where commonality can be found (Cochrane, 2012; Miall, 2004; Väyrynen, 1991). Criminalising political expression is closely linked to such issue framing, representing both an issue itself in terms of CPI, and a mechanism through which issues are framed because of CPA. Firstly the reverse of such criminalisation - decriminalisation - may be used as a bargaining tool to incentivise movement on other issues. Releasing prisoners, reforming law enforcement, de-proscribing organisations, all represent important bargaining issues which the state may use to leverage concessions.

The implications of such decriminalisation, however, are contingent on their informal outworking, as, although actors may be granted some form of formal pardon or amnesty, this will not address the embedded discourse of the criminal narrative as outlined in chapters three and four. While decriminalisation may address the structural issues described above, it will be unlikely to address informal criminalisation. Specifically for negotiations this means that decriminalisation will be interpreted differently across the various actors, fostering agreement and trust with some, while isolating others. This links into the second point, whereby the salience of the criminal 'issue' will frame how decriminalisation actually takes effect, as polemic criminal narratives determine how actors perceive the negotiation process itself. When group identities are labelled as criminal, this frames intergroup identities into dichotomies like victim/perpetrator (Bhatia, 2005). Negotiations in such contexts are defined by these identities, with actors framing their positions along these polarised lines - for example that they will not negotiate with terrorists. This is because narratives of victimisation tend to “minimise the context and extend the time frame of the event forward and backward in time”, whereas perpetrators tend to “attribute the event to outside causes, minimize the impact on the victim and see the event as a moment in time” (Pemberton

and Aarten, 2017:6). Indeed, reflecting on the conflict in Northern Ireland, the former British Prime Minister Tony Blair explained: "[H]uman nature being what it is, the victim group regards the perpetrator group, not just the perpetrators, as responsible" (Blair, 2010:153).

These challenges of informal criminalisation contribute towards the further problem of audience costs. By framing the 'other' group as criminal through CPI and CPA, the state signals its commitment to the discourse of criminality whereby reversing it would incur a "cost for backing down" (Moon and Souva, 2016:436). In this way negotiations are themselves perceived as potentially threatening to group identity, requiring the state to somehow communicate that the 'threat' has transformed and be prepared to justify why these criminalised actors are now legitimate negotiating partners. Otherwise, issues under negotiation will be defined by the label - terrorist or criminal - and so a polarised label will lead to polarised ways of addressing them (Putnam, 2010:148). This can be problematic for negotiations, as issues under negotiation are embedded in a zero-sum framework, so some reframing of these identities away from criminals or terrorists towards political actors may help facilitate the development of trust and dialogue (Fierke, 2009; Fisher and Ury, 2011).

The transformation of actors refers to changes in leadership, goals, or power relations between groups in such a way that will change the nature of the conflict itself (Cochrane, 2012; Miall, 2004). While this may involve a change in the actors themselves, criminalisation primarily impacts actors in terms of how they are perceived: their framing. CPI frames their political ideologies as illegitimate and polarises intergroup relations, determining which actors are deemed legitimate or not. This relates to both the state and non-state actors, as an oppressive criminal justice system may undermine the legitimacy of the state within certain communities, while the state's criminal framing may likewise undermine non-state actors (Bhatia, 2005). The significance of CPI and CPA therefore depends on how it is perceived and implemented, for instance for actors who regard the state as illegitimate already criminalisation will only serve to reinforce this perception, whereas for those non-state actors who may support the state, these powers may have a significant impact on their perception of state legitimacy.

Conversely the reverse of these powers may undermine support for the state by actors who are in favour of their continuation, providing opportunities for more extreme actors to emerge through ethnic outbidding (DeVotta, 2005; Moore *et al.*, 2014). Groups who are unwilling to compromise on the issues of CPI and CPA may use the concessions granted by the state or non-state actors as evidence of their betrayal of their group's interests. This ethnic outbidding reflects the wider challenges associated with informal criminalisation as explained in chapters three and four, that CPI and CPA embed a particular social reality of the 'criminal other' which contributes towards intergroup polarisation. Concessions from this perspective are perceived as threats to group identity. Therefore, in order to address this, political leaders must ensure that they have bottom-up support for the negotiated agreement, otherwise they may be unable to actually deliver upon it, thereby leading to the credible commitment issues discussed above.

Secondly, CPI reduces actors to simple characterisations as the criminal other, effectively dehumanising individuals and groups, rather than recognising their inherent emotional, political, and social identities (Toros, 2012). These characterisations vary considerably between and within cases because they are contingent on the communities whom actors derive support from and their relationship with the state. Entering negotiations with such actors therefore requires reframing these identities according to their wider political motivations. In other words, while negotiations may build empathy and trust between the various parties, a wider informal decriminalisation will need to take place in order to secure the buy-in from the communities elites represent. This does not mean that the 'crimes' of political violence which have been committed by all sides should be forgiven or forgotten, just that these actors should not be defined solely by these single identities. Indeed these crimes will need to be addressed as part of the wider peace process itself, although this point is addressed in following chapter in relation to peacebuilding.

Table 12. Comparison of CPI/CPA between Northern Ireland and South Africa in relation to negotiations

		Criminalisation of Identity (CPI)	Criminalisation of Activity (CPA)
Structure	**Northern Ireland**	- Proscription or restricting of certain cultural symbols (i.e. flags and emblems)	- Censorship of Sinn Fein
	South Africa	- Most political organisations opposed to the state were banned	- Meetings, publications, and protests were severely restricted/banned
Issue	**Northern Ireland**	- Political (non-violent) republicanism and loyalism delegitimised as criminal because of links with paramilitaries to varying extents	- Decriminalisation embodied a crucial issue itself to be negotiated in terms of political prisoners and the reform of criminal justice
	South Africa	- Communism label used to delegitimise many non-state political groups	
Actor	**Northern Ireland**	- Linkages between political groups and violent counterparts embedded the terrorism/criminal label for both	- Law enforcement perceived as a Unionist institution and distrusted by many within Republican communities
	South Africa	- Dehumanisation of groups through the communist label	- Non-Whites and anti-state activists feared the use of force by law enforcement

Individually each of these levels identifies specific ways the criminalisation of political expression may impact upon negotiations which, when brought together, illustrate the complexity of the relationship. This chapter is not seeking to resolve these complexities, but merely consider their development and potential implications for negotiations. Taking conflict as an opportunity and viewing negotiations as an important mechanism of transformation, conflict transformation provides an effective framework through which to consider the complexities of criminalisation through the case studies of Northern Ireland and South Africa. The two cases are themselves distinct with respect to the level of criminalisation, but both provide typical examples of how CPI and CPA may operate in the context of negotiations. Table 12 summarises these issues in relation to the two case studies. The remainder of this chapter will consider each these arguments across the levels of transformation.

Structural transformation: Criminalisation as a barrier or enabler

South Africa prior to the formal negotiations which began in 1990 represents a context in which there was widespread criminalisation of political expression. As explained in chapters three and four, at this time it was illegal to be a member of any proscribed group, communicate their political views, meet together, finance, or support in any form, punishable with custodial sentences (Dugard, 1978). For this reason the African National Congress (ANC) made the unbanning of itself alongside other political groups - the Pan Africanist Congress (PAC) and the South African Communist Party (SACP) - a non-negotiable prerequisite to formal negotiations as it was considered a clear and unassailable impediment. For example, "from around late 1986 onwards" almost every uMkhonto weSizwe (MK) operative entering South Africa from Zimbabwe was allegedly "killed or arrested within 24 hours" (Simpson, 2009:508-9).[4] The ANC vocalised their position in the Harare Declaration where they put forward their preconditions for entering into formal negotiations with the National Party (NP). It explained that the ANC would go on ceasefire if the State ended the state of emergency, released political prisoners, de-proscribed political organisations, and withdrew troops from Black townships (Simpson, 2009:511).

[4] This is according to Garth Strachan who was based in the ANC operation structures in Zimbabwe at the time.

These conditions were based in the fear of being arrested, imprisoned, or otherwise punished, as it was an ever-present reality for ANC negotiators. Joe Slovo referred to this explaining: "I would say that quite a proportion [of the ANC National Executive Committee] felt that we could be led into a trap" (Slovo, 1994). Likewise, Nelson Mandela explained their rationale in his response to being offered conditional release if the MK went on ceasefire:

> "What freedom am I being offered while the organisation of the people remains banned...What freedom am I being offered when my very South African citizenship is not respected? Only free men can negotiate. Prisoners cannot enter into contracts" (Mandela, 1994a:623).

So long as non-state actors face the threat of imprisonment they will face issues of credible commitment distrusting the state. Entering negotiations incurs a risk for these groups, so unless they trust that they will not end up imprisoned, or otherwise sanctioned - that they can be sure they will survive their "initial vulnerability" - they will be unlikely to engage in negotiations (Bapat, 2005:699). This is particularly relevant when conflicts are protracted, as actors will be even less likely to trust their opponents (Kirschner, 2010:760), and criminalising political activities presents one mechanism through which this distrust becomes embedded. This is because the very structure of criminal justice was designed to engage with these groups as criminals, not as political actors. Indeed, when announcing the reversal of the proscription of these groups De Klerk implied as much - even while he denied such an implication - stating: "The unconditional lifting of the prohibition on the said organisations places everybody in a position to pursue politics freely" (S. African Parliament, 1990a). The inference was that previously the liberation organisations had been unable to pursue politics freely because of the criminal sanctions and restrictions. Later De Klerk made this even more explicit stating:

> "The Government embarked on a deliberate programme of removing impediments perceived to have been standing in the way of full participation in the political process....Opportunity for peaceful protest within the law was broadened. In October last year eight persons serving life sentences were freed unconditionally" (S. African Parliament, 1990b).

The impediments referred to are linked directly to the opportunities for peaceful protest and political imprisonment, acknowledging that these were barriers to the negotiations,

albeit with the qualification of them being "perceived". By removing these structural barriers it helped facilitate trust and signify a symbolic shift. For instance Dennis Goldberg explained: "The logic of the situation was going to require various acts of more or less good faith. Because you can't negotiate without good faith" and because of his release from prison "it seemed to me that we were entering a phase - a new phase of politics" (Goldberg, 1993). The release of political prisoners and concessions relating to the de-proscription of the political organisation, were therefore regarded as key trust-building measures which helped facilitate the next stage of the negotiations.

But decriminalisation also served a more pragmatic end, as it facilitated a re-balancing of power relations between the ANC and the National Party whereby "ANC leaders could legitimise the move to negotiation in terms of its position of strength" (Lieberfeld, 2000:32).[5] As they no longer faced the same level of political repression, it became significantly easier to mobilise political support and communicate their goals beyond their immediate communities. Indeed de-proscription enabled the ANC to raise awareness of its political position in White communities, as previously censorship had meant many still viewed them as a criminal organisation (Lieberfeld, 2002:366). Furthermore, CPA has previously forced many anti-apartheid activists to operate in exile, externalising their voice and developing an international communicative strategy, as had similarly taken place in Northern Ireland, evident in the anti-apartheid movement and Irish-American critique of the British policy (Cochrane, 2007; Gurney, 2000).

Removing the criminal sanction began the process of challenging intergroup characterisations, opening up opportunities for dialogue where previous criminalisation had closed them off. Conflict transformation was, therefore, partially facilitated through this transformation of criminalisation, as the structural barriers embodied in the criminal sanctions were addressed, and as new opportunities emerged for non-violent political expression. The threat of sanctions were removed so that issues of credible commitment could be partially addressed (others still remained as will be discussed later).

[5] It is worth noting that the NP may have also seen these compromises as necessary in order to consolidate their own political power at this time due to mounting domestic unrest and international sanctions. For example Joe Slovo argued: "I think he concluded that the longer they wait before taking an initiative, the weaker position they would be in" (Slovo, 1994). Likewise Dennis Goldberg argued that "the price for [the USAs] continued support for the apartheid regime was the release of the political prisoners" (Goldberg, 1993).

Furthermore, the power imbalance between actors was partially ameliorated as many key actors who had been forced into exile, and others imprisoned for political offences, could now participate in negotiations.

Conversely in Northern Ireland negotiations took place without any formal decriminalisation of political groups, but this was because the British Government had not formally criminalised political organisations, as had been the case in South Africa. While the Irish Republican Army (IRA), Ulster Volunteer Force (UVF) and (after 1992) the Ulster Defence Association (UDA) were all criminalised, the communities they represented also had political, non-violent organisations to which each of these proscribed groups were unofficially affiliated: Sinn Fein, the Progressive Unionist Party, and the Ulster Democratic Party (Spencer, 2008). Not criminalising those engaged in political violence would have potentially risked the state being viewed as weak, or potentially resulted in a more repressive militarised response, but by limiting it to violent groups this kept open important political channels.[6] Non-violent political groups were not only legal, but they also had varying electoral mandates, providing a legitimate alternative to political violence. These groups provided the British Government with alternatives to terrorist groups, albeit informally affiliated, meaning they could enter into negotiations without the same backlash associated with audience costs (Byman, 2006). For instance, an IRA ex-prisoner explained: "[T]hey didn't need to de-proscribe the IRA in order to have negotiations, because they could negotiate with Sinn Fein and that was the way around it" (IRA ex-prisoner D, 2016). Peaceful political expression was not restricted in the same way it was in South Africa in terms of having political representation enabling groups to enter negotiations without formally being decriminalised.

It is important to contextualise this, however, as although these organisations were not decriminalised at this point, they had been earlier in the conflict. Three organisations had actually been de-proscribed, beginning with Republican Clubs in 1972, followed by Sinn Fein and the UVF in 1974, although the UVF was later re-proscribed. These examples provide an interesting contrast to South Africa, as de-proscription in the case of Republican Clubs was done to enable members to participate in local elections (UK

[6] The problem was it was not limited to political violence alone particularly regarding restrictions on cultural symbols and censorship. See Table 12.

Parliament, 1973b), whereas for Sinn Fein and the UVF it was "to encourage political dialogue to take place within the Province" (UK Parliament, 1975 c288). In this way deproscribing the organisation removed a number of legal barriers to political participation as was similarly the case in South Africa. Indeed while there had been consistent pressure on the British Government to re-proscribe Sinn Fein they resisted this by explaining: "I believe that it is better to deal with terrorists by pursuing and prosecuting people for criminal offences that they commit rather than for the views that they hold or the organisations to which they belong" (UK Parliament, 1984). While this argument is not entirely consistent with the actual policies of CPI and CPA at the time (see chapter four), it at least reflects the understanding that proscription would have closed off important avenues for dialogue, or at the very least been counterproductive in terms of propaganda. Focusing on the criminal behaviours of political violence meant that when it came to the negotiations the barriers were not as significant as was the case in South Africa.

While political activities were not criminalised to the same extent in Northern Ireland, there were still restrictions on political expression in terms of censorship, evident in the censorship of Sinn Fein publications and public statements from 1988 until the IRA ceasefire in 1994 (Kingston, 1995; Powell, 2008). This was done through the broadcasting ban whereby the British Government censored political expression of both illegal and some legal organisations. Instead of engaging with the men and women responsible for continuing violence, censorship "demonised" them and their organisation so that sections of the public were not really aware of their political goals (Powell, 2008:166). This was problematic for conflict transformation because while many rejected the political violence of the IRA, a significant proportion of the Catholic population shared at least some of the political aspirations of Sinn Fein (Moxon-Browne, 1981). Mitchel McLaughlin, the former General Secretary of Sinn Fein, explained: "[The British Government] silenced the voice of controversy so that all you got was a kind of a monologue, but even that didn't work. It obviously created huge difficulties and challenges. People overcome it" (McLaughlin, 2016). Resisting this then took the form of murals and other symbols, as an IRA ex-prisoner described: "[G]raffiti...was important at the time because the state were in total control of all other expressions of citizenship" (IRA ex-prisoner E, 2016). Therefore, decriminalising political activities was important for conflict transformation in terms of legitimising

dialogue as an alternative to political violence. So long as censorship was enforced it would be difficult for Sinn Fein to actually communicate their political objectives beyond their immediate communities, enabling others to frame them instead and usually in less favourable terms.[7] But it played a further - perhaps more important - symbolic role as this censorship represented a wider denouncing of their political identity.

Following the 1994 IRA ceasefire the British Government decided to end the broadcasting ban. Previously censorship had been justified on the basis of criminalising ongoing political violence,[8] but once a ceasefire was announced, amongst other contextual factors like Gerry Adams' visit to the USA, it became politically problematic to maintain. Criminalisation's role in constraining negotiations was supplanted by wider political pressures domestically and internationally. This meant that those involved in the negotiations would be able to communicate their positions openly ending years of censorship. So while CPI and CPA can be in tension with dialogue and negotiations, its reform is contingent upon the state's ability and willingness to separate peaceful or legitimate political activities - providing the means for this to take place - from violent or illegitimate alternatives.

Issue transformation: Criminality or political identity

Criminalisation as a bargaining issue

Criminalisation serves an important role as an issue itself, not simply in its ability to frame issues, but acting as an incentive structure shaping negotiations. The state will usually have imprisoned a number of political actors representing a barrier to negotiations as described above, but on the other hand its reversal has the potential to foster trust and provide considerable movement on other issues. For instance in Northern Ireland prisoner releases were used strategically as a bargaining chip by the British Government "to try and prise concessions from the two sides"; a third of the

[7] For example the Basil Brooke the Secretary of State for Northern Ireland referred to Sinn Fein as having "contempt...for political development without the use of violence" (HC Deb 21 June 1990 vol 174 cc1100-3).

[8] For instance Prime Minister John Major linked illegal IRA violence directly to Sinn Fein: 'Sinn Fein has been challenged to give up violence - it has not done so' (HC Deb 03 February 1994, vol 236 col 1024).

discussions during the initial meetings between the paramilitaries and the British Government were focussed on prison and prisoner issues (Spencer, 2008:469). Likewise, Republicans had resisted criminalisation since its inception, and so shortly after the 1994 IRA ceasefire Sinn Fein President Gerry Adams called for the abandonment of "the whole range of repressive legislation" and the release of all political prisoners (An Phoblacht, 1994a). In the same way the Republican publication *An Phoblacht* [*Republican News*] later published a list of all "Irish Republican Political Hostages" calling for their release (An Phoblacht, 1994b). Indeed a comparative study completed by the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO) in 1995 concluded that: "[W]e would argue that, until the question of prisoners is agreed then nothing, that will create a final solution, is agreed" (Gormally and McEvoy, 1995:43). Such was the prominence of political prisoners as a key issue in the negotiations that if not properly addressed the likelihood for a sustainable peace agreement would greatly diminish. Similarly, for Loyalists "a review of prison sentences would have been a way to counter the overall perception that there has been no real movement" (Schulze, 1997:106; Powell, 2008). The UVF publication Combat reflected this, arguing that while "the British Government are contemplating sending IRA prisoners...back to Ireland....Loyalist prisoners welfare groups have been trying to achieve the return of their men for some time, but to no avail" (Combat, 1994). Prisoner issues were accordingly of great importance to both sides, but concessions granted to one were perceived relative to the other. For these reasons the key security legislation - the Emergency Powers Act and Prevention of Terrorism Act - were repealed on 25 August 1996 and 19 February 2001 respectively, and rules on remission were revised.[9] Such concessions signalled a willingness to reach a mutually acceptable agreement contributing towards inter-party trust in the negotiations.

This prioritisation of decriminalisation is not surprising considering the key role which prisoners played in the negotiations themselves. For example in 1997, following the assassination of Loyalist Volunteer Force (LVF) leader Billy Wright, the UDA prisoners took a vote in prison and two thirds voted against the peace process. The significance of the vote is evident in how both Ulster Unionist Party leader, David Trimble, and later the Secretary of State for Northern Ireland, Mo Mowlam, visited the

[9] However many of the powers and aspects of these laws became rewritten in the Terrorism Act 2000, raising questions about whether the repeal of these laws was anything more than symbolic.

Maze Prison to negotiate with the prisoners (Mitchell, 1999; Powell, 2008; Shirlow *et al.*, 2010). A UVF ex-prisoner emphasised the significance of this for at least certain Loyalist groups arguing: "Had it not been for the role of former prisoners we wouldn't be sitting here with the Good Friday Agreement....All the key protagonists within the UVF and the Progressive Unionist Party are all former political prisoners" (UVF ex-prisoner C, 2016). A UDA ex-prisoner similarly reflected stating: "Keeping in mind that I was one of those prisoners at that point, I think we were given too much of a say from a Loyalist point of view" referring to how they were consulted on whether to go on ceasefire or not in 1993 (UDA ex-prisoner B, 2016). From these perspectives, Loyalist prisoners were given considerable input in the negotiations, whether as active negotiators themselves, or being consulted on key policy issues. Likewise an IRA ex-prisoner explained how instrumental prisoners were in the negotiations, not necessarily from inside the prisons but as ex-prisoners:

> "Subsequently in years when the peace talks - the majority of the talking was being done outside [of prison] - but I mean the majority of the people who would be leadership of the Republican family outside had all at one stage been political prisoners" (IRA ex-prisoner B, 2016).

In these ways the release of prisoners and prison issues were critical components of the wider peace negotiations. By leveraging concessions in relation to criminalisation, the British Government were able to foster agreement on a wider range of other issues. The British Government's chief negotiator from 1997 onwards, Jonathan Powell, reflected on this explaining: "[P]risoner release is a crucial part of any peace process of this kind with prisoners usually being the members of a terrorist movement most in favour of a lasting peace" (Powell, 2009:101). Therefore, it was important to leverage the concessions relating to criminalisation against wider support for the peace agreement.

Furthermore, the participation in the negotiations itself was used to leverage issue transformation through the Mitchell Principles; requiring all negotiating parties to commit to non-violence and democratic resolution of conflict. Doing so set the non-violent process of negotiations as a clear alternative to political violence; the two would not coincide, although this was implemented later on in the peace talks with the entry of Senator Mitchell as a mediator in 1996 (Mitchell, 1999).

Similarly in South Africa issues relating to CPI and CPA were used to facilitate trust and encourage dialogue. As alluded to above, this included the unbanning of various political organisations, release of numerous political prisoners, and amendments to security regulations, which were justified by De Klerk as reflecting "the Government's declared intention to normalise the political process in South Africa" (S. African Parliament, 1990a). By granting these concessions, therefore, the state not only removed the material barriers of CPA to negotiations, but was also able to signal a willingness to negotiate. Indeed over the course of the subsequent negotiations various other issues were granted. For example, during 1990-91 indemnity was granted to various categories of offenders; sentences were shortened for others; and others were simply released with no clear legal justification (Mallinder, 2009:30). The NP also had serious concerns over state actors being taken to court over past actions under the Apartheid regime evident in the Further Indemnity Act 151 (1992), which De Klerk argued was "to level the playing field between the government and opposition group" (Mallinder, 2009:40). In this way the issues of CPA and CPI framed a considerable amount of the negotiations and were used by all sides to leverage concessions on other issues. Eventually the debate moved towards the proposal that became realised in the Truth and Reconciliation Commission, of conditional amnesties granted in exchange for truth recovery. In this way, negotiations reframed what criminalisation meant, as all sides sought to resolve the issues of criminalisation historically, presently, and also for the future. For example Nelson Mandela emphasised the importance of consistency; that state crimes should be dealt with in the same way as those of non-state actors:

> "You have people who committed offence in their opposition to apartheid and vice versa, you have people who committed offences in defence of apartheid...We want to be consistent. To apply the same guidelines to those who committed the same offence in defence of apartheid" (Mandela, 1994b).

This was important for the ANC as it required disclosure of such offences so that they too would have to be transparent about what they did in defence of apartheid. Therefore, while concessions on decriminalisation can build trust, acting as "a radical new political opportunity structure", they also embody a narrative "battlefield", as actors on all sides seek to legitimise their narrative through decriminalisation (Campbell and Connolly, 2012:11). Conflict transformation in this sense is constrained by the inter-party bargaining dynamics. But the role it has in reframing the issues themselves is arguably of greater significance.

Polarising issues

While decriminalisation can be used as a bargaining issue facilitating movement at the negotiation table, this must be understood in the context of its implications beyond the negotiators themselves. The framing of non-state actors as criminals or terrorists contributes towards a narrative of conflict which denies the political legitimacy of the actors involved. As explained in earlier chapters this contributes towards the polarisation of actors along polemic lines embedding fundamentally divergent perspectives. This is problematic for conflict transformation in respect of CPI and CPA, because it delegitimises not only non-violent political expression, but also the political ideology and actors themselves. In other words, when an actor then enters negotiations with the criminalised other this can undermine their own legitimacy because dialogue is perceived as threatening to in-group identity. Negotiating with the criminal 'other' can signal weakness by 'backing down' from previously established threats. The negotiations may be perceived as giving into terrorism or criminality, directly relating to the challenge of audience costs (Moon and Souva, 2016).

To address this, actors will frequently enter into secret negotiations to overcome these challenges, at least initially. Indeed in Northern Ireland secret parallel negotiations took place with the paramilitaries, albeit often indirectly, and indeed had done so periodically since the 1970s (Ó Dochartaigh, 2011; Craig, 2014). These back-channel contacts were particularly important in the context of such criminalisation because they "permit negotiation on the question of legitimacy without conceding legitimacy"; taking effect similarly in South Africa between Mandela and representatives of the NP (Ó Dochartaigh, 2011:768; Lieberfeld, 2000). Furthermore, the former SADF General Constand Viljoen referred to secret negotiations conducted between a number of generals and the ANC in 1993 where "the Conservative Party, then said: 'We will not participate ourselves. It is too politically sensitive. But you generals, please do so, you carry on the negotiations'" (Viljoen, 1994). While the Conservative Party themselves could not openly engage in negotiations – due to these issues of audience costs – these generals were able to facilitate secret negotiations instead. But the challenge of moving out of these negotiations remains, as although certain points can be addressed in secret, actors still need to secure the support of their political supporters.

Criminalisation itself was only one mechanism contributing towards the delegitimisation of these actors; others - not least political violence - make it difficult to deduce precisely its direct implications on intergroup relations. But at the very least it had a significant role as its reversal – decriminalisation - was seen by some to be selling out justice for peace; letting 'criminals' get away with their crimes. Hazlett Lynch, a former project co-ordinator with the victims' group for security force personnel called West Tyrone Voice, explained that he felt certain individuals are "above the law" (Lynch, 2016), and a community worker of a victims and survivors NGO explained how many are asking: "How much more do we need [to give up] to buy peace?" (Community worker D, 2016) By bargaining the ability to prosecute, or for lower sentences, it gives rise to perceptions of justice being compromised for at least some individuals. Indeed this decriminalisation process will be constrained by a wider discursive battleground as each side seeks to legitimise its own position. Decriminalisation may, therefore, be perceived as both a mechanism facilitating a transition towards peace by some, while simultaneously as acquiescing to criminality by others. Indeed an IRA ex-prisoner implied the challenge this presented to the negotiations stating: "Luckily for us whenever we were doing the heavy lifting in the negotiations it wasn't with the Unionists, it was with the British" clarifying this by saying "If it had been up to the Unionists there wouldn't have been any power sharing" (IRA ex-prisoner C, 2016). From this perspective Unionist actors were less likely to compromise and grant concessions in comparison to the British Government because they had much more at stake. Measures such as power-sharing were perceived as direct threats to their group identity not simply because it involved relinquishing power, but because they were perceived as 'rewarding' violence. For example the UVF publication Combat stated: "[T]he Government is granting them [the IRA] concessions hand over fist in their attempts to keep them sweet and away from the bomb and the bullet" (Combat, 1997). As the IRA had since reneged on its ceasefire, these Loyalist actors perceived concessions given at this stage as directly rewarding violence, whereas "[n]ot one concession was granted to our men" (Combat, 1997). In this sense, the commitment to peace is contrasted to the violence of the out-group, whereby political measures continue to be defined in zero-sum terms. Whether it is possible or even necessary to address these perceptions is beyond the scope of this chapter, but it conveys how significant a role informal criminalisation can have on peace negotiations.

This was echoed in South Africa where individuals raised frustration over an elite-driven approach resulting in many historical crimes going unaddressed. Majorie Jobson, Director of the victims' organisation Khulumani, explained: "The reason the state won't pursue these prosecutions of Apartheid criminals is that they've got too much to hide themselves" (Jobson, 2016). The perception is that justice for state crimes was traded away, whereas many of those who were criminalised under the Apartheid system continue to suffer the consequences in terms of trauma and widespread poverty. While the challenge of addressing such issues should not be underestimated, many feel that the task has never been properly acknowledged, and so will never be addressed: "[...] the people who've carried all the sacrifices and damage [are unable] to get a foothold in the economy; as a result, you can just be ignored" (Jobson, 2016). Decriminalisation, therefore, can have serious long-term implications, especially on the post-settlement phase, and actually undermine conflict transformation in the long-term.[10] These points are developed more extensively, however, in chapter six.

Actor transformation: Distinguishing the 'criminals' from the 'negotiators'

Criminalising legitimacy

As explained in the introduction, there is considerable debate around the importance of legitimacy for negotiations, particularly in relation to terrorism (Bapat, 2006; Cronin, 2010; Pruitt, 2006; Spector, 2003; Toros, 2008; Zartman, 2003), but for actor transformation this legitimacy needs to be understood as an interactive process. For on the one hand criminalising political expression is often explicitly about delegitimising the target; ruling out any form of formal dialogue because from the state's perspective. Brian Gormally explained, referring to the state's rationale: "[Y]ou don't negotiate with criminals, you subject them to the criminal law" (Gormally, 2016). The state will use criminalisation to legitimise itself, contrasting its 'legal' practices with those of the criminalised. For example the Minister of Justice in South Africa stated, when announcing the Terrorism Act: "We are not going to reply to their violent assault with machine guns, but are going to try them in our courts in accordance with the norms of a

[10] For more discussion on this see Fionnuala Ní Aoláin and Colm Campbell, 'The Paradox of Transition in Conflicted Democracies', *Human Rights Quarterly*, 27(2005), pp. 172-213.

civilised community" (S. African Parliament, 1967). Likewise, in announcing the introduction of the Prevention of Terrorism Act, the Home Secretary Roy Jenkins stated: "These powers...are Draconian. In combination they are unprecedented in peacetime. I believe they are fully justified to meet the clear and present danger" (UK Parliament, 1974b). Because of the "campaign of indiscriminate murder" these powers were deemed necessary to "protect the innocent public" (UK Parliament, 1974a).

Yet by using the criminal justice system in this way, it can develop or reinforce the state's illegitimacy for those subject to it. This is because "the state can only confer legitimacy upon an entity for itself" (Toros, 2008:413), so it is often unable to extend it beyond this, and may actually contribute towards the reverse. While the state may label a non-state actor 'criminal' to delegitimise them, its impact will be contingent on the enforcement of this labelling and the wider legitimacy the state holds. This is particularly problematic when linking a political identity to a criminal narrative, as it informally criminalises those communities which espouse these identities (Breen-Smyth, 2014).

As explained in chapter four in Northern Ireland the legitimacy of the state was contested from its inception by many of those from within the Republican community as it embodied "the Orange state" (IRA ex-prisoner A, 2016).[11] Therefore, rather than delegitimising these actors, criminalisation was perceived as "corrupting the judicial process" because it "criminalised an entire community" (McLaughlin, 2016). Loyalist paramilitaries similarly rejected the label of criminalisation but from a different perspective, as they regarded the state as legitimate, but it was the enforcement of criminalisation and its denial of their identity which they rejected. For instance a UVF ex-prisoner explained how such criminalisation "was to strip you of any identity", and that the practices of security personnel "undermined my sort of view of my own state and the police" (UVF ex-prisoner B, 2016). What is interesting is how similarly those criminalised in South Africa regarded the legitimacy of the criminal justice system, as an MK ex-prisoner explained: "In this country there was no justice" (MK ex-prisoner A, 2016). Another former political prisoner echoed this stating: "We didn't even in a sense think about...whether [political violence] was legitimate or not; this state was

[11] 'Orange' was used as an alternative way of saying a Unionist/Protestant state.

illegitimate" (South African political ex-prisoner, 2016). As was the case for Republican and Loyalist paramilitary groups in Northern Ireland, the criminal label – when applied through CPI or CPA - held no legitimacy and actually served to embed state illegitimacy.

For negotiations legitimising both the state and non-state actors may, therefore, require some form of decriminalisation, formal and informal. In South Africa this was enabled partially by the ending of the Cold War, as terrorism had nearly always been expressed in terms of the Communist threat. The NP needed some way to 'sell' decriminalisation, as 58% of the White population opposed Government-ANC negotiations as reported in a survey from 1988 (Lieberfeld, 2000:22). Therefore the decline of communism was fortuitous, as noted by Justice Minister Kobie Coetsee, as "an opportunity to normalise" (Lieberfeld, 2000:23), enabling the NP to frame decriminalisation as the result of the decline of communism: the ANC was no longer the 'communist threat' it had been. Displacing the communist characterisation of CPI facilitated the humanisation of the ANC and other groups, as they were no longer defined principally by the single criminalised ideology, but by their wider political goals and objectives. But in order to consolidate support for the process the NP still needed to communicate these reframing to their political base; otherwise they may not have been able to actually deliver upon an agreement involving significant concessions to the ANC. To address this, De Klerk implemented a mandate referendum in March 1992 amongst White-only voters asking them "to reject or endorse his reform policies to negotiate an end to white minority rule through talks with the black majority" (Loizides, 2013:238). De Klerk reflected on the referendum explaining that through it "we really spelt out a policy which was totally devoid of any remnant of race or colour or racial differentiation" thereby shifting the political discourse of CPI (De Klerk, 1994). In this way De Klerk was able to secure bottom-up support for the negotiations which at least partially helped address the wider challenges of ethnic outbidding.[12]

This in turn complemented the negotiation process as Pik Botha, Minister of Foreign Affairs at the time, explained: "[P]eople did get to know each other for the first time as human beings, as fellow South Africans [and] that their struggle from their point of

[12] For a wider discussion on this see Loizides (2014).

view [was] driven also by their love for their country" (Botha, 1994). Instead of characterising those across the table as Communists, their political objectives were defined in their own terms, as Botha continued: "This is also their country and not just a country for the Whites. They want a fair share in it" (Botha, 1994). Similarly, Nelson Mandela reflected on his meetings with Botha explaining:

> "You respond to individuals in accordance with how they interact with you. I have heard a lot of stories about PW Botha and I don't challenge them but my own attitude must be determined by how he responded to me and the problems I put to him" (Mandela, 1995).

Instead of demonising the other Mandela reinforces the importance of actually meeting 'the other' so that he could draw his own conclusions rather than rely on the characterisations put forward by others. Indeed he went on to explain in this interview how Botha was "kind", "charming", and "relaxed", and "that is how my own attitude towards him is determined" (Mandela, 1995). Reframing identities contributed towards this building of empathy and shared understanding which are both understood to be important foundations for conflict transformation.

In Northern Ireland this reframing was more problematic because the links between political republicanism and loyalism and the 'terrorist' or 'criminal' elements were perceived as intertwined, and in some ways were.[13] If any of the illegal organisations had been de-proscribed it may have been perceived as legitimising political violence across both communities, alienating many especially within Unionist political parties who would have regarded such a concession as a sign of acquiescing to criminality and terrorism, a pattern which is common for most proscribed groups (Pruitt, 2006:381; Browne and Dickson, 2010). An IRA ex-prisoner referred to this stating: "In terms of negotiations...the British obviously had to keep them very secret because they couldn't be seen to be speaking to people they were labelling as terrorists" (IRA ex-prisoner D,

[13] For instance a senior UDA ex-prisoner stated: 'I've no doubt there are people within Loyalist paramilitaries who have always been criminals if you like under a flag of convenience' (UDA ex-prisoner C, 2016); a UVF ex-prisoner explained: '[Criminality's] probably been going since the paramilitaries first started because, sadly human beings being what they are, once people see there's a means of making money or whatever people come in' (UVF ex-prisoner B, 2016). In contrast republican ex-prisoners explicitly denied any form of criminality, but some referred to unjustifiable incidents, albeit ones linked to warfare not crime: 'That is not to say that everything that the IRA were involved in was right because it patently wasn't and there was all sorts of slaughter and mayhem...so I wouldn't even attempt to justify any of those horrendous actions by the IRA' (IRA ex-prisoner C, 2016).

2016). This is indicative of the challenge criminalising politics embeds; framing political activities as criminal and embedding this over decades not only impacts elite discourse and policy, but also intergroup perceptions throughout communities (McAuley and Ferguson, 2016). Another IRA ex-prisoner explained: "You even heard political leaders talking about periods of decontamination and the need to be housetrained" (IRA ex-prisoner E, 2016). Indeed during the previous decade the political approach towards the IRA had been centred around their criminality, not political objectives, as former Northern Ireland Office Minister - Richard Needham - explained: "The IRA are not a set of 'mindless cowards' as Police, Northern Ireland Office and Government officials so often call them" (Needham, 1998:319). Therefore, because of the embeddedness of the criminal identity, the 'housetraining' of actors refers as much to the normalisation of Republican politicians as it does their renunciation of violence.

This is why decriminalisation is the focus as opposed to de-proscription specifically; the latter proffers a contextually-bound proscriptive solution, whereas decriminalisation allows for a much wider range of options. The formal de-proscription of a group will not necessarily reverse the informal perception of that group as criminal as it does not need to be accepted, whereas an informal decriminalisation requires much more comprehensive transformation and support from the bottom-up. For instance there needed to be a more informal process of un-labelling these groups in order to facilitate trust and re-legitimise non-violent republicanism. Negotiations themselves play a role in this as the Northern Ireland Office Political Director at the time, Quentin Thomas, explained that they "de-demonised" Sinn Fein beyond the Republican community (Toros, 2012:125). Negotiations conferred a level of legitimacy on to the political credentials of these actors. Bottom-up support was in part achieved through the building of public support for the agreement as a whole, emphasising the "politics of consent" (Tonge, 2000:58). Yet it was balanced with the continuing criminalisation of their violent counterparts in the IRA, UDA, and UVF. Instead of reversing the political discourse of criminalisation, a half-way measure was pursued to balance the political divide whereby the political elements within these groups were given legal means to express their identity, while political violence remained firmly criminalised.

Such legitimisation affected Loyalist paramilitaries differently from Republicans, as many within Unionist and Loyalist communities continued to view them as illegitimate (Mitchell, 2010; Shirlow *et al.*, 2010). While some Loyalist communities viewed the paramilitaries with some legitimacy, for many it was the police and army who represented the legitimate defenders of their community, with paramilitaries being viewed as undermining the rule of law. For instance a Unionist politician explained: "[Y]ou grew up to respect...law and order...and that's why the UDA, which had at one time 50,000 people, couldn't get anybody elected" (Unionist politician, 2016). The relative legitimacy that Loyalist paramilitaries held, therefore, did not necessarily translate into electoral support. While the reasons behind this are complex, the implications are quite clear, as a senior UDA ex-prisoner explained: "You know we're there for a specific thing. We're there to do the dirty work. We're the skeletons in the cupboard. But it's the suit and the tie that they vote for and that's the way it's always been" (UDA ex-prisoner C, 2016). However, this was not the case for all in these communities as certain Unionist actors had a very uneasy relationship with the police. This was evident for instance around the Anglo-Irish Agreement, and then again at the Drumcree protests. Indeed in some communities Loyalist actors developed an electoral mandate, evident in the support for the Progressive Unionist Party and the Ulster Democratic Party (Bruce, 2001). Actor transformation through informal decriminalisation, therefore, varied considerably across Unionist and Loyalist communities. For instance, a UDA ex-prisoner referred to how he and the Loyalist community were side-lined during the negotiations while Republican actors were included: "Loyalism was put out to their right hand side...while the British Government was negotiating with Sinn Fein and the IRA" (UDA ex-prisoner A, 2016). However, such perceptions were not necessarily representative, as the UVF publication Combat affirmed after the signing of the Good Friday Agreement: "We have not been sold down the river and neither are we, Mr Ervine, Mr Trimble or Mr McMichael traitors...Of the agreement itself, we have nothing to fear or dread" (Combat, 1998). In other words, the article highlights how the leaders of the UUP, PUP, and UDP all endorsed the peace agreement because of their involvement in the negotiations. Transforming the political identities of actors was therefore variable, demonstrating how the impact of criminalising political expression varies depending on its subject - across and within pro/anti-state groups.

Balancing these issues of legitimacy is crucial for the wider legitimisation of criminal justice following a negotiated settlement in fostering the buy-in of the main political groups. Decriminalising non-violent political expression resolves a number of fundamental formal barriers, but must also be accompanied by the informal support of communities. Without entering the debate within transitional justice over how such re-legitimisation should take place, in terms of negotiations there is an important link between building support for decriminalising non-violent political expression and the re-legitimisation of the criminal justice system. The challenge, which is beyond the scope of this chapter, is how do you then ensure this elite level narrative is translated down through to the communities they represent, and on the other hand, how you reconcile the old narrative with the new without alienating large sections of the state? These are questions for further research, but this chapter provides an introduction to some of the key challenges shaping them.

Conclusion

This chapter has discussed the potential implications which the criminalisation of non-violent political expression can have on negotiations, and consequently for conflict transformation. It argued that the processes of criminalisation and decriminalisation embody important incentive structures affecting peace negotiations, and that for conflict transformation to effectively occur criminalisation needs to be orientated away from a criminalisation of actors and on to specific acts; thereby legitimising non-violent political expression and negotiations. Put differently, if the state continues to criminalise non-violent political expression this will undermine its credible commitment to the wider process, embedding intergroup hostilities. However, these arguments are qualified by the challenges of audience costs and ethnic outbidding which are linked to the issues of informal criminalisation. The embedded social reality of criminalisation constructed by CPI and CPA will be extremely difficult to reframe particularly in the short-term context of peace negotiations.

These arguments relate to the particular nature of criminalisation, because its implications depend on its target and implementation. By distinguishing the criminalisation of political identity (CPI) from the criminalisation of political activities

(CPA) these implications begin to become clearer. Table 11 outlines these distinctions across the levels of conflict transformation, and Table 12 maps them across the two case studies. Specifically, CPA appears to function as a barrier to peace negotiations, as non-state actors will fear possible sanctions, and be forced to operate covertly, distrusting the state's commitment to dialogue. These issues then come to embody bargaining issues, themselves to be negotiated, but if left unaddressed, their enforcement will likely contribute to the greater alienation of the state from within targeted communities. Similarly, CPI may undermine the negotiations by polarising intergroup identities into oppositional categories. Identities are reduced to simple characterisations which frame political beliefs and ideologies as criminality or terrorism. This polarisation displaces underlying political objectives, embedding negotiations into zero-sum terms which dehumanise participants and limit the potential for a stable agreement. Therefore, from a policy perspective, criminalising political expression in a civil conflict presents a serious challenge for formal negotiations to take place. It compounds the credible commitment of the state, creates information breakdown, and increases audience costs associated with political compromise, effectively increasing the costs of negotiations for both the state and non-state actors. These are very general points because of the inherently complex processes under discussion, but they provide at least an initial theoretical framework for considering this complexity.

In many ways these findings are intuitive; that by criminalising non-violent political expression the state restricts opportunities for negotiation. But the implications of this are of great importance for conflict transformation. Table 13 summarises a number of ways (de)criminalisation can facilitate conflict transformation which follow from the discussion above. Instead of arguing for a binary reliance on criminalisation or decriminalisation, the findings suggest that the two processes can complement one another if orientated away from actors and on to actions. In other words, decriminalising non-violent political expression (both CPI and CPA) can open up opportunities for negotiation, and reorienting criminalisation on to violent acts delegitimises violence as an alternative to negotiation. But this central argument needs to be qualified by a number of issues which follow from the cases.

Table 13. (De)criminalisation as a mechanism of conflict transformation

Levels	
Structure Transformation	- Decriminalise non-violent political activities to remove the structural barriers they represent for negotiations; removing the deterrent of sanctions, and the restrictions on communication and non-violent mobilisation - Open up intergroup political dialogue to address 'criminal' characterisations both at the elite level and at the grassroots
Issue Transformation	- Decriminalising political identity to re-humanise groups so that they are no longer defined solely by their 'crimes', but by their political objectives - Use decriminalisation to build trust between groups and a willingness to reach a mutually beneficial agreement - Negotiate an intergroup policy of criminalising political violence to ensure the buy-in of all (or at least most) parties
Actor Transformation	- Decriminalise political groups so that they can openly engage in non-violent political dialogue - Maintain the criminalisation of violent acts to delegitimise it as a form of political expression - Transition away from using criminal justice to delegitimise political actors, and seek to develop political support for these institutions

The comparison between the two cases was important, as it unpacked how the variation in the nature of criminalisation may constrain its implications for conflict transformation. For instance in South Africa decriminalising political groups was regarded as a non-negotiable prerequisite to negotiations because of the oppressiveness of sanctions and extensiveness of restrictions on political expression, whereas in Northern Ireland political groups were generally able to operate with greater freedom, as non-violent groups were not formally criminalised - albeit there were some restrictions in terms of censorship. In other words, so long as there are viable and favourable alternatives to political violence, the importance of criminalising political expression will likely diminish. Furthermore, the variation across pro- and anti- state

groups in Northern Ireland illustrates the contingency of criminalisation upon the communities it seeks to impact. Pro-state communities will be much more inclined to incorporate and accept the state narrative of criminalisation due to the legitimacy they ascribe to law and order, whereas communities alienated from the state may view it as a further intrusion on their identity. This means criminalisation needs to be regarded not simply as a legal top-down process, but also as a bottom-up one. For conflict transformation, therefore, the above reorientation will depend on the bottom-up buy-in of communities, otherwise the reorientation itself might be resisted by those who accepted the prior status quo. However, this should be qualified as achieving the buy-in of all actors is unlikely due to the complexity behind why actors engage in or support political violence. The continuing existence and support of so-called dissident Republicans illustrates this, as a significant minority in Northern Ireland still rejects the political settlement of the GFA (Evans and Tonge, 2012; Tonge, 2004).

These arguments demonstrate the importance for peace negotiations to focus not only on the formal mechanisms of decriminalisation, but also address informal decriminalisation. Failing to do so may result in the issues of credible commitment, whereby concessions agreed upon are unable to be enacted because of lack of bottom-up buy-in, or due to ethnic outbidding. It would therefore be important to develop this through further research into how local actors perceive such mechanisms and the negotiated agreements after they have had time to become implemented. Indeed the following chapter addresses one aspect of this in terms of criminal record expungement, considering how the way it was negotiated and implemented reflects the relative bargaining power of negotiators rather than the wider issues of conflict transformation.

Chapter 6

Expunging criminal records and conflict transformation: Trading peace for justice, or just restoring peace

Following a peace settlement societies emerging from a violent conflict will face a number of challenges in terms of addressing historical crimes and patterns of political violence, which from the perspective of conflict transformation, means transforming what are destructive patterns of violent conflict into positive non-violent ones (Miall, 2004:71; Kriesberg, 2009). This chapter considers how the process of criminalising political expression can impact upon this post-settlement phase through the framework of conflict transformation. Having criminalised political expression throughout a conflict – as outlined in chapters three and four – it is important to analyse how this can impact the transformation of the conflict as it emerges out of a peace settlement. Indeed the importance of this phase of conflict is evident due to the high number of recurrent conflicts, as of "thirty-nine conflicts active in the past ten years, only eight were new conflicts, thirty-one being resurgent conflicts in areas where they had been dormant for at least a year" (Ramsbotham, Woodhouse and Miall, 2011:71). How processes such as criminalisation impact conflict transformation in this context is therefore crucial in addressing at least one contributing factor to conflict resurgence.

Previous research has highlighted the 'positive' contribution many ex-prisoners have made to peacebuilding, while also highlighting the ongoing issues they face in terms of stigma and criminal sanctions (Dwyer, 2012; McAuley, Tonge, and Shirlow, 2009; McEvoy and Shirlow, 2009a, 2009b; Mitchell, 2008; Rolston, 2006; Shirlow *et al.*, 2010). Others caution against such 'positive' assessments of ex-prisoners emphasising the harm they may continue to cause to victims, that these individuals are often perceived as being rewarded for their violent pasts, or that their role as 'peacebuilders' may replicate former paramilitary power dynamics within certain communities (Edwards and McGratten, 2011; Holland and Rabrenovic, 2017; McGratten, 2014; Steenkamp, 2011). Debates around the issue of criminal record expungement (CRE) illustrate these tensions, as the criminal record represents a material and social barrier to reintegration for ex-prisoners, alongside a central pillar of retributive justice for certain

victims. In these ways it is initially unclear how it should be addressed to help facilitate conflict transformation, as on the one hand its expungement could enable a smoother process towards ex-prisoner reintegration, while on the other hand this could signify a reward for violence and denial of retributive justice contributing to intergroup polarisation.

To address these tensions this chapter proposes a wider theoretical framework than has been previously applied; focusing not only on criminal records for political violence, but those of all individuals convicted for offences relating to political expression. This enables the issues of rewarding violence and dealing with outstanding historical cases to be distinguished from those convicted of non-violent political offences. In other words, the chapter draws on the typology developed in chapter one which distinguishes the criminalisation of political violence from the criminalisation of non-violent political expression.[1] By including non-violent political expression in the analysis this provides an important contrast to the issues associated with criminal records for political violence. These distinctions are important because the legitimacy of the criminal record will be linked directly to what it criminalised.

Furthermore, drawing on critical criminological and legal approaches to crime, CRE itself needs to be understood beyond its formal nature to account for its informal implementation and experienced reality (Hulsman, 1986; Lacey, 2009; McEvoy and Gormally, 1997; Shiner, 2009). While 'expungement' covers a range of possible processes, in this chapter formally it refers to the destruction or sealing of a record so that the offender may "regard his or other record as no longer existing" (Thomas and Hebenton, 2013:237). Allowing for a range of possible processes is necessary because this chapter will discuss a number of these in comparison to analyse their implications (these are summarised in Table 14). But while it is necessary to understand what constitutes the formal process of expunging a criminal record, the implications of this are based in the experiences of the criminalised, the perceptions and behaviours of wider society towards them, and the variable ways in which this takes effect across groups. This informal criminalisation is realised through the prevailing conflict narratives (Bell, Campbell and Ní Aoláin, 2004; Campbell and Connolly, 2012),

[1] The distinctions between political identity and activity are not essential to this discussion and so will not be discussed in this chapter.

stigmatisation (Gear, 2002; Shirlow *et al.*, 2010), and practices of law enforcement (Brewer, 1994; Ellison and Smyth, 2000). In other words, while politically motivated destruction of property may be criminalised, only non-state actors may be charged for such crimes, or even just a particular identity group. Some actors may even claim that such acts are not crimes but legitimate tactics of war. Therefore, the legitimacy and relevance of such a criminal label, and by extension the criminal record, is dependent on its wider informal context.

Table 14. Relationship between the criminalisation of political expression and the multilevel framework of conflict transformation

	Criminalisation of political identity and activity (CPI/CPA)	**Criminalising Political Violence (CPV)**
Structure	• Shapes power relations in favour of the state in relation to the criminalised marginalising their voice; • Places structural barriers on finding employment	• Depending state legitimacy this can delegitimise spoiling behaviour deterring future violence • Can isolate criminalised actors due to social ostracisation • Constrains the reintegration of armed groups by restricting opportunities for employment
Issue	• Displaces political identity by equating it with criminality • As an issue it is often marginalised because these actors are themselves marginalised	• Frames political violence as criminal to de-politicise and delegitimise it • The restrictions often become an issue themselves to be resisted
Actor	• Dehumanises actors by framing them as criminals leading to social stigmatisation which will vary across groups	• Those engaging in political violence are labelled as criminals • If perceived as illegitimate law enforcement can represent a tangible 'enemy'

Conflict transformation again provides an effective analytical framework to account for this complexity across the levels of actor, issue, and structure transformation (Lederach, 2003). With regards to issue transformation, criminal records both embody an issue and a mechanism which can affect the salience of other issues. For actor transformation, actor legitimacy is linked to their criminal record, but this is constrained by the legitimacy of the label. Accordingly, while the structural barriers associated with criminal sanctions can be removed, ongoing informal issues may continue in terms of societal stigmatisation, trauma, and violence, and can lead to an intergenerational transference of the sanction. These arguments are summarised in Table 14 to show how across each of these levels, and depending on the type of criminal record, criminal records will often have different implications. This is because in societies which have recently undergone an intrastate conflict many actors will have been convicted of offences which they would contest; whether due to the process by which their convictions were reached, the acts which have been criminalised, or the authority overseeing the criminal justice process; all embodying sites of political contestation (Abel, 1995; McEvoy, 2000). Ongoing implications associated with criminal records, if unaddressed, will perpetuate these issues, compounding other political challenges in the post-settlement context of a conflict.

Drawing these complexities together this chapter advances two arguments: (1) that criminal record expungement for non-violent political offences helps facilitate conflict transformation across all levels, but the extent of this depends on whether it addresses informal criminalisation; and (2) that criminal record expungement for violent political offences may undermine conflict transformation if only formally implemented without addressing informal criminalisation. This is because the prevailing narratives of culpability within a conflict will frame who is or is not considered legitimate, polarising intergroup relations into polemic categories of victims and perpetrators, which when applied to non-violent acts results in political identities being criminalised, making their transformation integral to the wider peacebuilding process. However, if used as a mechanism of state power, criminal record expungement will likely embed intergroup polarisation and structural issues, potentially perpetuating the conflict. As a mechanism of state power it will often be applied as a political device to protect the state, even implicitly, or it may not address the concerns of victims of political violence.

Table 15. The criminalisation of political expression (formal and informal) in Northern Ireland and South Africa in the post-settlement context

	Criminalisation of political identity and activity (CPI/CPA)	**Criminalising Political Violence (CPV)**
Northern Ireland Formal	• Restrictions in employment, insurance, travel, and other areas. • Those convicted of minor offences related to illegal parades, flags, and publications, can have their records expunged • Certain provisions for 'spent' convictions under The Rehabilitation of Offenders (Northern Ireland) Order 1978	• Those criminalised during the conflict still retain a criminal record; still labelled as criminals/terrorists • Ongoing debates over how to address outstanding cases of historical political violence
Informal	• Ongoing stigmatisation and issues in finding employment	• Ongoing (possibly increased) stigmatisation of loyalism, and continuing narrative linking non-violent expressions of republicanism with terrorism
South Africa Formal	• Those with criminal records can now have these expunged as since 2009 under provisions in the Criminal Procedure Act 1977 • Employment opportunities are greatly restricted by criminal records	• The TRC and subsequent mechanisms have partially addressed issues of historical political violence • Victims of political violence are often marginalised due to the top-down nature of addressing historical crimes
Informal	• Many previously criminalised under apartheid suffer social stigmatisation and socioeconomic issues.	• There is a narrative battleground over the legitimacy of the use of political violence historically.

The case studies of Northern Ireland and South Africa after their respective peace agreements in 1998 (Belfast Agreement) and 1991 (National Peace Accord) illustrate these complexities. As summarised in Table 15, political violence was criminalised in both cases, but only in South Africa were these criminal records expunged. Likewise, the extensiveness of CPI and CPA in South Africa was of a different level altogether to Northern Ireland. The case selection therefore enables a comparison between the relative importance of criminal records for non-violent political 'crimes' to those for political violence, as well as a comparison of the expungement processes. These variations are instructive because in both cases the issue of criminal record expungement was, and is, highly politicised, and focuses primarily on the formal process; with informal criminalisation continuing to create numerous challenges for conflict transformation. Analysing the cases, therefore, provides important insights into how criminal records can impact upon conflict transformation. However the chapter is not seeking to definitively establish the relationship between conflict transformation and criminal record expungement, but instead draw out a number of implications for conflict transformation from how criminal records have been used in these cases, and how this has impacted upon these contexts. By contrasting two examples of how criminal records impact conflict transformation the cases provide an important contribution to the theory and practice of conflict transformation, broadening analysis onto the criminal records for all forms of political expression, highlighting their inherent interdependency with informal criminalisation, and the challenges this entails.

Transforming criminalisation

As an analytical framework conflict transformation provides multiple lenses through which to see the same thing (Lederach, 2003), in this case CRE. So while CRE may facilitate constructive transformation for one level, it may undermine it in another. Individually each level provides specific insights, but collectively the levels enable the complex outworking of criminal records to be assessed in relation to conflict

transformation.[2] Table 14 summarises this, but it is worth elaborating upon this first before discussing it in the context of the cases.

Structure transformation relates to how criminal records are themselves mechanisms of power, shaping the relative distribution of power between actors. For conflict transformation to be effective it needs to contribute towards the rebalancing of power relations between groups, meaning criminal sanctions must be applied impartially across groups, not disproportionately assisting one side over another. This is particularly important because frequently criminalisation functions as a mechanism of state power during violent conflict used to facilitate repression and empower state forces; embodying a symbolic pillar to be resisted and defeated. If it continues in such a pattern, or is perceived to be, this will undermine wider efforts at transforming the conflict. Yet criminal records embody only a single mechanism in a much wider context and must be understood in relation to their limited role. For an individual a record will have significant implications for employment and other areas, but its ability to transform intergroup power dynamics is much less significant. For instance, many who have records for non-violent acts will continue to be marginalised even if their records are expunged because of wider issues of socioeconomic subjugation.

Furthermore, the criminal sanctions which follow from the record – particularly for those convicted of non-violent offences - may embed structural injustices which perpetuate conflict through poverty, trauma, and collective stigmatisation. These issues are not isolated to individuals, but also their families and communities, often leading to an intergenerational transference of the sanction. The expungement of the record, therefore, needs to be complemented with a process which seeks to also address the consequences of the sanction in the first place - at least partially - whether through counselling, reparations, or some other support. However, how this works in practice will vary depending on the nature of the 'crime', the 'criminal', and the process of criminalisation.

[2] Maddison (2017) outlines three different levels of conflict transformation – constitutional, institutional, and relational – but these relate to the overall transformation of a conflict, whereas the focus here is on a specific mechanism's impact.

As was the case for negotiations in chapter five, the expungement of criminal records relates to issue transformation as an issue itself and a mechanism shaping the salience of other issues. Firstly as an issue itself, those criminalised for political offences will seek to have their records removed, while those who implemented it and agreed with the criminal justice approach will contest this. This is why it is important to distinguish between the nature of the offence, as criminal records for non-violent political offences will be substantially less contentious than those for political violence due to there not being a clear 'victim', except perhaps the criminalised individual themselves. Indeed, support for the expungement of these records may actually draw groups together as they seek to de-politicise the criminal justice system going forward. Yet because those engaged in political violence are usually included as part of a peace settlement they will frequently have substantially more political power than those engaged in non-violence. The relative importance of their criminal records will, therefore, often result in the marginalisation of those less powerful.

Secondly, the expungement of criminal records affects the salience of other issues. If implemented, removing the criminal label associated with non-violent political offences could open opportunities for greater intergroup dialogue and understanding, as the political identities of actors will no longer be formally reduced to the criminal label. However, if implemented for cases of political violence this may contribute towards intergroup polarisation as it may be perceived as 'rewarding' their violence. This is not to say it should not be done for political offences, but that the formal process on its own would likely undermine issue transformation. Instead, informal decriminalisation needs to complement the formal mechanism – particularly for offences of political violence – to address the narratives of criminality which exist within and between groups - particularly those expressed through the media and political discourse - which constrain CRE. In other words, criminal records themselves are a highly contested issue subject to political debates, meaning their potential to transform conflict will be constrained by these wider narratives and perceptions.

The final level of actor transformation involves transforming the legitimacy of actors and the relationships between them, and is inextricably bound up in debates over criminality. Indeed, research into implications of criminal records predominantly focuses on actors discussing the negative issues associated with them, whether for

ordinary offenders (Ispa-Landa and Loeffler, 2016; Mujuzi and Tsweledi, 2014), or specifically for politically motivated ex-prisoners (Dwyer, 2012; Jamieson, Shirlow and Grounds, 2010; Shirlow *et al.*, 2010), in restricting access to employment, travel restrictions, and social stigmatisation, to name but a few of the challenges. Implicit in many of these studies is the inherent illegitimacy certain actors continue to face formally through "residual criminalisation" and informally through ongoing stigmatisation (McEvoy and Shirlow, 2009a). The impact of the criminal label, however, varies considerably and will create complex implications for the wider process of conflict transformation. This is because criminalising an actor is a diffuse process which is only partially implemented through legal mechanisms alongside wider processes in society; the social construction of the criminal identity (Becker, 1963; Hulsman, 1986; Quinney, 1977). In this way the criminal label can simultaneously be implemented and reversed, accepted and resisted. Expunging records may address the criminal sanction, but the criminal identity often remains socially embedded through ongoing stigmatisation. This is important as these identities affect actor behaviour determining their actions and motivations (Lederach, 2003:63-64; Miall, 2004). Conflict may, therefore, perpetuate so long as polarised identities frame intergroup interaction in "an endless replay of the meta-conflict" (Bell, Campbell and Ní Aoláin, 2004:316).

Informal criminalisation embodies this process of identity construction and polarisation, as actors define their identity into binary categories of victims and perpetrators, focusing on the actions of actors rather than their motives, and viewing the future in oppositional zero-sum terms. This is problematic because although the behaviours of actors may change - as witnessed with many of those ex-prisoners in both cases (Gear, 2002; Shirlow *et al.*, 2010) - the attitudes towards them remain embedded (Galtung, 1996:71), and indeed this may be due to continuing violent behaviour (Steenkamp, 2011). Accordingly, the formal mechanisms of expunging criminal records will only ever address manifestations of conflict, not the underlying causes. Deconstructing these identities so that actors no longer rely on "the past divisions of winners versus losers, victims versus perpetrators, 'us' and 'them'" (Mani, 2005:512), means actors are no longer defined solely according to past crimes, but this will depend on the prevailing narratives, demands for legal accountability for past actions, and the actions of criminalised actors themselves.

The two case studies demonstrate a number of these challenges contrasting the two different types of CRE which developed over time. The type of record expunged, the power dynamics shaping expungement, and the challenges of informal criminalisation, present important observable aspects of the cases to consider. The remainder of this chapter will therefore analyse these cases through the three lenses of conflict transformation.

Structural transformation: Reshaping power structures

The power of the criminal record

Criminal records embody a form, albeit limited, of state power which can be used to delegitimise the criminalised. Maintaining such records places material constraints on those subject to them, but also serves as a symbolic constraint on these actors. Expunging these records would initially address these issues and potentially contribute towards a re-balancing of the power relations between the state and non-state actors. But this depends on whether the mechanism is applied impartially and proportionately, otherwise it will likely only contribute towards intergroup polarisation. The comparison between the cases demonstrates this, as the partisan way which criminal records were addressed in South Africa, prioritising those convicted of political violence, contrasts with Northern Ireland, where narrative battlegrounds constrained what was politically possible. Furthermore, even within the cases there were a series of different mechanisms implemented which allowed for CRE but varying in terms of their target, context, and process. This is summarised in Table 16. The following section will discuss how each of these mechanisms developed and their implications for structure transformation.

Table 16. Mechanisms of criminal record expungement in Northern Ireland and South Africa

	Formal Mechanism	Provisions
South Africa	- TRC Amnesty Hearings - Presidential Pardons - Criminal Procedure Amendment Bill	- Expungement for all political offences in return for full disclosure of the facts - Expungement for all political offences as determined by the State President - Automatic expungement for non-violent political offences committed during apartheid - Application process for the expungement of other 'political' and minor criminal offences
Northern Ireland	- The Rehabilitation of Offenders (Northern Ireland) Order 1978 - Criminal Cases Review Commission	- Minor offences are 'spent' – not expunged - after varying time periods - Investigates cases of unsafe convictions providing for them to be quashed if successful

In South Africa the Truth and Reconciliation Commission (TRC) was established primarily to address issues of truth recovery and provide amnesties to "persons who made full disclosure of relevant facts relating to acts associated with a political objective" (TRC Report 1, 1998:57). Accordingly, all those convicted of both non-violent and violent political offences could apply to have their records expunged on the condition they disclose all relevant details. CRE was provided for under Section 20(8) and (10) of the Promotion of National Unity and Reconciliation Act 1996 meaning in cases where amnesty was granted for past or current offences their respective records would be removed so that the offence would "be deemed not to have taken place" (Section 20(10)). However despite the provision for this, many did not realise it was the case, nor fully comprehended the necessity of it (TRC Report 6.3, 2003:268). This meant that the vast majority of those convicted during apartheid for non-violent political

crimes did not actually apply, resulting in the TRC only really addressing the issue of CRE for political violence, not for non-violent activities. Indeed the TRC recommended in its concluding report that a mechanism needed to be established to address this very issue: "Many victims received criminal sentences for political activities. It is recommended that mechanisms to facilitate the expunging of these records be established by the appropriate ministry" (TRC Report 5, 1998:189). An uMkhonto weSizwe (MK) ex-prisoner reiterated this: "For the majority of the people, they didn't go to the TRC and they've still got that [criminal] record" (MK ex-prisoner B, 2016). Understanding why this was the case requires seeing CRE in the wider conflict context of informal criminalisation.

In South Africa "law continued to be an arena of political contestation" (Mallinder, 2009:134), with the African National Congress (ANC) seeking to protect its own actors and criminalise those of the Apartheid state, and vice versa. The wider peace process can be viewed as "a radical new political opportunity structure" embodying a narrative "battlefield" (Campbell and Connolly, 2012:11) which enabled both sides to reframe the social reality of historical 'crime' according to their own narrative. Liberation became equated with the ANC creating "a sanitised version of historical events...depicting an often good-and-evil narrative" (Victor, 2015:84-85). Accordingly, this led to an elite-driven focus which prioritised those individuals connected to positions of power, embedding asymmetric power relations rather than addressing them.

This became particularly evident in the subsequent decade from 1998-2008 whereby Presidential Pardon functioned as a central mechanism of CRE, investing its power in the hands of the Presidency under the Constitution in section 84(2J). The President could, therefore, use pardons as a mechanism of political power to serve their interests, rather than an independent process connected to the wider objectives of structural transformation. These pardons were not linked to any form of truth recovery, commitment to reconciliation, non-recidivism, or public apology, instead being afforded to individuals for "their role in the liberation struggle" (Mallinder, 2009:111), or later for those convicted for offences which were committed for "a political motive and/or political objective" (www.justice.gov.za, 2017). In other words, the predominance of a particular historical narrative constrained the actual implementation of CRE, resulting in

what was an elite-driven process[3] prioritising combatants over victims (Hamber, 2002), and serving to consolidate the discursive hegemony of the new state over competing narratives (Victor, 2015). It was not until 2008 that these issues began to be properly addressed.

By 2008 in South Africa Presidential pardons were being applied for by "hundreds, if not thousands, each year" for "minor offences" committed over ten years prior (South African Parliament, 2008). To address this, an automatic expungement process was established whereby the records pertaining to offences resulting from the discriminatory legislation of apartheid – covering nearly all crimes related to non-violent political expression - would be automatically expunged. For those not covered there would be an administrative mechanism established so that these individuals could apply manually to have their records expunged (Mujuzi, 2014). Records for violent political offences would continue to be addressed through Presidential pardons. These changes were implemented in 2008 under section 271C of the Criminal Procedure Act 1977. But while this formal mechanism of CRE was designed to positively transform the conflict, many of the informal challenges associated with criminal records continued.

For those not covered by the process but who still retained criminal records, they could apply to have these expunged through an administrative process. However the bureaucratic and limited nature of this process restricts applicants ability to engage, as a representative from the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) explained: "The application process is administratively a nightmare" because "there's just a strict schedule of who qualifies and who doesn't...without the human elements in it" (Padayachee, 2016). Because the majority of those with such records are predominantly of low educational achievement and will have limited resources, they are forced to try and pay a legal professional to complete the application typically costing between R2,000-R7,500 (Muntingh, 2011), or they simply do not know that there is such a process available. Without proper legal support for the application process it is unlikely that it will effect significant transformation. The contrast of Northern Ireland provides an illustrative comparison where records were again subject to these wider tensions of informal criminalisation.

[3] The elite-driven nature of the process is shown in terms of issue transformation which is considered in the following section.

In Northern Ireland the issue of criminal records was used to the opposite effect, as a way to 'sell' wider transformative measures, in particular the prisoner releases. This was because the most contentious issue of the Good Friday Agreement was that of the Early Prisoner Release Scheme (EPRS). It provided for the partial rescinding of the criminal sanction - early release from prison – but was conditional on non-recidivism; that their paramilitary organisation renounces violence, and that those released early would be released on licence. In this way the EPRS operated as a mechanism of structure transformation in respect to violence granting prisoner releases in return for a commitment to non-violence. Those eligible could have their sentences reduced depending on the nature of their offence and prior sentence served (McEvoy, 2001:337; Mallinder, 2008:158). Accordingly, the mechanism did not expunge the criminal records of political prisoners, but rather granted a limited withdrawal of the criminal sanction, reflecting the British Government's official position that these individuals had committed a criminal offence and that a full pardon would undermine the rule of law. But this does not mean the criminal record was irrelevant, indeed it was crucial to EPRS in securing support for the proposed scheme.

By maintaining and pointing to the continuing presence of criminal records the British Government tried to reassure those concerned about the issue of prisoner releases, as although 71 percent voted in support of the Belfast Agreement only "31 percent of Catholics and only 3 percent of Protestants" supported prisoner releases (Mitchell, 2008:5). To address this the Secretary of State for Northern Ireland described these releases as part of "a package" which "is a whole and not to be cherry-picked"; before going on to emphasise the safeguards put in place, that "[i]f released prisoners break the licence in any way, they will be taken back" (Mowlam, 1998). Accordingly, the records were used as a symbolic message that, although released, these individuals – as far as the British Government was concerned – are still considered to be criminals. As was the case in South Africa, criminal records were used as a mechanism of state power, but in this case they did go some way to addressing the asymmetries by enabling the prisoner releases. The distribution of power between actors was, therefore, partially rebalanced as those released could be framed as political prisoners within their communities, while the state and Unionist actors were able to maintain their competing narrative of

criminality without imposing the custodial sanction. This transformation was however only partial, as many of the wider challenges of informal criminalisation remained.

But while criminal records were used to reassure individuals, there were still mechanisms established to address certain aspects of the criminal record, the difference with South Africa is that these were for all offences, not just political. Firstly, under the current legislative framework those sentenced to less than 48 months may have this record 'spent' subject to various conditions under The Rehabilitation of Offenders (Northern Ireland) Order 1978. However most ex-prisoners are not eligible to have their record 'spent' because of the length of their sentences being over the two and half year threshold. Moreover, most of those convicted of terrorism-related offences refuse to even acknowledge their record because they regard it as recognising their conviction as a crime (Dwyer, 2013; McEvoy and Shirlow, 2009b:37; Rolston and Artz, 2014). For instance a UVF ex-prisoner referred to how he would not acknowledge his criminal record and believed that even disclosing it in job applications was a form of recriminalisation, as he explained: "I'm not a criminal, I'm not going to criminalise myself...I've got political convictions [not criminal ones" (UDA ex-prisoner B, 2016). The current legal framework, therefore, often places ex-prisoners in the position of either saying they were criminals and admit culpability, or lie about their convictions, denying the criminal identity.

Instead, some ex-prisoners have turned to the Criminal Cases Review Commission (CCRC) which refers cases to the Northern Ireland Court of Appeal (NICA) if it is likely that the conviction or sentence will be overturned following a new legal argument or evidence (Quirk, 2013).[4] In these cases the NICA may quash a conviction if it is found to be "unsafe"; meaning either that the person is "factually innocent" having been wrongfully convicted, or that due process was not properly followed (Roberts, 2003:446). Republican ex-prisoners in particular have used this mechanism as a "potential counterweight" to the British narrative (Quirk, 2013:951), enabling these actors to apply to have their convictions overturned challenging the narrative of paramilitary criminality. In this way the CCRC as a mechanism of CRE has provided

[4] For more on the background of the mechanism see Hannah Quirk (2013) Don't Mention the War: The Court of Appeal, the Criminal Cases Review Commission and Dealing with the Past in Northern Ireland. *The Modern Law Review* 76(6):949-980.

for a limited re-balancing of the power relations between the state and non-state actors, albeit incomplete. Indeed issues of resourcing have become a serious challenge for the CCRC following austerity measures resulting in a backlog of cases (McGuinness, 2016). Furthermore, although convictions may be quashed, the process provides no apology for wrongful conviction, as it is silent on the question of innocence, frustrating many successful applicants (Quirk, 2013). But its provisions for quashing wrongful convictions proffer an important opportunity for structure transformation, and while the legal positivist approach limits its remit, it also enhances its legitimacy particularly for those from within Unionist communities.

Each of the formal mechanisms of CRE outlined above highlight a number of potential opportunities and challenges for structure transformation. But their potential is only the beginning of a much more comprehensive process needed to address issues of informal criminalisation, and it is constrained by it being centred in state control as a mechanism of state power. Its transformative power is, therefore, limited and conditional, which is why it is important to consider the wider reasons for this embodied in the levels of issue and actor transformation.

Issue transformation: Narrative battlegrounds

Criminal records as 'an issue'

In the context of peacebuilding criminal records represent a crucial issue themselves particularly for those convicted of political violence, because these criminalised actors often seek to (re)define their identities as *political* actors, seeking to no longer be defined by their past 'crimes'. In other words, the formal process of CRE serves an important symbolic role in addressing informal criminalisation, enabling actors to (re)define the historical narrative. As explained above, this can lead to CRE being used to assert and establish power relations in favour of those in control of the mechanism, rather than trying to re-balance them. Gains made with respect to CRE for one side are accordingly perceived as losses by the other, as one side has their 'crimes' expunged this may legitimise their narrative and delegitimise opposing alternatives.

In South Africa the issue of CRE for non-violent offences received widespread political support when put before the South African Parliament in 2008 as part of the 271C of the Criminal Procedure Act 1977 illustrating its potential to bring opposing factions together (Mujuzi, 2014:289). There was a cross party consensus on the issues addressed by the Bill due to the acknowledgement of the issues arising from these records. For example in announcing the measure the Deputy Minister for Justice and Correctional Services explained: "There were hundreds of thousands of unfortunate persons who were stigmatised and subjected to criminal sanctions under these so-called "apartheid offences"....A provision of such a nature is long overdue" (S. African Parliament, 2008). Likewise, Dr Delport of the Democratic Alliance referred to how the Bill was "not controversial" and Jonas Sibanyoni of the ANC affirmed their support for the measures. The united stance on the issue by all the major political parties demonstrates just how important addressing CRE for non-violent offences can be, and the potential it has in facilitating issue transformation. But this contrasts with the ongoing issues associated with records for political violence which are processed through the mechanism of Presidential Pardons. Because of the nature of these offences and their politicised contexts, their expungement is constrained by wider challenges of compromising retributive justice and causing harm to victims. In other words, the formal mechanism of CRE could undermine issue transformation if it is not complemented by a corresponding process of informal decriminalisation.

On the 27th November 2007 President Thabo Mbeki addressed the South African Parliament to announce the creation of a cross party Reference Group tasked with considering pardon applications for offences "among the category of offences that were considered by the TRC Amnesty Committee....in the interest of promoting the critical objectives of national reconciliation and nation-building" (Mbeki, 2007). Following their consideration the Reference Group produced a list of 149 cases deemed to be politically motivated, nearly all of which were for the post-1994 period. This cross-party approach to pardons could be regarded as signalling a positive transformation of the issue of CRE away from the partisan challenges it previously suffered from, albeit with the final decision still being maintained by the President. But no matter how balanced and representative the process was, because it focused solely on the issue of criminal records and not informal criminalisation it had a number of adverse implications for issue transformation particularly in relation to victims.

Instead of addressing the concerns of victims, these were initially not taken into consideration, leading the South African Coalition for Transitional Justice to launch a successful legal challenge against this process (Kesselring, 2017:36), and later the Constitutional Court also ruled that "victims had a right to be heard" (SACTJ, 2014). Indeed the Director of the victims organisation Khulumani referred to the process as "political manipulation of the worst kind" (Jobson, 2016), and the Vice President of the International Centre for Transitional Justice described it as "a secret process from which victims were entirely excluded" (Seils, 2015). Because the initial pardoning process only engaged with the applicant, this marginalised all others. In this way the pardoning mechanism was never properly utilised to address the challenge of issue transformation, rather only embodying an issue itself.

The mechanism of criminal record expungement in Northern Ireland was much more limited than in South Africa, because while it embodied a highly contentious issue itself, this was based in competing interpretations of what it actually represented. Measures which addressed the issues associated with ex-prisoners were framed to allow competing narratives to co-exist. For instance, the EPRS and the wider agreement it was part of - the Belfast Agreement - was itself written to "deliberately adopt language that is vague and can, simultaneously, mean different things to different people", termed as "constructive ambiguity" (Bell and Cavanaugh, 1999:1355). Whereas on the one hand it was framed by some Unionists political leaders as bringing an end to political violence and defeating the Irish Republican Army (IRA), on the other is was framed by certain Republican political leaders as a victory for republicanism and the beginning of British withdrawal from the North of Ireland (Dixon, 2002:736). But the challenge with such ambiguity is that "it postpones real agreement until some future date" (Bell and Cavanaugh, 1999:1355) as conflicting narratives continue to embed conflicting identities; meaning issues continue to remain polarised through two (or more) opposing narratives. Moderate interpretations are marginalised by more hard-line positions embedding, rather than resolving, intergroup conflict. Indeed, criminal records were framed in polarised ways across and within the two main political communities.

The significant differences in public opinion around issue of prisoner releases were not necessarily about the formal mechanism, but with what it signified. A Senior Civil Servant referred to this explaining:

> [Politicians] deal in the political sphere, and political factors are not just about what makes the most sense; it's also about political symbolism and what makes the best sense for their constituents and how they can present themselves in the best light" (Senior civil servant, 2016).

Ex-prisoners were for many - particularly within Unionist communities - the visible representations of the conflict, reminders of the violence and destruction which took place (McAuley, Tonge and Shirlow, 2009:32). Therefore, the EPRS was perceived by many as giving into those responsible for the violence, the perpetrators. For instance, a former project coordinator for West Tyrone Voice (WTV) - a security services victims' group - explained:

> And what has been happening here for the last 40 years has been a process of sanitisation of what all the terrorist groups have done. And that sanitisation has gone on in order to bring all these people in from the cold (Lynch, 2016).

A Unionist politician echoed these concerns stating: "In the Unionist community, I think part of that is the attitude that: 'You've done the crime so you do the time'" (Unionist politician, 2016). From this perspective, the EPRS was framed as a concession, but one which maintained the criminal records of those released to preserve some support from within Unionist communities for the wider process. Through the EPRS, therefore, the British Government did not address the criminal records of ex-prisoners, but instead used them as a symbolic message to reassure those particularly within Unionist communities.

In contrast some Republican ex-prisoners expressed pride at having been imprisoned regarding it "as a badge of honour" (IRA ex-prisoner C, 2016); criminal records being just being the tacit recognition of their political status; even providing "legitimacy in itself" (Shirlow, Tonge and McAuley, 2008:173). On the other side, Loyalists often regarded their imprisonment as a sacrifice for their wider community**: "**You weren't there for any self-gain or self-gratification" (UVF ex-prisoner A, 2016). This is important because resisting criminalisation was an inherent Republican strategy and a marginal Loyalist one, and so for some, particularly Republican ex-prisoners, criminal

records continue to represent a site of resistance. For instance an IRA ex-prisoner explained:

> Even today the media and civil service are probably two of the major elements that still are, to a large extent, fighting the war here as they find it very hard to come to terms with people like myself (IRA ex-prisoner C, 2016).

Bell (2009:25) refers to this in terms of the 'battlefield' of transitional justice whereby mechanisms like pardons are used to "enable victory in the metaconflict", that is to control the narrative over culpability for the conflict itself, and ultimately to shape the direction of the transition. In other words, stigmatisation persists to ensure the dominance of one narrative over another, which from the perspective of Republican ex-prisoners meant: "[The state] attempted to deprive the public out there of any understanding of what was going on, and this is particularly evident even today" (IRA ex-prisoner C, 2016). In this way the criminal narrative persists through "the informal mechanisms of the media" and wider society, framing "ideas of what is a crime and who is a criminal" (Shiner, 2009:175), as a Republican community worker explained: "Lots of power structures in society apply the term criminal and terrorist and it's almost like they are interchangeable now" (Community worker E, 2016). This means that the sanction for an offence does not end upon release, instead, through the criminal record and the constant reminders of this record in the media and applications for jobs and insurance, ex-prisoner identities are framed as criminals throughout their entire post-release lives (Ispa-Landa and Loeffler, 2016). For instance, a UVF ex-prisoner remarked how "society never lets you forget" (UVF ex-prisoner B, 2016), that because of their previous convictions, these actors continue to be referred to by the media and political elites according to the homogenised identities of criminals and gangsters.[5]

These ex-prisoner perspectives, much like those of the state in South Africa, contrast with those of victims. This is because "the voice and agency of victims is often both publicly and legally bound up both with the innocence of the victim and the capacity to blame the perpetrator" (McEvoy and McConnachie, 2013:494). Who qualifies as a victim has become subsumed in the wider political debate over the nature of the conflict itself, drawing strict boundaries between the categories of victims and perpetrators,

[5] Political elites here primarily refers to all the main political parties in Northern Ireland, although Sinn Fein is much less vocal on these issues, and some within the DUP are more cautious with their language because of their links to former UDA members (indeed some have been former UDA members).

which while at times valid, may become permeable in particular contexts (McEvoy and McConnachie, 2013:493). Certain victims' groups have accordingly become polarised "[m]irroring the conflict divisions", "have become engaged in political posturing, and have been manipulated by political actors" (Lynch and Argomaniz, 2015:2). Debates over who qualifies as a victim frequently descends into debates about the narrative of the conflict itself, not distinguishing between the wrongful act and the consequences of the act (Hamber, 2002:1090). Focusing primarily on the acts, groups aligned particularly with the Unionist community have adopted a hierarchy of victimhood, distinguishing between 'innocent' victims - referring to civilians, state combatants and their families - from 'guilty' victims - non-state actors and their families (Brewer and Hayes, 2015:746; McEvoy and McConnachie, 2013:500). Such terminology has been met with criticism from some within Republican communities, such as one community worker who explained: "There's nothing as offensive as trying to play one family's grief off another family's grief, whether that family wore uniform or didn't wear uniform" (Community worker A, 2016). Elevating the status of some victims over others for political purposes embodies how narratives frame not only how the conflict is perceived, but also what solutions are acceptable.[6]

These tensions are illustrated by how the EPRS was regarded by those subject to it as an implicit recognition of their political status, legitimising their political identity, as an IRA ex-prisoner explained: "The British Government have acknowledged that we weren't criminal because they let us all out of jail" (IRA ex-prisoner B, 2016); and a Ulster Volunteer Force (UVF) ex-prisoner similarly remarked: "They did accept the political nature of the people that went to prison when there was an early release mechanism built into the Good Friday Agreement" (UVF ex-prisoner A, 2016). However, these perspectives are widely contested, as just because a political offence was committed does not necessarily mean a criminal offence was not, and the boundaries between these two categories are not as straightforward as is made out (Silke, 1999a, 1999b). Moreover, as explained above, the release from prison was framed by the British Government as part of a package, maintaining that these

[6] While there are important differences between the suffering of victims and variations in the causes of victimisation, the problem is that these are often tied to wider debates of the metaconflict. For more on these nuances see: Luke Moffett, 'Reparations for 'Guilty Victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms', *International Journal of Transitional Justice*, 10(2016):146-167.

individuals were still criminal. Indeed, the dominant Unionist narrative is that these people are "terrorist murderers" (Stalford, 2017), and the wider Unionist community were victims of their campaign of violence. Therefore, the divisive nature of the debate on victimhood reflects the wider challenge of informal criminalisation because "victimhood is inevitably mapped onto competing narrative" (McEvoy and McConnachie, 2013:504), and so as long as there remains no agreement on the narrative, such divisions are likely to remain, limiting the possibilities for issue transformation.

When used in these ways CRE will replicate the prevailing narratives of victimhood and perpetrators embedding conflicting historical accounts of the conflict rather than transforming them. The prevailing narratives in both cases framed the willingness and ability to address the criminal records of those convicted of political offences. While norms of justice, reconciliation, and peace were all integral to these approaches, they are qualified and used to justify these particular narratives. Other voices are sidelined and marginalised to ensure the dominance of the hegemonic narrative (Hamber, 2002; Rolston, 2006), undermining efforts at conflict transformation and embedding the polarised identities which limit the potential to overcome communal divisions. Therefore, unless the formal mechanism is complemented by a corresponding transformation in the informal narrative of criminalisation, it will be unlikely to address issue transformation, and may even undermine it.

Actor transformation: Transforming actor legitimacy

Legitimising the criminalised?

Criminal records frame the identity of actors to varying degrees depending on the nature of the offence (violent or non-violent), the nature of the associated sanctions, and the legitimacy of the criminalisation process. These identities are important because how they are perceived will have an impact on the way actors relate to one another. The above discussion of issue transformation illustrated many of these challenges whereby criminal records are subject to considerable debate within the two cases. But beyond this, criminal records often lead to psychosociological and socioeconomic issues for the

criminalised and their families. While attempts have been made to address the formal record in South Africa the informal implications are still highly problematic, whereas in Northern Ireland, as the records of ex-prisoners remain, the issues of informal criminalisation are of a different nature. Considering these mechanisms with regards to actor transformation, therefore, highlights the variable relationship they can have.

In South Africa, while the criminal record expungement process provided for the expungement of criminal records absolving individuals of wrongdoing, it was unable to address the structural implications associated with the prior sanction in terms of trauma and violence: informal criminalisation. Previous research has documented a number of the challenges ex-prisoners and ex-combatants[7] have faced (Merwe and Lamb, 2009; Gear, 2002; Liebenberg and Roefs, 2001). Regardless of whether these individuals have a criminal record or not they continued to face informal criminalisation in their everyday experiences. For instance "[f]ormer combatants from across the political spectrum complain that they are targets of criminalising stereotypes" but its source varies for differing categories of ex-combatants: for former South African Defence Force (SADF) members it is the media and the new government, whereas for former MK members it is the police (Gear, 2002:46). A former SADF Special Forces member explained that "[n]ow the roles have changed: the heroes of yesterday are now the villains" (Quoted in Gear, 2002:47). During the conflict they were regarded as defending the state at least from within their own communities, since they were seen as symbols of repression. Likewise, MK ex-combatants reported being "profiled as criminal suspects because of their ex-combatant status" (Gear, 2002: 69), with the police targeting them as potential suspects rather than treating them as ordinary civilians.[8] However, while this was particularly problematic in the early period of transition after 1991, it lessened significantly over time as the police became reformed and the context shifted. The formal implementation of CRE would be largely irrelevant for these individuals as many did not get convicted of specific offences, but the issues associated with the informal narrative are evidently fundamental. Indeed an MK ex-

[7] The term ex-combatants is used here to differentiate those who went to prison – labelled throughout the thesis as ex-prisoners – from the wider spectrum of those who engaged in political violence but did not necessarily get convicted of an offence.

[8] There is some evidence to suggest that some of these ex-combatants have transitioned in ordinary crime undergoing a process of re-criminalisation due to issues in getting employment (Merwe and Lamb., 2009:14-16).

prisoner described being called “mdlwembe” [criminals/unruly people] by members of the community, and others ex-prisoners explained that their communities regarded them as criminals who belonged in prison (Gear, 2002:42). In other words, the ‘criminal’ label continues to be applied to these individuals mirroring the wider challenges associated with the narratives of criminalisation discussed above with respect to issue transformation.

One example which illustrates these issues is that of the MK ex-prisoner Shirley Gunn, who was detained in 1989 accused of blowing up Khotso House, a crime she had been framed with, and which the TRC later concluded was “a deed which...was actually performed by agents of the then government” (TRC Report 4, 1998:307). Having been cleared of any criminal wrongdoing by the TRC, and having had her named legally exonerated, still she finds that she is associated with the framed crime, as she explained: “I may be in a queue, I hand over my credit card or debit card, and they see my name, and then the teller looks up and says: 'Are you that person that did that [crime]?'” (MK ex-prisoner B, 2016). Despite being found innocent of the offence, still, she remains associated with the criminal label by some within the wider public. Reflecting on this she explained: “It just shows you how effective the disinformation was, and how powerful the media is in shaping public opinion” (MK ex-prisoner B, 2016). While the TRC and the CRE it provided for addressed the formal sanctions of the criminal record, in this case the informal implications persisted through the embedded social reality it constructed (Hulsman, 1986).

Beyond these issues of narrative and stigmatisation, however, are the more direct challenges directly linked to the legacy of the criminal sanction, as individuals who have been sent to prison may have suffer from trauma, lack of education, and family breakdown (Ispa-Landa & Loeffler, 2016; Mujuzi & Tsweledi, 2014; Myrick, 2013; Pager, 2003; Thomas & Hebenton, 2013). Therefore the sanctions associated with prior criminalisation were not simply the custodial sentence or criminal record, but also the psychosociological issues this has created. The silent penalty imposed upon many of these individuals, therefore, does not end upon the expungement of their records.

The prison experience itself was often traumatic with prison authorities using fear and violence to maintain order as was explained in chapter four. Despite no longer suffering

the sanction of imprisonment, those who underwent periods of imprisonment may continue to struggle with the wider challenges of trauma (Gear, 2002). These challenges are important for actor transformation as they will directly impact whether actors are able to assimilate back into civilian life. For instance Marjorie Jobson, the Director of Khulumani, explained how "one of the consequences of trauma is that it atomises people; it disconnects them...it creates incredible problems with interpersonal relationships" (Jobson, 2016). Likewise a Community Practitioner explained how this can impact ex-prisoner reintegration:

> "Some of them are not able to maintain their relationships. They're not able to stay in jobs. They resort to self-medicating, taking drugs or alcohol. So they are violent. They are still carrying this stigma of having not completed opportunities of going to school. They are not educated. They are not working" (Community practitioner, 2016).

The criminal sanction therefore does not end with the expungement of the record, but continues long after through a range of complex socio-psychological issues.

Yet while this atomises the individual, the consequences are collective, as a community worker referred to how "the fear is that there is intergenerational transference of trauma" (Community practitioner, 2016), whereby these issues have a wider effect on families and communities. For instance a community worker who works with ex-offenders explained:

> "We normalise violence in South Africa. We don't acknowledge violence, and many of our young people are victims of some kind of crime, and because that's not addressed, they become the perpetrators" (Community worker F, 2016).

The violent experiences individuals have suffered can lead actors to repeat them, whether in their interpersonal relationships, or on a societal level. So when you have a generation of individuals of whom many were unjustly and violently criminalised, this leads to "shame and a lack of dignity, and that's where the violence starts inside you" (Padayachee, 2016). Therefore expunging records only represents the beginning of actor transformation, to be followed by substantial psychosociological and socioeconomic community based projects. Such projects are already being carried out (Clark, 2011;

Kappler, 2013),[9] but until these issues are addressed actor transformation will continue as a pressing challenge.

In Northern Ireland, the issue of criminal record expungement continues to present challenges for ex-prisoners convicted of serious offences during the conflict. Although there are provisions for 'spent' convictions as discussed above, these generally do not apply to those with criminal records for political violence. The practical implications of this have been well established by previous research in terms of posing significant issues for these actors in terms of reintegration (Dwyer, 2012, 2013a, 2013b; Jamieson, Shirlow & Grounds, 2010; Rolston, 2007). Indeed both Republican and Loyalist ex-prisoners emphasised these issues, with Republican actors referring to the criminal records as being "retrospectively punitive" (IRA ex-prisoner B, 2016), emphasising that "former political prisoners are the only group in society that can be legally discriminated against in employment" (Republican community worker, 2016). Similarly a UDA ex-prisoner explained: "I'm always walking on eggshells...because people are trying to criminalise me....we are not treated as full citizens" (UDA ex-prisoner B, 2016).

But beyond the immediate barriers criminal records pose, as was the case in South Africa, there were the wider issues of social stigmatisation and intergenerational challenges. Although, while there was some concerns raised by Republicans, it was primarily an issue for Loyalists as the challenges of informal criminalisation vary in many ways across the communal divide. For instance, some within Loyalist paramilitaries explained how the narrative of criminality persists through stigmatisation of their collective identity, as many are now actively engaged in conflict transformation projects (McAuley, Tonge and Shirlow, 2009) yet this continues to be regarded with scepticism. For instance a senior civil servant remarked:

> "Even in things like restorative practice where people have been trying to do good things, it's taken quite a while for some of the communities to actually accept their intention is actually honourable and not just developing a new way of exploiting the community" (Senior civil servant, 2016).

[9] For a more holistic overview of the challenges facing peacebuilding in the South African context see Colin Know &Pádraic Quirk (2000) *Peacebuilding in Northern Ireland, Israel and South Africa: Transition, Transformation and Reconciliation*. Basingstoke: MacMillan Press Ltd.

The language used in the media reinforces this, as witnessed in the controversy over funding for CharterNI (Belfast Telegraph, 2016), or previously with the decision to cut £1m of funding from the Conflict Transformation Initiative (BBC News, 2007). As a result, those subject to such characterisations are arguing that their future is being criminalised because of past actions, as an Ulster Defence Association (UDA) ex-prisoner stated: "What's currently happening is the criminalisation of individuals who were involved in the political struggle, to delegitimise their future going forward so they don't have a future" (UDA ex-prisoner A, 2016). The potential for these actors to engage in conflict transformation projects, or indeed in ordinary jobs, is constrained formally then through the criminal record, but informally also through this ongoing narrative of illegitimacy.

This reinforcing of the criminal identity can then become a self-fulfilling prophecy as ex-prisoners seeking to move away from past actions are continually defined by them, as one UDA ex-prisoner explained: "You will only be an ex-prisoner as long as society lets you be. I want to move away from that but society still blocks me" (UDA ex-prisoner B, 2016). So while the EPRS removed an aspect of the criminal sanction, the continuing criminal record continues to delegitimise actors and inhibit the redefinition of their identity. As a result this reinforces the very structures which are being condemned, as ex-prisoners continue to rely on support from their paramilitary organisations, as a UVF ex-prisoner explained: "[I]f you continuously [criminalise], people are going to band together, it is going to have a unifying effect on these organisations and make them more likely to stick around" (UVF ex-prisoner A, 2016). The reliance on these organisations appears to confirm issues of ongoing paramilitarism, embedding the criminal narrative further. This is not to deny the clear issues of criminality which persist in some of these organisations, but to highlight the challenges many ex-prisoners face in disassociating themselves from it.

Furthermore, as time goes on these identities become memorialised through the narratives put forward by the media and political elites, which is particularly the case for Loyalist groups who raised concerns that their role in the conflict will be remembered through such narratives. For instance a UDA ex-prisoner explained:

> "My family knows the sort of person I am. But my grandkids won't know. They'll read the Sunday papers or they'll hear some of the reports about this

> Loyalist criminality and think: ‘Was my granddad part of that?’” (UDA ex prisoner C, 2016)

These narratives apply simplistic homogeneous characterisations to frame the entire ex-prisoner community, focusing on the specific acts committed, but not the motivations behind the acts. The narrative, therefore, becomes one of self-interest and pathological violence, not the political objectives. Indeed this ex-prisoner went on to explain how he believes that the criminal record is maintained to continue to delegitimise ex-prisoners: “Unionist politicians are afraid of us becoming...respectable and electable. And there's this old cliché of the last thing Unionism wants is educated Loyalists” (UDA ex-prisoner C, 2016). Regardless of whether this is a fair representation of unionism or not, it illustrates how for these actors the record continues to represent an important mechanism of delegitimisation inhibiting actor transformation.

Furthermore, this relates to a wider challenge for actor transformation of the intergenerational transference of the criminal sanction; as not only are these actors criminalised, but their families likewise face stigmatisation, as a UVF ex-prisoner reflected:

> “My wee boy is a decent football player - just decent - but he says he's going to play for Liverpool, and I say: 'That's great son'. And I often say to his mommy: 'Wouldn't it be terrible if he got playing for Liverpool because of within a week of him signing it would be [in the headlines]: ‘His Daddy Was a Murderer’” (UVF ex-prisoner B, 2016).

These ex-prisoners are worried not solely about their own identity and reputation, but how this identity is transferred onto those around them. Indeed, there is evidence that the stigmatisation that they face is impacting their children, and even their grandchildren (Alderdice, McBurney and McWilliams, 2016). Republican ex-prisoners also emphasised this aspect stating: “[T]here's children of ex-political prisoners and they're barred from getting particular types of work” (IRA ex-prisoner B, 2016). Therefore the issues which individual ex-prisoners face are argued as “affecting not only the individual, they're affecting families, they're affecting the generational issues” (IRA ex-prisoner D, 2016). Moreover the importance of this was emphasised by the ex-prisoners who explained: “Now if you want to give ‘food’, or excuse, or reason to people to be opposing the state even at a minimum level...there's the families” (IRA ex-prisoner B, 2016). In other words, the significance of the criminal record does not stop

with the ‘criminalised’, but has implications for those connected to them. While it is unclear from this to what extent the formal criminal record can be linked to political mobilisation against the state, its significance in informally undermining state legitimacy and wider actor transformation should not be ignored.

Conclusions

This chapter has discussed how CRE represents an important mechanism of conflict transformation, yet one which can both undermine and facilitate it depending on the nature of the records – whether they were for violent or non-violent political expression – and whether it addresses the accompanying challenges of informal criminalisation. Across the two cases there were a range of CRE mechanisms (summarised in Table 16) which highlight the complexity and variation such formal mechanisms can take. However, their potential to contribute towards conflict transformation was constrained by a number of factors linked to each of the three levels of transformation: structure, issue, and actor.

For structure transformation, because the state is in control of the criminal justice system, often CRE becomes utilised as a form of state power embedding its own power rather than rebalancing the power relations between actors. This, however, related primarily to the records for political violence with the record symbolising a wider battleground over culpability. On the other hand, CRE for non-violent political offences in South Africa represented an important mechanism to effect structure transformation drawing support from across all parties, although the delayed time it took to become implemented reflects the tendency to marginalise such potential transformations. In Northern Ireland, the process for addressing wrongful convictions likewise helped counter-balance state power, but it too suffered from limited political support evident in a lack of funding. Instead, the continuation of criminal records was used to reassure certain Unionist actors that prisoner releases were conditional as part of the EPRS.

These challenges are due to the criminal records themselves representing a highly contested issue perceived differently across communities and contexts. Whose perspective gets listened to or ignored constrains their ability to contribute towards, or

undermine, conflict transformation. While this is highly complex, what the cases show is how if the formal mechanism of CRE is not accompanied by measures to address the informal narratives of criminalisation it will marginalise and contribute towards intergroup polarisation. This was particularly the case for victims of political violence in both cases who are often marginalised in favour of more expedient measures. In other words, CRE will reflect the social realities of criminalisation which have become normalised and embedded over the course of the conflict – as outlined in the previous three chapters – and while it can contribute towards their reframing, it is more likely that it will act as an expression of these social realities particularly if implemented as a top-down mechanism.[10]

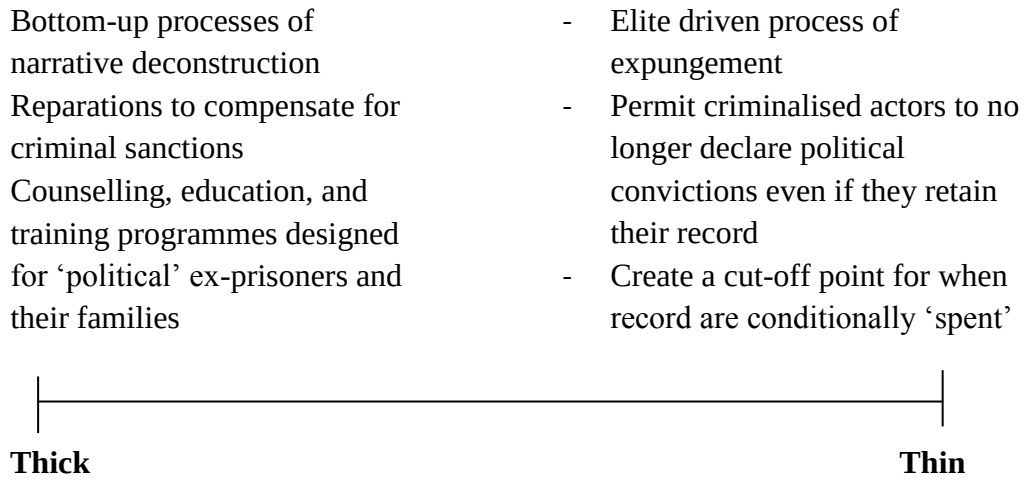
These issues are compounded by the final level of actor transformation. While expunging a criminal record will address certain formal barriers in employment, travel, and other areas, informal stigmatisation and ongoing psychosociological and socioeconomic issues continue to undermine the wider transformation of these actors and their families. Indeed in South Africa ex-combatants and ex-prisoners reported experiencing such issues regardless of having a criminal record or not due to the wider challenges of informal criminalisation – that they continued to suffer from a lack of education, social ostracisation, and personal trauma because of their experiences in prison and/or at war. This illustrated an important issue whereby the nature of the offence – violent or non-violent – was not necessarily important in determining the implications, as both groups of individuals reported similar challenges. The significance of criminalisation alone, however, should be qualified as it is difficult to extricate it from the socio-economic context, and in many ways it reflects the wider issues of economic inequality, poor education, and unemployment. Likewise in Northern Ireland, while ex-prisoners emphasised the importance of CRE due to the barriers it created in terms of employment, insurance, and travel, they also highlighted its wider implications on society and their families. Expunging records, therefore, only reflects one (albeit important) part of the wider process of conflict transformation and needs to be followed

[10] For an example of a bottom-up approach see the Prison to Peace programme which took place in Northern Ireland. For a good example of both the benefits and challenges such an approach can contribute towards see: Lesley Emerson, Karen Orr and Paul Connolly (2014) Evaluation of the effectiveness of the 'prison to peace: learning from the experience of political ex-prisoners' educational programme. *OFMDFM*; Lesley Emerson (2012) Conflict, transition and education for 'political generosity': learning from the experience of ex-combatants in Northern Ireland. *Journal of Peace Education* 9(3):277-295.

or accompanied by wider measures aimed at addressing trauma, skills, and social stigmatisation.

For these reasons, if CRE is to address conflict transformation its conceptualisation needs to be broadened to encompass a wider spectrum of potential options beyond the formal expungement of a record. This spectrum relates to the distinctions between 'thick' and 'thin' conceptualisations of justice (McEvoy, 2007), with the former addressing a much wider range of issues than the latter. Yet the thin approach is usually the one adopted, at least initially, because the records themselves are seen to be the 'problem'. But broadening the focus to encompass the broader range of informal challenges may provide opportunities for agreement even when there is no agreement on the formal process of expungement. For instance, it may be possible to not expunge criminal records but allow ex-prisoners to not have to declare it in certain circumstances. This is summarised in Figure 6.

Figure 6. Spectrum of criminal record expungement



Recent policy developments in Northern Ireland illustrate these issues in regards to what is euphemistically termed 'dealing with the past'. Under the Fresh Start Agreement £150million was agreed "to help fund the bodies to deal with the past" (Fresh Start Agreement, 2015:Section D 1.1), but the majority of this will go towards the truth recovery and accountability mechanisms - the Historical Investigations Unit and Independent Commission on Information Retrieval - as a senior civil servant explained:

> Establishing the legacy inquests system and the HIU (Historical Investigations Unit) we reckon would cost around £30-40million [per year]...Politically there is already a problem because I could spend all the money and that doesn't give you your oral history archive (Senior civil servant, 2016).

Moreover the role of these mechanisms will be foremost about addressing historical accountability: "Its role will ultimately be primarily truth recovery but in fact, its orientation will actually be towards prosecutions" (Senior civil servant, 2016). While not disputing the importance of such mechanisms, the challenges associated with conflict transformation remain. Instead of addressing the polarised narratives of conflict these mechanisms will more likely embed them, or else redefine them according to a particular political position as was the case in South Africa. The challenges of conflict transformation and criminal records have, therefore, been side-lined for the more visible and tangible alternative of formal retributive mechanisms.

The issues of the 'thin' approach are, therefore, evident in these policies as there continues to be a prioritisation of formal mechanisms without sufficient support or resources addressing the challenges associated with informal criminalisation. So long as this continues the potential for CRE to effect conflict transformation will be very limited. Indeed the opposite may actually be the result as polarised narratives become embedded. Broadening the conceptualisation of criminal record expungement may go some way to addressing this, moving away from simply seeing the 'record' as the issue to be solved, to consider the wider challenges and opportunities underlying it.

Chapter 7

Criminalising transformation or transforming criminalisation

Throughout the thesis it has been argued that criminalisation's impact on conflict transformation is dependent on its target – political identity, activity, or violence – and the experienced reality it contributes towards through informal criminalisation.[1] In each of the conflict contexts examined in chapters three to six it was argued that criminalisation takes on a particular role designed by the state, perceived variably across the population, and constrained by its enforcement. Specifically, three arguments follow which explain how each type of criminalisation, defined according to its target, will impact conflict transformation: (1) if it targets the political identity of a group this will contribute towards intergroup polarisation framing groups in opposing terms as victims and perpetrators reducing their *political* identity to criminal characterisations; (2) by targeting political activity this closes off opportunities for non-violent political expression reducing the likelihood of accommodative strategies and intergroup dialogue; and (3) the targeting of political violence may both facilitate or inhibit conflict transformation depending on whether it is enforced impartially, targeting the behaviour of violence not political identities, and whether it is applied proportionately, not becoming a form of state repression. These three arguments are derived from the analysis in the preceding chapters. However, as criminalising political expression (CPE) is contextually dependent it is important to consider a range of other cases to analyse how different contexts may shape these arguments.

To develop this, this chapter considers the arguments through a small-n comparative analysis of four cases: Sri Lanka, Turkey, Canada, and Belgium. These cases provide important insights, not only confirming and developing many of the specific findings from the previous chapters, but also into the evolving nature of criminalisation over the course of an entire conflict. Before explaining what this would entail it is worth clarifying why a small-n analysis is the most appropriate approach as opposed to a large-n framework. The primary reason for this is due to the epistemological approach

[1] Informal criminalisation refers to how – although not legislatively criminalised – a group's identity is targeted as a threat by law enforcement and discursively delegitimised, whether through the media or politics, as if it were criminal. See chapter one for a fully explanation.

adopted throughout the thesis which regards crime as a socially constructed phenomenon, not an objectively defined concept (McEvoy and Gormally, 1997). Likewise, because its construction is dependent on the perceived reality this creates (Hulsman, 1986) it is not possible to analyse this on a global scale as quantified indicators would require an inappropriate level of abstraction. While they may be able to analyse the formal nature of CPE and even capture the distinctions between the various targets, the findings would be still undermined due to its interdependence on informal criminalisation as depicted in figure 1 in chapter one. In other words, because informal criminalisation emphasises the contextuality and complexity of the process it is necessary to account for these factors. Indeed, building on the interpretativist methodology developed in chapter two, it "requires extensive knowledge of the case in question and...can therefore only be undertaken in a small number of cases" (Hansen, 2006:10). Therefore, the structured, focused comparison (Lustick, 1993) enables patterns of CPE to be considered across a wider range of case types, including typical crucial and counterfactual cases, demonstrating the interaction between formal and informal criminalisation varying according to the 'target': CPI, CPA, or CPV.

This said, the cases still need to meet the two essential requirements set out in chapter two, whereby the cases must have a legal system which commands at least some domestic and/or international legitimacy because criminalisation is inherently tied to legitimacy, whether legitimising the state or delegitimising non-state actors, and so the mechanism itself needs to command at least some legitimacy if it is to be relevant. From the perspective of legal positivism, for instance, laws derive their validity from their effectiveness in regulating the society to which they apply (Patterson, 1952:7). In other words, the legal system will only be regarded as legitimate if it "is generally efficacious" (Hart, 1997:104) as determined by "a set of *social facts*, in particular, the beliefs, attitudes and behaviour of a population" (Green, 2005:1940, emphasis in original). If the population in its entirety rejects the legitimacy of the legal system it will be unable to command obedience or respect. Therefore, only cases whose legal system has at least some domestic or international legitimacy are considered.

Secondly, the cases must also be deeply divided societies as in such cases the criminalisation of political expression can directly frame intergroup relations as outlined in the above three arguments (Horowitz, 1985). Without clearly defined group divisions

it is unlikely that these findings would be relevant with no clear political identity to target. This relates to the puzzle articulated in chapter three, as although deeply divided societies have the "potential for violence between the segments" (Guelke, 2012:30), it only escalates into violence in some cases and not others. The reasons behind this are undoubtedly complex and dependent on various factors, but this chapter will build on earlier sections to consider how CPE is related to it. This is because in the context of deeply divided societies the issue of security poses one of the most significant challenges for conflict transformation as "perceptions of the sources of the threat to security tend to divide along communal lines" (Guelke, 2012:10). The divisions between communal groups map onto divisions regarding what the greatest threats are to their respective group's security. Criminal justice represents an important mechanism through which this 'threat' becomes defined and addressed. Who controls this process will, accordingly, shape how this threat comes to be defined in legislation and regulated through law enforcement.

In order to minimise selection bias in small-n studies it is necessary to carry out "careful, theory-guided selection of nonrandom cases" (Levy, 2008:8). This first required identifying those cases which actually met the necessary requirements of being deeply divided societies (DDS) with semi-legitimate legal systems. In order to measure this the Ethnic Power Relations (EPR) dataset was used to identify all cases which had two or more ethnic groups which were over 10% of the population in size (except in cases where the group was regionally, and not nationally, significant).[2] The 10% threshold was used to include only cases which were deeply divided societies,[3] of which there were ninety-two from 1945 until 2013. The purpose of this was not to create a definitive list of DDS but to exclude those which were irrelevant; those with almost no communal divisions. To address the second criteria, the World Bank rule of law measure was used[4] to include only those cases which had a legitimate legal system. This

[2] All cases had to have two or more groups whose size was equal to or greater than 10% and whose status was not classed as 'irrelevant' to governance.

[3] This relates to the definition from chapter one of contexts where "ascriptive ties generate an antagonistic segmentation of society, based on terminal identities with high political salience" (Lustick, 1979:326).

[4] If a state had a score of 0 or higher (the score ranged from -2.5 to 2.5) in any of the 17 years coded (1996-2015, omitted 1997, 1999, 2001) they would be included, thus maintaining a low threshold. However even with this low threshold some notable cases fell outside of the criteria such as Colombia. Therefore the cases noted in Table 17 convey those which are most relevant in terms of the theory, but not exclusively, as the findings also apply to a much wider range albeit in a more qualified way.

criterion was likewise set at a very low threshold as only a minimal level of legitimacy was necessary, but still only twenty-nine had a legitimate legal system in at least one year from 1996 until 2015[5] as summarised in Table 17.[6] Identifying cases on this basis enables a "restricted range of difference" narrowing the number of competing factors and focusing only on those which are relevant to the analysis (Horowitz, 1985:17; see also Lustick, 1993).

Selecting cases from this list was done on the basis of case type, whether they were typical, counterfactual, or crucial, linking their selection directly to the purpose of theory development. This was to address a number of issues relating to selection bias. Firstly, it was necessary to include at least one counterfactual case which did not have the criminalisation of political identity or activity (with respect to the communal conflict), to consider whether the same findings could be observed in the absence of formal criminalisation. If so this would challenge arguments made indicating that the changes in conflict transformation may be linked to competing factors, however, if they were not observed this would provide an important counterfactual to compare the other cases with. Belgium was chosen for these reasons as it did not criminalise the political identity of either of the two main communal groups. To further develop this, Canada was chosen as a crucial case because while the state did criminalise certain political activities and identities, it was limited in doing so and it did not result in a protracted violent conflict (Levy, 2008). The implications of these two cases, therefore, provide important insights for conflict transformation, developing the theoretical claims established throughout the rest of the thesis.

Secondly, typical cases are important in order to consider how CPE operates in different contexts and whether the same arguments can still be made. The cases of Sri Lanka and Turkey act as such cases similar to Northern Ireland and South Africa in terms of the conflict contexts and usage of criminal justice, as in both cases criminalisation was targeted against all three types of political expression. Interestingly, the cases extend the findings to international actors highlighting the significance of criminalisation at the international level to delegitimise political activity in another state.

[5] While this later timeframe of 1996 to 2013 is problematic in terms of validity – the analysis is focused on 1945 onwards – it is due to data availability.

[6] Of these twenty-nine cases 72% have experienced at least one year of armed conflict since 1995 and 48% had a group which were discriminated against or were powerless (as coded by the EPR dataset).

Table 17. Deeply divided societies with 'legitimate' legal systems (1995-2013)

Country	Ethnic Groups[7]
Bahrain	Shi'a Arabs, Sunni Arabs
Belgium	Flemish, Walloons
Bhutan	Sharchops, Ngalops (Drupka), Lhotsampa (Hindu Nepalese)
Canada	English Speakers, French Speakers
Cyprus	Greeks, Turks
Egypt	Arab Muslims, Coptic Christians
Estonia	Estonians, Russians
Fiji	Indians, Fijians
Ghana	Other Akans, Northern Groups (Mole-Dagbani, Gurma, Grusi), Asante (Akan), Ewe
India	Hindi (non-SC/ST), Other Backward Classes (Castes), Scheduled Castes and Tribes, Other Muslims
Israel	Palestinian Arabs, Ashkenazim (Jewish), Mizrahim (Jewish), Israeli Arabs, Russians (Jewish)
Jordan	Palestinian Arabs, Jordanian Arabs
Kuwait	Kuwaiti Sunni (Arab), Kuwaiti Shi'a (Arab)
Latvia	Latvians, Russians
Malaysia	Malays, Chinese
Mauritius	Hindi-speaking Hindus, Creoles (Black Creoles), Muslims, Tamils and Telugus
Montenegro	Montenegrins, Serbs, Bosniak Muslims, Croats
Morocco	Arabs, Berbers
Northern Ireland	Protestants, Catholics
Philippines	Christian lowlanders, Indigenous, Moro
Rwanda	Hutu, Tutsi
Saudi Arabia	Sunni Wahhabi (Najdi) (Arab), Sunni Shafii/Sofi (Hijazi) (Arab), Ja'afari Shia (Eastern Province) (Arab)
Senegal	Wolof, Pulaar (Peul, Toucouleur), Serer
South Africa	Blacks, Afrikaner, Coloured
Spain	Spanish, Catalans, Basques
Sri Lanka	Sinhalese, Sri Lankan Tamils, Indian Tamils
Taiwan	Taiwanese, Mainland Chinese
Trinidad and Tobago	East Indians, Blacks
Turkey	Turkish, Kurdish

[7] As classified by the EPR dataset. This draws on the definition of ethnicity developed by Horowitz (1985).

The case comparison is illustrated in Table 18 which shows the primary legislation responsible for CPE in each of the cases. This structured, focused comparison of CPE across the cases therefore enables various patterns to be compared to understand what conditions shape whether CPE facilitates or undermines conflict transformation (Lustick, 1993). The chapter, accordingly, considers the typical cases first demonstrating how the findings from Northern Ireland and South Africa apply beyond their immediate contexts. The second section develops these arguments through counterfactual case of Belgium and the crucial case of Canada, highlighting the importance of informal criminalisation. Moreover, as each of the cases consider criminalisation over the course of the conflicts – not specific phases – they provide insights into how CPE operates as a reactive and evolving process responding to particular conflict contexts as they arise, as well as being shaped by these contexts as well. The final section summarises the implications of these cases for conflict transformation and concludes with discussion of the potential areas for future research.

Table 17. Legislation responsible for criminalising political expression in Belgium, Canada, Sri Lanka, and Turkey

	CPI	CPA	CPV
Belgium			- The Terrorist Offences Act 2003
Canada		- War Measures Act 1914	- Public Order (Temporary Measures) Act 1970
Sri Lanka	- The Official Language Act 1956 - The Constitution of Sri Lanka 1972	- Public Security Ordinance No. 25 of 1947	- Prevention of Terrorism (Temporary Provisions) Act 1979
Turkey	- Various restrictions on Kurdish language and identity	- Constitution of the Republic of Turkey 1961, 1982	- Anti-Terror Law Act No. 3713

Criminalising political expression and conflict transformation: Sri Lanka and Turkey

Criminalising non-violent political expression can exacerbate intergroup relations for the three reasons outlined in chapter three: by collectivising repression, contributing towards intergroup polarisations, and raising the costs of non-violent movements. Turkey and Sri Lanka develop these findings, as in Turkey the Kurdish political identity was formally criminalised similarly to Northern Ireland and South Africa (Aydinli and Ozcan, 2011); whereas in Sri Lanka, although not formally criminalised, the Tamil political identity was informally criminalised through the practices of law enforcement and subordination of Tamil nationalism (Vittachi, 1958). Furthermore, following the escalation of these conflicts into armed violence both states resorted to politicising criminal offences – again reflecting similar practices to Northern Ireland and South Africa as outlined in chapter four – which, in the context of criminalised non-violent political expression, further exacerbated intergroup relationships, because it not only targeted the violent behaviours of 'terrorism' but the political motivations behind them (Bacik and Coskun, 2011; Nadarajah and Sriskandarajah, 2005; Selvadurai and Smith, 2013). Conflict transformation was undermined by these approaches, and continues to be, as criminal identities become embedded resulting in intergroup dialogue and accommodative reforms being perceived as giving in to terrorism and criminality by at least some within the state's communal group. Therefore, considering how the two cases developed provides important comparative examples to extend and refine the theoretical arguments developed in earlier chapters.

Criminalising non-violent political expression

The Turkish case reflects many of the characteristics of Northern Ireland and South Africa with respect to criminalisation as the state sought to criminalise the Kurdish identity, associated political activities, as well as political violence. In other words, the political identity of the "Kurdish" was reduced to "a terrorism issue" (Aydinli and Ozcan, 2011:441). To briefly set the context, the Kurds are a transnational ethnic group with significant minorities across the Middle East in Iraq, Iran, Syria, and Turkey. It is estimated that there are "approximately 20-25 million ethnic Kurds scattered across...the

Middle East", and in Turkey the Kurds account for around 23% of the total population (Loizides, 2010:514).

The emergence of modern Kurdish political activism is generally dated to the early 1960s as a socialist movement "antagonistic to Turkish 'state' nationalism" (Gunes, 2013:250). This is because Turkish nationalism depicted "Kurds as essentially Turkish" (Gunes, 2013:250) or as "future-Turks" (Yeğen, 2007:137) rather than acknowledging their political identity. Indeed the development of the Kurdish movement during this period is attributed to their links with left-wing organisations that helped "disseminate an alternative interpretation of social reality, challenging Turkey's official ideology" (Gunes, 2013:251). In other words, the emergence and development of Kurdish opposition was done in opposition to the social reality constructed by the Turkish state framing intergroup relations in polarising terms. For example the Turkish constitution referred to "the indivisible unity of the Sublime Turkish State" emphasising the salience of the Turkish identity, while not mentioning Kurdish identity once (Constitution of the Republic of Turkey, 1982: Preamble). Moreover, the Turkish language was exclusively designated as the official language, and under the 1982 Constitution it stated that "[n]o language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institution of education" (Section II Article 42). Indeed the Turkish Government changed the wording of the "nationalism" in the 1961 Constitution to "nationalism of Ataturk" in the 1982 Constitution to remove any ambiguity regarding what this nationalism referred to (Sencer, 1985-6). Therefore, legal restrictions on the Kurdish identity were codified in the central legal instruments of the Turkish state.

Furthermore, non-violent political activities were likewise restricted as even though the constitution stated "[t]he press is free, and shall not be censored", it went on to state that this did not apply to those who write "any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State" (Section X, Article 28) effectively referring to any form of Kurdish nationalist political expression.[8] Freedom of movement was similarly qualified "for the purpose of investigation and prosecution of an offence, and prevention of crimes" (Section V, Article 23) essentially rendering the entire 'freedom' to be conditional on state interests. Restrictions on

[8] This section of the Constitution was notably repealed 3 October 2003 and restrictions have been partially relaxed as part of Turkey's application to EU accession (May, 2012:180).

communication have also been qualified on the "grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others" (Section IV, Article 22) effectively granting the state extensive powers in censoring political expression.[9]

In practice this has enabled non-violent political activities to be 'legally' repressed by the Turkish state, for instance with "the arbitrary arrest and detention...in May 1960, of 485 Kurdish tribal leaders and other high-profile personalities and the subsequent exile of 55 of them to southern and western Turkey" or "the arrest and detention of 23 Kurdish activists in September 1963" (Gunes, 2013:251). Criminalising non-violent political expression was, accordingly, an important factor undermining the possibility of conflict transformation as it led to "the space for non-violent ethnic politics [being] restricted" (Loizides, 2010:522) closing off opportunities for the peaceful resolution of the conflict. Moreover this led to the eventual reductive framing of Kurdish nationalism as 'terrorist' (Barrinha, 2011) and their goals being the break-up of Turkey "blurring...the distinction between minority rights and secessionism" (Loizides, 2010:522). Indeed, during the mid-1990s Turkish parliamentary debates regarding the issue framed it as an "international conspiracy", not of a group fighting for self-determination (Loizides, 2016:81; Yeğen, 2007); and later during the 1998 crisis over the extradition of the PKK leader Öcalan from Italy some of these views also filtered down to civil society, evident in its mobilisation in support of extradition (Loizides, 2016).

In Sri Lanka formal criminalisation initially did not have a significant role in the conflict due to the anglicised composition of criminal justice (Vittachi, 1958). Instead it was informal criminalisation operating through the practices of law enforcement which shaped intergroup relations. Following independence in 1948 Sri Lanka was divided between the Sinhalese (72%), and three ethnic minorities - the Sri Lanka Tamils (11.2%), Indian Tamils (9.3%), and Sri Lanka Moors (7.1%) (Fernando and Kearney, 1979:6)[10] – that initially coexisting with relative political stability. However, one area in

[9] These provisions relate to the current Constitution so not all of the provisions will have been expressed in exactly the same way during the 1960s and 70s. For more regarding these distinctions see Sencer (1985-6).

[10] These figures were derived from the 1971 census.

particular drew sharp distinctions between these ethnic groups, that of language. Having been ruled under the British colonial system the English language persisted as the language of governance; for instance with the legal system operating completely in English despite 95% of the population being unable to speak or read it (Vittachi, 1958:17). This represented a vital issue with "language being connected to upward mobility in the most fundamental ways" (DeVotta, 2005:148) having significant implications on the socio-economic development of each linguistic group.

While initially there was political cooperation in making both Sinhalese and Tamil the official languages, the struggle for political control between Tamils and Sinhalese, as well as between Sinhalese elites (Gaul, 2017; DeVotta, 2005), led to the highly divisive 'Sinhalese Only' or The Official Language Act of 1956 (Samaranayake, 1991) which not only subordinated Tamil culture but also excluded them from the civil service for not meeting a certain proficiency in the 'official language' (Horowitz, 1985:380). As the political conflict escalated, instead of addressing the political divisions, the Government response entrenched these with The Constitution of 1972 recognising only Sinhalese as the official language. Indeed the 1978 Constitution maintained this, but included Tamil as a "national" language alongside Sinhala (Sri Lankan Constitution, 1978:4.19). It was not until 1987 with the 13th Amendment to the Constitution that Tamil was recognised as one of the official languages of Sri Lanka. While it did not formally criminalise the Tamil identity, in practice it led to its political marginalisation, as Tamils were subordinated to secondary status within the state. Moreover, this then contributed towards a wider ethnic polarisation evident in the Government response to Tamil non-violent responses.

Following the introduction of the Sinhala Only Act, Tamils responded with non-violent protest (satyagraha) threatening an "an island-wide *Satyagraha*" (Vittachi, 1958:20, emphasis in original) if linguistic parity was not implemented. Yet by framing intergroup relations in zero-sum terms such reforms were perceived as losses by many Sinhalese who responded to the protests with anti-Tamil riots, in which over 150 Tamils were killed (Vittachi, 1958:20). However, instead of addressing the threat posed by extremist Sinhalese, the Government imposed emergency rule on the Tamil dominated northeast. Under a state of emergency – provided for by the provisions of the Public Security Ordinance No. 25 of 1947 (Omar, 1996) - the Prime Minister could issue

curfews and permit detention, which, when enforced, severely restricted the ability to engage in non-violent protest and mobilisation. In practice it enabled "the military to operate in a ham-fisted fashion and with impunity" resulting in Tamils being "searched in humiliating fashion, beaten, stoned by soldiers...and women occasionally raped so that by the mid-1960s the army especially was seen as a Sinhalese occupation force bent on subjugating the Tamils" (De Votta, 2005:152). Although the Tamil political identity and activity were not formally criminalised, Tamil non-violent resistance had been allowed to be met with extremist violence, which when reciprocated was met with state repression. The reason why formal criminalisation remained insignificant at this stage may be due in part to the legal system operating primarily in English, thereby being inaccessible, and accordingly irrelevant, to the vast majority of Sinhalese. Changes in the legal framework itself would not necessarily have enhanced the Sinhalese state's power. Although as the nature of governance shifted, so too did the significance of such legal measures.

Language issues in these cases were inherently intertwined the national identity of each communal group. But instead of accommodating the concerns of the Tamil and Kurdish minorities, they were legally marginalised through the respective constitutional and legal frameworks. When protesting such repression these actors were met with further limitations on political activity. This not only limited the ability to engage in political dialogue – by making it unlikely to succeed – it essentially eliminated it as an option by contributing towards intergroup polarisation and state repression. The escalation into political violence was not necessarily directly linked, but at the very least such criminalisation presented serious obstacles to the peaceful resolution of the conflict. State responses to this political violence further illustrate this, whereby the focus remained on the political identity of actors and not violent behaviours.

Criminalising political violence

Following the initial unrest between Sinhalese and Tamils in the 1960s a number of militant Tamil organisations developed, although it was not until 1976 that the Liberation Tigers of Tamil Eelam (LTTE) was officially founded and not until 1983 that

widespread communal political violence took place.[11] In this initial period the LTTE primarily "concentrated on assassinating Tamil moderate politicians and executing police informers" (Samaranayake, 1999:116). This emerging Tamil militancy was, accordingly, labelled by the Government as terrorism, enabling the Government to link "terrorism with the Tamil political project" (Nadarajah and Sriskandarajah, 2005: 89). In other words, the Sinhalese Government associated the political identity of Tamils to the wider 'threat' of Tamil political violence. This was enshrined in the Prevention of Terrorism (Temporary Provisions) Act 1979 providing for substantial security powers to address the "the use of force or the commission of crime" which seeks "governmental change within Sri Lanka" (Prevention of Terrorism Act, 1979: Preamble). This is particularly important as it contrasts closely with the cases of Northern Ireland and South Africa, whereby the criminalisation of *political* violence was used to delegitimise a wider political identity "enabling the 'securitisation' of the issue", securing Sinhalese support for the regime, and assuaging international criticism of state repression (Nadarajah and Sriskandarajah, 2005:91).

Linking the 'threat' of political violence to the political project of Tamil secessionism "legitimated Sri Lankan state violence as counter-terrorism", leading to the wider repression of the Tamil identity itself (Sentas, 2012:99). In practice, however, this led to a "heavy-handed and indiscriminate" approach (Selvadurai and Smith, 2013:554) exhibiting the very repression that the LTTE were claiming to fight against. For instance between January 1988 and December 1994 there were "at least 21,600 of enforced disappearances" (Khalil, 2015:82), and while most of these were directed against the JVP they at least illustrate the scale of state repression. Indeed, in the northern and eastern Tamil regions the security forces perpetrated a number of war crimes and crimes against humanity including: "the discriminate bombing of civilian areas; attacks on medical facilities and places of worship; forced displacement of civilians; and torture and extrajudicial execution" (Khalil, 2015:82). It was because of the context of criminalising political identity and activity – albeit informally - that the criminalisation of political violence became so problematic for conflict transformation,

[11] However there was a significant revolutionary insurgency in 1971 which was orchestrated by the Janatha Vimukthi Peramuna (JVP), a left-wing organisation known as the "Che Guevara movement" (Samaranayake, 1999:114).

because, instead of targeting violent behaviours, it resulted in the wider criminalisation of Tamil separatism.

In Turkey the Kurdistan Workers' Party (PKK) was established in 1978 with the mission of establishing a separate Kurdish state through guerrilla warfare, launching its insurgency in 1984. The ensuing protracted conflict resulted in "close to 40,000 lives, destroyed thousands of villages, displaced millions of people, and consumed hundreds of billions of dollars" (Bacik and Coskun, 2011:249). Despite the political threat posed by the PKK it was not until 1991 that the Turkish state officially implemented the Anti-Terror Law Act No. 3713.[12] Under this legislation terrorism was essentially defined as any act which sought to challenge the Constitution or Turkish State through "pressure, force and violence, terror, intimidation, oppression or threat" (Act No. 3713, Article 1.1).[13] By politicising these criminal offences this once again provided for expanded security powers, stricter sentences, and a legally defined threat in the form of 'terrorism'. But as explained in chapters three and four, politicising crime directs law enforcement against the political identity of actors as well as against violence, and this was evident in Turkey, as "Turkish leaders tended to interpret any political unrest in its Kurdish areas as secessionism" and "reacted with repression" (Brathwaite, 2014:483-4). Therefore, in practice these measures essentially legalised what were already unofficial state practices. Yet by 1992 it was estimated that the supporters and actors within the PKK number around 10,000 (Criss, 1995:20). The reasons for the growing numbers are complex, but what is clear is that counter-terrorism policies were not preventing their rise. As was the case in Sri Lanka, by criminalising the political identity and activities of the Kurds this contributed towards their marginalisation, linking terrorism to this identity ensured that law enforcement was targeted against it as well. While this was taking place long before the formal politicisation of crime, the attempt to legalise it served to further inhibit the possibility of conflict transformation.

[12] There was however a three year state of emergency declared in 1980 whereby many of the restrictions on political expression became even greater alongside state repression (Brathwaite, 2014).

[13] The exact wording is as follows: "Any criminal action conducted by one or more persons belonging to an organisation with the aim of changing the attributes of the Republic as specified in the Constitution, the political, legal, social, secular or economic system, damaging the indivisible unity of the State with its territory and nation, jeopardizing the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, damaging the internal and external security of the State, the public order or general health, is defined as terrorism."

Furthermore, once enacted the criminalisation of political expression became extremely difficult to reverse. In Turkey the political discourse of criminality had become embedded to the point that it was "politically risky, often suicidal even" to try and reconstruct the social reality created by criminalisation (Loizides, 2010:521). In other words, the process of criminalisation framed the issue of identity – in this case the Turkish identity – in opposition to the threats of Kurdish nationalism. Compromises to Kurdish nationalism are accordingly perceived as threats to the Turkish identity and the state. This relates closely to the challenge of audience costs as backing down from a threat will have a significant bearing on the fate of the political leader doing so (Moon and Souva, 2016). This is important in relation to criminal justice because Turks have respect for their legal system and an acceptance of the labels they construct "as long as there is a government deemed capable of enforcing them" (Bal and Laciner, 2001:110), meaning a significant reversal within the legal system regarding Kurdish 'terrorism' runs the risk of jeopardising a wider respect for the state itself, or at the very least its political leadership. For instance in 2007 "a Turkish prosecutor initiated a criminal inquiry against former President Kenan Evren for suggesting that Turkey become a federation" (Loizides, 2010:521), effectively equating political accommodation with criminal activity.

A similar challenge was evident in Sri Lanka where the Sri Lankan Sinhalese political parties sought to outbid each other on the issue of language. Parity between Tamil and Sinhalese had been campaigned on by all political parties during 1952, but recognising the substantial political capital in a Sinhala-only policy S. W. R. D. Bandaranaike, who was the leader of the Sri Lanka Freedom Party (SLFP), campaigned in 1956 with the slogan 'Sinhala only, and in twenty-four hours' (DeVotta, 2005:149). As a result the incumbent United National Party lost the election to the SLFP despite a last minute switch to the Sinhala-only policy itself. By taking a more hard-line approach to language the SLFP were able to 'outbid' the Government as the defenders of the Sinhalese identity.

While ethnic outbidding gave rise to this outcome, it also made subsequent accommodative measures highly controversial and political costly due to the further challenge of audience costs (Moon and Souva, 2016). Having campaigned on a platform of ethnic dominance the Government had defined this dominance in opposition to the

social reality of 'the other'. Once the dominance of the Sinhalese language was established any measures to accommodate Tamil were perceived, or at least framed, as a threat to the Sinhalese identity (Vittachi, 1958). For instance the Bandaranaike-Chekvanayakam (B-C) Pact of 1957, which granted regional language rights to the Tamil Provinces in the North, was met by significant Sinhalese protests, eventually escalating into further race riots and resulting in the deaths of between 300 and 400 Tamils (DeVotta, 2005:151). Although the political identity of Tamils was not formally criminalised at this stage, its subordination facilitated a wider informal criminalisation which contributed towards heightened intergroup tensions. Reversing this subordination became tantamount to challenging the Sinhalese identity itself. Loyalist resistance in Northern Ireland to reversing such informal criminalisation mirrors these challenges, with such attempts being perceived as losses through a zero-sum framework.[14]

These cases demonstrate how the findings from Northern Ireland and South Africa extend beyond their immediate contexts. The issues of criminalising political expression undermined wider conflict transformation in each of the cases due to its target being the political identity and non-violent activities of a particular communal group. When enforced this amounted to the subordination of this group contributing towards intergroup polarisation and closing off opportunities for non-violent peaceful resolution of intergroup conflict. These issues then became entrenched as the discourse of criminality was linked to a political threat, politicising crimes to delegitimise a wider political identity whether intentionally or not. Due to the embeddedness of these labels, their reform or reversal becomes extremely difficult resulting in their ongoing perpetuation of intergroup conflict as each side is reduced to simplistic categorisations of victims and perpetrators.

Normalising non-violent conflict: Belgium

Criminalising political expression in the above cases reaffirms the complex and problematic interaction between conflict transformation and targeting criminalisation

[14] For instance a UVF ex-prisoner explained: "[P]eople [in Loyalist communities] are saying now: '....See all them ones, them peelers, they're all Nationalists. It's gone the other way. They want to come in and pay us back. They want to hammer our community'" (UVF ex-prisoner A, June 2016).

against political identities and activities. But the case of Belgium provides an important contrast because, firstly, CPE was directed almost exclusively against political violence, not political activity or identity. Unlike in Sri Lanka and Turkey, the criminal justice system was not used by any particular group to directly alter the intergroup power dynamics. Secondly, the criminalisation of political violence was not necessarily 'targeted' against a communal group, but instead applied relatively impartially focusing on the criminal behaviour of violent acts, not on the identities of actors. This is not to say that there are not other challenges in this case, just that the counterfactual absence of CPI and CPA corroborates the findings from the other cases.

Alternatives to criminalising political expression

Belgium is an important counterfactual case because, while it was sharply divided between Walloons and Flemish, it never implemented policies directly criminalising non-violent political expression. Providing such a case is valuable for two reasons: firstly it helps to understand why such criminalisation is sometimes not implemented, and secondly, what alternatives there are to it. This is important because, unlike the other cases, Belgium never faced communal or separatist groups engaged in political violence (Jenkins, 1990:300) with conflict never escalating "into expressions of violence" (Mulle, 2016:105), and this is despite the tensions between the Walloons and Flemish remaining embedded (Caluwaerts and Reuchamps, 2015).

Understanding why criminalising political identity or activity was never implemented requires considering the intergroup context. Initially the state was divided along Catholic and secular cleavages, before the linguistic ones, with consociational governance predating the rise of the linguistic conflict (Mulle, 2016:111). However as the conflict developed neither side utilised criminal justice to consolidate their political power. Instead consociational structures were developed over time responding to the demographic changes and demands of either side, eventually resulting in a system of segmental autonomy, most significantly through the constitutional reform of 1970. This meant both communities had relative political autonomy with neither side being able to dominate the other at the centre (Deschouwer, 2006). In other words, unless both communities consented, CPI and CPA could not be implemented, and so it never was,

as obviously neither side would have agreed to the targeting of its own identity. So while such powers have contributed towards political deadlock, especially in more recent years (Caluwaerts and Reuchamps, 2015), they have also reduced, possibly even eliminated, the possibility for criminal justice to be used by one community to subordinate the other. In terms of conflict transformation, this provides an important example of why a relative equilibrium in intergroup power within the state itself is important, as it restricts the ability of any single group being able to employ formal CPE in a way that would undermine political expression.

Furthermore, by devolving political power to the two linguistically homogenous regions it ensured that both groups could mostly "live their day-to-day lives with little contact with the 'other'" (Mnookin and Verbeke, 2009: 183). Therefore, even if CPI was formally implemented its target would have had little impact on the everyday existence of most of the population as the threat of 'the other' was geographically removed, rendering it ineffectual. This meant that the conflict – unlike that in the above cases – was not existential, as it did not threaten "their core identity or their ability to survive as a people" (Mnookin and Verbeke, 2009:183). Beyond this, both communities had a strong distrust of intrusive security powers, having experienced their abuse throughout the Second World War under the Nazis, and so were averse to "an overly centralised police apparatus" (Sheptycki, 1999:14).

But not only were the different groups unwilling to implement such criminalisation, they even went the opposite direction, as since 1961 "questions concerning the language spoken by Belgian residents have been legally prohibited in the official population census" (Mulle, 2016:107). However, although this may initially appear to neutrally address the question of political identity, in practice it serves a status quo embedding intergroup relations as they are. This is characteristic of the wider approach of conflict management. The problem with this approach is that while it may "effectively accommodate political conflicts that are currently on the agenda...it renders the process of intersegmental conflict accommodation increasingly more difficult in the long run"

(Caluwaerts and Reuchamps, 2015:279). In other words, the mechanism provides short-term solutions which come at the cost of long-term conflict transformation.[15]

The case is even more compelling when the relative absence of CPI/CPA is considered in the context of non-violent movements during this time. For instance in the 1966 and 1968 there were two student revolts by Flemish students in Leuven regarding linguistic reforms, since termed the 'Leuven Question' (Vos, 2008). The issue initially arose when Belgian Bishops of the Catholic University in Leuven proclaimed that the Francophone section of the University would remain, despite being located in what was legally a monolingual Flemish town. Flemish students and staff responded through mass protests. But instead of the protests escalating into political violence, or being policed through repression: "[p]rotestors generally followed the line of nonviolent resistance, and arrested demonstrators were usually released the same day" (Vos, 2008:158). CPA was avoided and instead the state responded to the tensions through political accommodation, adjusting "the structure of the state to the new nationalities" (Vos, 1998:94). In other words, the structure of the state was reformed to reflect intergroup identities rather than criminalise them. However, as mentioned above with respect to conflict management, this also meant that the "antagonism between Flemings and Walloons/Francophones" became embedded in the structures as well (Vos, 1998:94). So while CPI/CPA was never implemented, this did not mean conflict transformation took effect. It is the presence of CPI/CPA, not its absence, which will have implications for conflict transformation.

This leads to the final aspect of criminalisation – CPV – and whether it has impacted upon conflict transformation in Belgium. Having experienced relatively low levels of political violence from 1970-2000, Belgium's counter-terrorism framework was less developed than many other states resulting in substantial criticism (Lefebvre, 2017). The complexity and fragmentation of Belgium's criminal justice system and security sector likely contributed towards this inefficiency (Daems, Maes and Robert, 2013; Mnookin and Verbeke, 2009; Sheptycki, 1999), as well as issues in the level of funding received by security forces (Bartunek, 2015) and the lack of political oversight

[15] This chapter is unable to fully consider the significance of different institutional structures for criminalisation; such as consociationalism and majoritarianism. For more on these see Loizides (2015, 2016). The conclusion highlights this as an important area for future research.

particularly in the 1980s (Lasoen, 2017). In responding to these criticisms and the wider political context of the 'war on terror' the Belgium state responded in 2003 with The Terrorist Offences Act creating the offence of terrorism. It defines a terrorist offence as an act which can "cause serious harm" with the intention of intimidation, or the goal of "seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation" (CODEXTER, 2014). While this may appear similar to the definitions of the other cases, what distinguishes it from them is how it has been qualified.

Belgium approaches towards criminalising political violence is distinct from the other cases as it qualifies its counter-terrorism legislation with a provision in Article 141*ter* Criminal Code:

> "...which stated that no provision of Title I*ter* could be interpreted in such a manner as being intended to reduce or restrict rights or fundamental freedoms, such as the right to strike, the freedoms of assembly, of association or of expression" (Dewulf, 2014:38).

Some have argued that this provision is superfluous and possibly even problematic (Dewulf, 2014) because it adds an unnecessary human rights clause to the criminal code. In contrast, others have criticised Belgium's counter-terrorism framework for not consistently abiding by the provisions (Vervaet, 2015). Yet its presence stands in dramatic contrast to the other cases. Specifically, it recognises that acts of political violence are not necessarily analogous with a homogenous political identity. The practical outworking of this in the counter-terrorism framework demonstrates this as it is predicated on three key principles of empathy, addressing root causes, and safeguarding fundamental rights (Coolsaet and De Swielande, 2007). In other words, just as the construction of 'crime' shapes social reality (Hulsman, 1986), so too does its qualification. Therefore, arguing that it is superfluous fails to recognise the significant role it can have in wider social construction. Indeed it encapsulates, at least formally, the need for criminal justice to target violent behaviours rather than identities both formally and informally. This is not to say such an approach is sufficient for conflict transformation – it will still be dependent on the nature of informal criminalisation - but that it certainly helps by contributing towards the delegitimisation of violence as an alternative to non-violent political expression. A much clearer distinction is therefore

drawn between the behaviours and identities of actors than was exhibited in the other cases.

Furthermore, there is some evidence that CPV – in Belgium this primarily relates to those of Islamist or left-wing groups[16] – can contribute towards political cohesion as coalitions form to address the shared threat of political violence (Indridason, 2002). Because neither communal group pursued political violence, CPV presents a potential shared interest which may transcend the linguistic cleavages. In this way, the political leadership of both groups would take on shared audience costs, whereby the failure to address the external threat of terrorism would undermine them both. The extent to which such commonality exists is, however, unclear and would depend on both groups agreeing on the nature of the threat and how to address it. The likelihood of commonality developing is therefore dependent on wider contextual factors, such as the perceived severity of the security threat (König and Finke, 2013). Moreover, if political violence escalates or is perceived to be poorly addressed this can undermine the legitimacy of such coalitions potentially destabilising the wider political process (Sheptycki, 1999).

Constrained criminalisation: Canada

From the above cases it is clear that the presence of CPI, CPA, and CPV are all relevant for conflict transformation. Canada develops this by demonstrating how dependent the formal processes are on their informal outworking through law enforcement and discourse. This is because, while Canada introduced CPA and CPV, this did not lead to the escalation of conflict as occurred in Sri Lanka, Turkey, Northern Ireland, and South Africa. In other words, Canada acts as a crucial case where the presence of CPA and CPV would be predicted to undermine conflict transformation, but in practice they had a comparatively minor impact. Because they were targeted against a specific manifestation of Québécois nationalism, contained to a narrow timeframe, and coordinated alongside political accommodation, their implications were much less significant than those of the other cases.

[16] Combatant Communist Cells was the major terrorist threat in the late Cold War period, and more recently Islamic State (Lefebvre, 2017).

The conflict in Canada is based on the communal divisions between the anglophone and francophone communities. The francophone community made up about 25% of the total population throughout the twentieth century. The foundations of the modern separatist movement which embodies the recent intergroup conflict developed in the 'Quiet Revolution' in the 1960s when "Quebec experienced...economic, political, and social change" (Dutter, 2012:60). The primary militant organisation was the Front de Liberation du Quebec (FLQ) which emerged in 1963 lasting until 1972, and was responsible for "some 200 bombs and...the deaths of eight people and injuries to dozens" (Dutter, 2012), with over 40% of all terrorist attacks between1960 and 1985 taking place in the four years 1968-71 (Ross, 1988:220). Political violence was, therefore, primarily contained to this period and perpetrated by the FLQ, culminating in what has been termed the October Crises.

On October 5th 1970 the British diplomat James Cross was abducted by the FLQ, and within twelve days the provincial cabinet minister Pierre Laporte was abducted and assassinated, resulting in "broader social turmoil" as "thousands of students walked out of universities in protest" (Munroe, 2009:289). Following the initial abduction the FLQ made a series of demands, primarily involving the release of a number of imprisoned FLQ members from what they called "the ancient racist and colonialist British system" (FLQ Communiqué A, 1970). The language used was of liberation from the repression of the British colonial system. Their propaganda explicitly sought to advance their political aims – Québécois secessionism – by drawing parallels between themselves and the Palestinians, black Americans, Catholics in Northern Ireland, and the 'liberation' movements in Latin America. But the contrast between the cases here is instructive, as while political violence in Sri Lanka and Turkey was in the context of widespread repression, this was not the case in Canada.

The FLQ were not fighting against government repression, but fighting for independence and their identity. This was an important factor, albeit one amongst many others,[17] in limiting wider support for political violence, as "access to the political arena and the possibility of change" undermined the need for political violence (Dutter,

[17] See for instance David Charters (1997) The amateur revolutionaries: A reassessment of the FLQ. *Terrorism and Political Violence* 9(1):133-169.

2012:72). So while the absence of criminalising political identity does not prevent political violence from developing, its absence means those engaging in political violence will not be able to use it to increase their support base pointing to it as a grievance. This is further supported by the FLQ not having strong links with "a legitimate political 'Front'" as their violence was predicated on non-violent alternatives being ineffective (Smith, 1993:87). In fact, political accommodation was forthcoming, albeit slowly, with Canada becoming officially bilingual in 1969, and later through the referendums on independence in 1980 and 1995 (Dutter, 2012).

In response to the abduction the Government invoked the War Measures Act 1914 which provided for extensive security powers, and it was based on the belief that they were facing a situation which could quickly escalate into a wider insurrection (Munroe, 2009). This enabled the Government to "suspend civil liberties, impose martial law on the province, and rule by decree" (Dutter, 2012:67) enabling mass censorship, detention, restrictions on movement, and seizures of property. While in the first four days of the crisis there were fifty arrests and a thousand searches "the intensity of the police effort escalated until the very laws the police were trying to uphold became a limiting factor" escalating into the mass detentions of some 450 people most of which were subsequently released without charge and an estimated 31,700 searches overall (Munroe, 2009:299). In other words, instead of this being a political measure designed to repress the francophone community, it was the result of the police seeking "legalise operations either contemplated or already taking place" (Munroe, 2009:299). This reinforces the importance of informal criminalisation, as although the War Measures Act enabled the suspension of civil liberties and emergency powers, it was the police's enforcement of these that resulted in a "ham-fisted internment campaign" and of which the "political leaders involved...expressed their surprise at how the detention effort escalated so quickly into something far larger than they had expected" (Munroe, 2009:300). Even in introducing the Proclamation the Minister of Justice recognised this danger describing the potential "trap" it represented, as it may give the FLQ "evidence of alleged authoritarianism" (HC Debates, October 16 1970:193-4).

The FLQ did exactly this seeking to capitalise on the Government's repressive response by releasing a communiqué on October 17 1970 stating:

> "The present authorities have declared war on the Quebec patriots. After having pretended to negotiate for several days they have finally revealed their true face as hypocrites and terrorists".

The communiqué continued referring to "massive and illegal" actions conducted by "the fascist police" (FLQ Communiqué B, 1970). Indeed, the October Crisis continues to represent the colonial oppression which the FLQ claimed to be fighting against, and while this did not lead to the mass mobilisation they had hoped for, it further undermined the legitimacy of Canadian state for many within the Quebec nationalist movement (Charters, 1997; Munroe, 2009). In other words, Quebec nationalism itself was perceived by some as the target of this repressive response, not the FLQ, leading to an informal criminalisation of their political identity. This demonstrates the close relationship between CPI and CPA whereby even in the absence of legislation targeting political identity it can still be criminalised informally by directing CPA against it. This said, the French media in particular were accused of exacerbating the situation. For instance Québec-Presse called for passive resistance in response to the security measures stating: "we must resist the repression which is striking everywhere in Quebec" (Quoted in Cohen-Almagor, 2000). Therefore, the media also had an important role in contributing towards the situation, as one commentator concluded: "[T]he behaviour of some organs of the French media exacerbated the crisis and forced the government to contemplate possible procedures for monitoring the media" (Cohen-Almagor, 2000). Though whether CPA was the solution to this challenge is a much wider debate, but this at least demonstrates the complex outworking of informal criminalisation particularly in terms of provoking political resistance.

Recognising that the War Measures Act was "too blunt an instrument", in the words of the Minister of Justice (HC Debates, November 4 1970:879), the Government moved to replace the proclamation with new legislation, passing the Public Order Temporary Measures Act 1970, proscribing the FLQ and all associated groups. Membership and all forms of support for the FLQ were criminalised on the basis that the threat was collective not individual, therefore requiring new legislation rather than the ordinary criminal code (HC Debates, November 4 1970:883). Mass arrests could accordingly be conducted on the grounds that these were suspected members or supporters of the FLQ. The Act notably included a sunset clause expiring on 30 April 1971 making it clear that the intention was to respond to the current crisis and not act as a permanent measure.

Indeed, following the murder of Pierre Laporte and recovery of James Cross the Government withdrew the military from Quebec on January 5 1971. In this way the Government sought to minimise the political repercussions of the security practices in response to the October Crisis. While the above issues of informal criminalisation had a negative impact on the state's legitimacy, by containing their presence to the specific period of the crisis this minimised the long-term implications.

Although Quebec nationalists have since used the imagery of state repression during the October Crisis to evoke support for separatism (Charters, 1997), this has been through non-violent political expression. Due to the public outrage which was directed at the FLQ following the murder of Laporte, their support quickly diminished, with The October Crises effectively marking "the end of violent revolutionary protest in the province" (Clement, 2008:175). Therefore, while CPA and CPV did lead to some negative repercussions in terms of state legitimacy and human rights abuses, it did not escalate into widespread political violence as was the case in Turkey, Sri Lanka, Northern Ireland, or South Africa. For instance, following the October Crisis the separatist Parti Québécois – only founded in 1968 - had a dramatic rise in electoral support, from 23% in 1970 to 41% in 1976 in the Quebec provincial elections, whereas support for the FLQ had almost disappeared completely by 1972 (Dutter, 2012).

Comparative findings

These cases reinforce the theoretical arguments developed in the earlier chapters, that criminalisation's target and the nature of informal criminalisation have significant implications on whether it will facilitate or undermine conflict transformation. Utilising the multilevel framework of conflict transformation again (Lederach, 2003), with the levels of structure, issue and actor transformation, enables these complexities to be aggregated across each level as summarised in Table 19. The remainder of this chapter will discuss each of these by analysing the comparison between the cases across the three levels.

Firstly, structure transformation is frequently undermined by both CPI and CPA. Rather than contributing towards a re-balancing of intergroup power relations, the criminalised

are disproportionately disempowered due to criminalisation being under state control. For example, in Turkey Kurdish political expression was effectively outlawed through the Constitution to ensure that the territorial integrity of Turkey could not be legally challenged, reducing Kurdish nationalism to the issue of separatism. While in Sri Lanka the Sinhalese Government did not formally use criminalisation until the late 1970s, when it did, it likewise reduced Tamil nationalism to political violence through counter-terrorist legislation, legitimising the state particularly in the international arena (Nadarajah and Sriskandarajah, 2005). Furthermore, international states in both of these cases similarly proscribed groups as a means of denouncing their wider political aims (Baser, 2015; Nadarajah and Sriskandarajah, 2005) making it more difficult for these actors to mobilise externally. For instance, the proscribing of the PKK by Germany restricted the Kurdish diasporas' political options by framing them as a security threat (Baser, 2015), and it has been argued that their proscription by the UK has meant "those who support Kurdish self-determination are unable to be recognised as legitimate political subjects in the global legal order" (Sentas, 2016:915). Similarly, the US proscription of the LTTE appears to have been designed more to undermine the Tamil political project rather than defeat the LTTE (Nadarajah and Sriskandarajah, 2005:96). Indeed there are further examples of this, such as the proscription of various Colombian 'terrorist' groups by the United Kingdom, which has restricted the ability of third-party actors in helping to facilitate intergroup dialogue as part of the wider peace process (Haspeslagh, 2013). Therefore, CPI not only operates domestically but also internationally, though the implications of this require further research.

Furthermore, the identity of non-state actors can become marginalised and persecuted by law enforcement, as it targets both their 'criminal' behaviours and identities. Indeed, even in the absence of formal CPI, law enforcement may still be targeted against a group's political identity through CPA as was the case in Sri Lanka and to a much lesser extent in Canada. This is why informal criminalisation can be more important than the legislation framework for conflict transformation, because the efficaciousness of non-violent political expression will depend on the extensiveness of CPA's enforcement. For instance, the costs associated with non-violent political expression in Turkey were comparatively much greater than in Canada, where non-violent political activity was only periodically targeted and for a comparatively small section of the entire communal

Table 18. Implications of criminalising political expression for conflict transformation

	Destructive transformation	Constructive transformation
Structure	• If targeted against an identity criminalisation will exacerbate intergroup power dynamics generally in favour of the state who controls the criminal justice system • CPI/CPA reduce opportunities for non-violent political expression by raising the associated costs, while informal criminalisation can raise the costs inaction through repressive security measures	• The same processes which create the 'social reality' of crime can also be used to qualify this reality so that political violence is targeted against the behaviours of perpetrators not the identities
Issue	• CPI can be informally implemented by law enforcement targeting the political identity of a group through CPA • The criminal label created by criminalisation reduces complex political issues to a single 'criminal' problem marginalising shared interests	• By only criminalising political violence it can provide a uniting issue which transcends the communal divisions if both sides seek to undermine it together
Actor	• The social reality created by CPI/CPA can undermine long-term accommodative measures due to audience costs and ethnic outbidding • CPI and CPA contribute towards intergroup dehumanisation	• If applied evenly across all actors CPV can contribute towards the delegitimisation of political violence in contrast to non-violent alternatives

group. In this way Canada did not undermine non-violent political expression in the long-term because of its limited approach.

However, while criminalisation can contribute towards this power imbalance, it does not necessarily cause it. The inverse may actually be the case. For instance, in Belgium because neither communal group had complete control of the criminal justice system, amongst other factors outlined above, they were unable and unwilling to try and direct it against the opposing group. A relative equilibrium in intergroup power would therefore appear to be conducive with there being a lower likelihood of the implementation of CPI or CPA. This does not necessarily mean it will facilitate conflict transformation just that CPE will not undermine it. Indeed the alternative of consociationalism in Belgium partially facilitated the embedding of polarised identities, characterising a conflict management approach.

For issue transformation, CPI contributes towards intergroup polarisation reducing political identities to simplistic criminal narratives. In Turkey the Kurdish identity was linked directly to the threat to the territorial integrity – and by extension security – of Turkey and was therefore dealt with as a criminal problem rather than a political issue. Likewise in Sri Lanka, despite there not being legislation formally criminalising Tamil identity (at least until the Prevention of Terrorism Act) the subordination of the Tamil language represented a wider informal criminalisation of Tamil nationalism. The creation of the 'criminal' other in these cases therefore contributed towards the wider challenges of audience costs and ethnic outbidding discussed in chapter five. Shared interests are displaced as issues are framed in zero-sum terms. The identity of one group is, accordingly, perceived as the threat to another. This reduces accommodative measures and concessions to the out-group to the 'social reality' of threat, contributing towards intergroup polarisation which becomes embedded as the conflict develops.

But once CPI is implemented CPA becomes its manifestation acting as an expression of intergroup animosity with state forces and pro-state militias targeting these 'threats'; and in response, criminalised actors may respond in kind in a tit-for-tat escalation of violence. The issue of criminality can, therefore, become the overriding paradigm shaping intergroup relationships reducing all other issues to this single threat. For instance, in Sri Lanka, despite there being significant threats from Sinhalese dominated

JVP in the 1970s and 80s, evident in the insurgencies in 1971 and 1987, the Sinhalese Government focused its attention on Tamil nationalism and emerging Tamil militancy proscribing the LTTE in 1978 and the JVP only later in 1983 (Nadarajah and Sriskandarajah, 2005). Political violence against Tamil protests was permitted, at times even encouraged or facilitated by state actors, whereas Tamil militancy was met with severe repression (De Votta, 2005, Vittachi, 1958).

On the other hand, Québécois nationalism was never framed as a threat to Canadian security, only FLQ political violence. This meant violent political expression and non-violent alternatives were clearly distinguished so that the latter could be targeted without undermining the former. While the enforcement of CPA led to some perceptions of state repression, by containing it to the period of political violence surrounding the October Crisis and providing effective non-violent alternatives to political violence, it was able to minimise the negative repercussions (Clement, 2008). Indeed the October Crisis signified the end for the FLQ and Québécois nationalism instead developed through Parti Québécois (Dutter, 2012). In Belgium the 'criminal' label was never used as part of the intercommunal conflict, and so CPE was of marginal significance in terms of issue transformation.

In contrast to this, a limited approach towards criminalisation which only targets political violence presents an opportunity for conflict transformation. If neither group is engaging in political violence this means violence external to their conflict presents a potential shared threat and a collective interest. Agreeing on measures to address such violence provides opportunities for cooperation and there is some evidence suggesting that it increases the likelihood of coalition formation (Indridason, 2002). This would have important implications for conflicts emerging from violence, with both sides committed to non-violent dialogue criminalising the shared threat of violence could act as a confidence building measure as both will take on the associated audience costs, albeit constrained by agreement over what this would mean in practice.

Actor transformation is undermined through CPI and CPA because it contributes towards actor dehumanisation. The fundamental importance of knowing 'the other' is undermined as out-groups are perceived as a threat, not according to their complex identities. In other words, by linking a 'criminal' issue to a political identity this labels

all those associated to that group with individual acts of political violence. This securitises the context at the expense of political accommodation. This is due to a wider issue of ethnic outbidding where moderate voices are marginalised by extremes who advocate for extreme positions on the grounds of there being an equivalent 'threat' – which CPI and CPA 'identify'. By framing the issue of Sinhalese linguistic subordination in terms of Tamil domination, this meant the Tamil language was itself framed as the threat to Sinhalese identity. Accommodative measures previously advanced by the Sinhalese political elite where therefore no longer feasible. Moderate positions gave way to the extremes as the threat was defined in like terms. Similarly, in Turkey measures aimed at political accommodation were framed as being tantamount to criminality for threatening the territorial integrity of the Turkish state (Loizides, 2010). Canada was more limited in its measures dealing with the FLQ targeting only the organisation and explicitly limiting the threat of political violence to the FLQ, not the wider nationalist movement.

If re-orientated, however, criminalisation may also enable wider actor transformation. By targeting only specific behaviours, criminalisation may be able to re-distribute actor legitimacy away from political violence and onto non-violent alternatives. For instance by singling out the political violence of the FLQ in Canada, the state was able to undermine violence as a means of achieving political transformation while providing alternative political opportunities. In this way it was political violence, not Quebec nationalism, which was undermined. However, this would only facilitate transformation if the criminal justice system holds legitimacy across all actors, which is unlikely in many of the contexts emerging from conflict because of its historically politicised nature.

Conclusions

This chapter has brought together and developed the theoretical arguments established throughout the rest of the thesis, employing a small-n study of the conflicts in Turkey, Sri Lanka, Belgium, and Canada, to build upon the earlier findings. Considering the evolution of the conflicts in these cases was important as it enabled the chapter to map the fluid development of CPE and identify the distinctions between formal and informal

criminalisation over time. This chapter, therefore, develops the theoretical arguments through its extension beyond Northern Ireland and South Africa, considering different conflict contexts to analyse how it impacts conflict transformation. This was achieved through selecting the cases on the basis of their case type: as typical cases Sri Lanka and Turkey extend the external validity of the research; as a crucial case Canada refines the arguments by providing a least likely outcome of non-violence following CPA and informal CPI; and as a counterfactual case Belgium enables these arguments to be considered in relation to the absence of CPE. By being selected according to case type this ensured that the cases were able to provide valuable new insights through in-depth analysis while still accounting for the subjectivity and complexity of the cases (Hansen, 2006; Levy, 2008).

The overall findings are summarised in Table 19 illustrating how constructive and destructive conflict transformation map onto the three levels of transformation. In summary, considering the four cases over the course of their conflicts demonstrated how CPE operates as a reactive and evolving process responding to particular conflict contexts as they arise, as well as being shaped by these contexts as well. Rather than representing a specific mechanism of state power, these cases show just how variable the impact of CPE can be due to the interaction between informal and formal criminalisation. The examples of extensive state repression facilitated through CPA in Sri Lanka and Turkey contrast with the contained approach to the FLQ in Canada with corresponding outcomes in terms of political violence; protracted violent conflicts in Sri Lanka and Turkey, and democratic mobilisation in Canada. CPE alone cannot account for the entirety of these outcomes, but from the evidence discussed above it was clearly an important contributing factor. Furthermore, despite an absence of formal CPI in Canada and Sri Lanka (until 1979) informal criminalisation still took place through the implementation of CPA demonstrating the interaction between the formal and informal processes. The contrast of Belgium is effective in qualifying these points whereby the absence of CPE does not necessarily result in a more effective approach to conflict transformation. It is the presence of CPE, not its absence, which has significant implications for conflict transformation.

The chapter also develops a number of further arguments which follow from the cases. While the focus has been on CPI domestically, the international dimension has

important implications for conflict transformation as well. The proscription of the LTTE and PKK by international actors led to a number of challenges in mobilising international support for the wider political objectives of these groups particularly in terms of fundraising and political lobbying (Baser, 2015; Nadarajah and Sriskandarajah, 2005; Sentas, 2016). While it was beyond the parameters of this chapter to properly consider these implications for conflict transformation, this would be an important area for future research to consider. Furthermore, the Belgium case highlights how a relative equilibrium in intergroup power within the state reduces the likelihood of the state implementing either CPI or CPA. In such contexts it would be unclear which identity criminalisation would target, and it would require both sides risking the abuse of the powers by the other. This demonstrates the important role of institutional designs, such as the consociational institutions in Belgium. Therefore it would be important for future research to consider the link between institutional design and CPE, and whether certain institutional systems are more likely to facilitate any of the different types of CPE.

These findings reinforce the argument that targeting non-violent political expression through CPI or CPA is counter-productive for short and long-term conflict transformation. On the other hand, instead of using criminalisation to consolidate in-group power through constructing the social reality of the 'criminal other', it can potentially be used to the opposite effect. By qualifying CPV to focus on specific violent behaviours it may be possible to reframe the 'threat' so that it no longer contributes towards out-group dehumanisation and intergroup polarisation. For instance the Belgium example of counter-terrorism legislation illustrates how such an approach could take effect formally. The crime of terrorism is qualified so that directed against expressions of political violence, not the identity of the actors. This does not preclude legislation which targets certain forms of support for terrorism, such as financial or logistical, but instead suggests that such proscription would benefit from qualifications like those evident in the Belgium case. But this is still dependent on the wider implementation of such legislation. These points are developed further in the conclusion where it discusses these issues in the wider context of the entire thesis.

Conclusion

The central research question guiding this project was: What implications does criminalising political expression have for conflict transformation? The thesis began by considering the British Government's 'criminalisation' strategy which had a profound impact on the direction of the conflict in Northern Ireland (Crawford, 1999; McEvoy, 2001). But as the research progressed it became clear that British strategy was emblematic of various other iterations even within the conflict in Northern Ireland, not to mention beyond. What this criminalisation strategy embodied was, therefore, only one example of a particular mechanism of state power used to delegitimise opposing actors. Drawing on the substantial body of research on the 'criminalisation' strategy (Boyle, Hadden, and Hillyard, 1975; Hillyard, 1993; Ellison and Smyth, 2000; Gormally, McEvoy and Wall, 1993; McEvoy, 2000, 2001; Walsh, 1983; Wright and Bryett, 1991), the empirical analysis in the thesis shows how this reflects a wider pattern of state behaviour. Indeed some have previously argued that there was considerable continuity across many of these policies (Walsh, 1983, 2000), but this thesis develops this into a theory of how criminalising political expression impacts conflict transformation.

Linked to this were the conceptual and epistemological issues underpinning traditional approaches to conflict analysis, which assumed a level of state legitimacy and unit homogeneity (McEvoy and Gormally, 1997; Cederman, Gleditsch and Buhaug, 2013). These assumptions are problematic when applied to the process of CPE, and in particular to deeply divided societies, because in such cases order becomes equated with a political status quo which can often mean the hegemony of one group at the expense of others (Guelke, 2012; Horowitz, 1985; Lustick, 1993). While previous research has clearly outlined the important role states have in shaping intergroup relations particularly through identity construction and polarisation, this thesis builds upon this by examining a specific mechanism through which this has been achieved. In other words, CPE embodies a mechanism of state power which is used to consolidate the state's hegemonic position, rather than as a neutral instrumental process protecting society from harm. The criminal label accordingly applies to the political identity of

actors, reducing their political aspirations to criminal intent. In such cases any assumption of the legitimacy of the label will therefore assume the illegitimacy of these political actors. This thesis, accordingly, sought to address both these issues considering whether CPE represented a pattern of state behaviour through a comparative framework and developing a critical conceptualisation of CPE.

Theoretically the thesis has developed a critical conceptualisation of CPE building on critical criminological and legal studies distinguishing the formal legal system from its informal implementation and experienced effects (Hulsman, 1986; Lacey, 2009; Quinney, 1977; Shiner, 2009). This was necessary in order to challenge the statist assumptions underpinning legal positivist approaches, instead viewing criminalisation to be a mechanism of state power which constructs the social reality of crime (Becker, 1963). From this post-structuralist perspective, the construction of the 'criminal' label in legislation is interdependent with the wider perceptions of those subject to it, enforcing it, and witnessing it. For instance, the implications of criminalising the display of political flags depends on who enforces it, which flags it applies to, the extent of its enforcement, the perceived legitimacy of the state, and the salience of flags as symbols of political identity. It was necessary therefore to consider not just the laws which criminalise political expression, but their implementation and the perceived social reality they contributed towards; in other words, the 'practices' of criminalisation (Bourdieu, 1977, 1992).

As the research developed it became clear that even focusing on CPE encompassed a wide range of different processes. Therefore the thesis developed an original explanatory typology of CPE based on its target, disaggregating it into three 'types': namely identity, activity, and violence. This was because each of these types pertains to different implications particularly in relation to informal criminalisation. Criminalising political identity in isolation was linked to a form of state regulation often permitting 'criminal' deviance so long as it remained benign (Foucault, 1975, 1976); whereas criminalising political activity involved directing law enforcement to confront and repress this threat. Criminalising political violence relates to targeting political violence usually by politicising criminal offences to de-politicise the actor motivations, building on the distinction by Brewer *et al.* (1996). While interrelated, these distinctions were applied throughout the thesis to demonstrate how they each can have varying

implications. Indeed their interrelated nature was something that the thesis emphasised throughout, but distinguishing between them enabled the thesis to draw comparative distinctions with particular relevance for conflict transformation.

To account for the complex and subjective nature of criminalisation the thesis applied the multilevel framework of conflict transformation (Cochrane, 2012; Miall, 2004). Theoretically this framework was chosen as it challenges the two central problems of statism and unit homogeneity which pervade throughout traditional conflict analysis scholarship providing what has been termed "the critical theory-based approach to conflict" (Toros, 2012:65). Therefore the thesis aimed to assess what relationship CPE had with conflict transformation, whether it contributed towards the constructive or destructive transformation of conflict (Lederach, 2003; Miall, 2004). This meant considering criminalisation in a number of specific conflict contexts to deduce how it operated (formal instrumental process), its perceived reality and implementation (informal criminalisation), and what implications these two aspects had for the wider conflict.

Empirically the thesis draws extensively on original interviews and archival material providing new insights into the perceived reality which CPE contributed towards and the ongoing implications it continues to have. The range of interviewees from across two conflict contexts provides an important empirical contribution towards the wider field of conflict analysis. Moreover, the combination of original and archival sources also enabled new material to be cross-referenced with archived accounts improving its overall validity. These interviews were cited throughout the thesis and were integral to the overall framework in understanding how different actors perceive criminalisation and how this corresponds to its informal nature.

The rest of this chapter will summarise the extent to which the thesis achieved these aims, outlining the research findings, limitations, and implications. Following the thesis' analysis it developed three main arguments relating to the target of CPE: (1) targeting the political identity of a group contributes towards intergroup polarisation by framing groups in opposing terms as victims and perpetrators, reducing their political identity to criminality; (2) targeting political activity closes off potential opportunities for non-violent political expression reducing the likelihood of political accommodation

and intergroup dialogue; and (3) targeting political violence may both facilitate or inhibit conflict transformation depending on the nature of its enforcement, and how it is perceived. Therefore, following on from the critical conceptualisation of criminalisation, the implications of the formal target of CPE are dependent on their informal manifestations, with actors experiencing the same formal process in very different ways even from within the same communal group.

Following from this analysis there are several potential research implications with respect to criminalising non-violent extremism, counter-terrorism, peace negotiations, and criminal record expungement for political offences. This chapter will discuss how the theoretical findings may inform these different policy areas, particularly focussing on the United Kingdom because of its proximity to the case selection. The policy discussion, however, will be set in the context of the research's limitations and suggesting a number of areas for future research which could provide clearer recommendations for specific policy areas.

Research findings

Building on the critical conceptualisation and interpretativist methodology outlined in chapters one and two, it was important to analyse CPE to account for its subjectivity and complexity. Therefore, chapters three through to six considered how CPE operated in particular conflict contexts through a two case comparison of Northern Ireland and South Africa. This section will accordingly outline the significant contribution which these chapters make to the wider field of conflict analysis with respect to nonviolent movements, counter-insurgency, peace negotiations, and peacebuilding, in terms of reframing understandings of CPE and its implications for conflict transformation.

Chapter three focused on the context of non-violent movements to consider why states respond towards such movements through CPE, and the implications this may have for the conflict context. In such contexts, limiting the analysis solely to deeply divided societies, non-violent movements often represent a challenge to the state's hegemonic position, and so a state may use CPI and CPA to undermine it. But as criminalisation contributes towards the social reality of crime and indeed conflict (Hulsman, 1986;

Quinney, 1977), this has important implications for actor motivations to engage in political violence as violence responds to this "as a reflection of the underlying social reality" (Väyrynen, 1991:3).

In summary, the chapter argued that state responses of CPI and CPA can have three crucial implications: (1) it contributes towards intergroup polarisation; (2) collectivises repression; and (3) it raises the costs of non-violent mobilisation. In Northern Ireland and South Africa CPI contributed towards a wider securitisation of intergroup relations with the political objectives of the out-group being framed as a threat to the in-group. Formal criminalisation was justified on the basis of public order, but because the state was dominated by a single communal group this 'order' was synonymous with the political hegemony of the state. As such, CPI came to regulate non-violent political activity through politicised law enforcement, albeit varying considerably in its extensiveness between the cases. But as non-violent political activity developed – posing a threat to the state's hegemony – CPA was implemented to undermine its effectiveness, and because CPI directed law enforcement against an identity, state repression was perceived as directly targeting this identity, thereby creating a collective grievance to mobilise against. Furthermore, raising the costs of non-violent political activity through criminal sanctions reduced its strategic effectiveness encouraging a small number to pursue alternatives including political violence, albeit acting as only one among many factors. Together these issues reflect the first argument developed by the thesis that CPI and CPA generally undermine conflict transformation, as in these cases they contributed towards a wider de-stabilisation of the conflict context and escalation into collective political violence. Therefore, these findings contribute new evidence and theoretical insights into issues of state repression and nonviolent mobilisation.

Chapter four considered how states employ CPV following the onset of collective political violence. Theoretically this is linked to a wider counter-insurgency framework whereby ordinary crimes – such as murder, theft, or arson – are linked to a political motivation; politicising crimes to criminalise the political motivations (Brewer *et al.*, 1996). The reasons behind why states do so are well researched (Dugard, 1978; Ellison and Smith, 2000; Gormally, McEvoy and Wall, 1993; Walsh, 1983), but the implications for conflict transformation remain unclear. Specifically this cooption of a

criminal justice system into a counter-insurgency framework is problematic because the predominant objectives of criminal justice - namely deterrence, retribution, and reform - become directed against an 'enemy' rather than independently administering justice.

The chapter summarises this by considering three tensions between politicising crime and criminal justice: (1) it is ineffective at deterring violence because political actors perceive the costs of criminal sanctions differently from ordinary offenders (McEvoy and Mallinder, 2012; Sarkin and Daly, 2004); (2) that reform becomes a site of resistance for political actors, as it becomes designed to break their political resolve (Buntman, 1998; McEvoy, 2001); and (3) that punishment for offences directs moral outrage against both the acts of political violence, and also the motivations (Bonner, 1992). Deterrence is undermined through this politicisation of crime as those who engage in political violence calculate the costs differently to ordinary offenders; they are often willing to die or suffer great harm for what they believe to be a greater goal (McEvoy and Mallinder, 2012; Sarkin and Daly, 2004). This means the attempts at deterring political violence by increasing the likelihood of facing a criminal sanction are unlikely to have a significant impact, and may even become counterproductive if implemented through state repression. Indeed the inaction of non-state actors in such contexts may be perceived as costly, perhaps even more so, than action (Kalyvas and Kocher, 2007). Attempts at reform are similarly problematic because by targeting the political motivations behind violent behaviours it seeks to reform actor identities themselves. In both cases, therefore, politically motivated prisoners resisted criminalisation in the prisons extending the arena of contestation and conflict (Buntman, 1998; McEvoy, 2001). Furthermore, politicising crimes directs moral condemnation against both the motivation and behaviour of prisoners and can contribute towards a wider dehumanisation of their political communities. It also politicises the criminal justice system by bringing questions of 'political' affiliation into judicial decision-making and law enforcement, which when applied undermined its legitimacy even with certain pro-state actors in Northern Ireland. In these ways this chapter argues that CPV can undermine conflict transformation when implemented through the politicisation of crime. It is therefore not arguing CPV undermines conflict transformation, just a specific manifestation of it, reinforcing the importance of informal criminalisation.

The third conflict context considered by the thesis is that of peace negotiations. Through an analysis of the peace negotiations in the two cases, this chapter argues that criminalisation operates as an important incentive structure shaping negotiations and wider conflict transformation. Its impact depends on the specific target and implementation of CPE, as CPI and CPA typically undermine negotiations by embodying structural constrains, closing down opportunities for dialogue, and dehumanising actors. Some form of decriminalisation in such cases can therefore facilitate conflict transformation, but this depends on the context. Moreover, if implemented as a top-down mechanism without support from local communities it can actually contribute towards intergroup polarisation, alienating actors who perceive justice as being compromised. Therefore the chapter's overall argument is that criminalisation will need to be orientated on to specific acts, not actors, in order for it facilitate conflict transformation, as this will legitimise non-violent political expression and negotiations as an alternative to political violence.

The chapter develops these arguments across the three levels of structure, issue, and actor transformation to show how CPI and CPA impact upon each level. For structure transformation decriminalising identity and activities is important in opening up intergroup communication and building trust. This may mean de-proscribing political groups like the ANC, as this was a pre-requisite to entering negotiations, but as Sinn Fein were not proscribed it instead meant removing certain restrictions on censorship. Indeed, going further to de-proscribe the IRA would have possibly de-stabilised the context by alienating Unionist actors altogether. Issue transformation was directly impacted by criminalisation framing the salience of issues and representing an issue itself. In this way it was used to leverage concessions as part of the wider negotiations in terms of prisoner releases and institutional reforms. But it also has a significant role in shaping intergroup narratives of the negotiation process, as decriminalisation may be necessary in order to remove the homogenous criminal narrative attributed towards the out-group. However this is constrained by the challenges posed by audience costs, as the social reality of criminalisation will usually have been embedded over the course of the conflict making it politically costly to reverse. For actor transformation, CPE has a considerable role in redistributing legitimacy. Criminalised actors may need to undergo some form of decriminalisation, whether formally or informally, in order to legitimise their involvement in the negotiation process. But this again depends on whether it is

employed as a bottom-up process to ensure communities 'buy-in' to the process and thereby reverse informal criminalisation. Together these findings provide insights into the challenges CPE can present to conflict transformation in the context of peace negotiations linking into the wider theoretical debates on secret negotiations, audience costs, and credible commitment issues.

Chapter six considers the context of peacebuilding focusing specifically on the mechanism of criminal record expungement as illustrative of how CPE can operate in this context. The chapter broadens the theoretical debate on criminal records by distinguishing between the records for violent and non-violent offences as is it important to understand how record expungement differs according to the target of CPE. Moreover, the implications of criminal record expungement relates to a wider debate within peacebuilding research where on the one hand they are argued as facilitating ex-prisoner reintegration, yet on the other represent a denial of retributive justice. Specifically the chapter has two central arguments building on those of earlier chapters: (1) that criminal record expungement for non-violent offences facilitates conflict transformation but its extent will depend on whether it addresses both the formal and informal issues associated with the record; and (2) that whether expunging the records for violent offences facilitates conflict transformation depends on whether it can address informal criminalisation. In other words, CRE for violent offences can undermine conflict transformation if it is implemented as a top-down processes without bottom-up buy-in from communities.

These arguments reflect the wider conceptual issues of CPE between formal and informal criminalisation alongside the distinction its 'target'. For instance, expunging the records of violent offences could exacerbate the conflict by not addressing the concerns of victims, and polarising groups once again into perpetrators and victims. In other words, the expungement process will often map onto the wider conflict narratives as has been the case in Northern Ireland, and until these are addressed it is unlikely expunging criminal records would contribute towards the positive transformation of the conflict. Furthermore, South Africa demonstrates how records for violent offences can take precedence over non-violent ones because those with these records have proportionately more power in the negotiation process. This can result in victims being sidelined and record expungement representing another mechanism of state power. The

chapter concludes by suggesting a number of areas for further research particularly around alternative approaches to 'formal' expungement. The focus on elite level expungement processes has marginalised less polarising alternatives. For example, it would be possible to maintain the records for violent offences but not require individuals to declare these for insurance or certain job applications. These points will be addressed in more detail below regarding their policy implications.

Together these chapters provided in-depth analysis of the conflicts in Northern Ireland and South Africa providing a close examination of the relationship between CPE and conflict transformation. Chapter seven builds upon these findings to analyse how this relationship evolves over the course of a conflict through a further small-n framework. Four cases were selected on the basis on case type determined according to the nature of CPE in the cases, and thereby adding an additional layer of analysis to that developed in the cases of Northern Ireland and South Africa. The cases included: Belgium as a counterfactual case because it never implemented CPI or CPA; Canada as a crucial case because while it did implement CPA the conflict did not escalate further into political violence; and Sri Lanka and Turkey act as typical cases. Analysing four cases ensured that complexity and subjectivity of CPE could still be accounted for, while also developing the theoretical findings.

As a counterfactual the Belgium case illustrated how, when there is a relative equilibrium in intergroup power, this appears to be lead to a lower likelihood of CPI or CPA. This is because neither group is able or willing – because they do not have sole control of the legislature - to criminalise the out-group due to more favourable alternatives; in this case consociational institutions. Moreover, because neither communal group was engaged in political violence CPV presented a potential opportunity for conflict transformation. By focusing on the shared threat of political violence it represented a potential common interest transcending the linguistic cleavage complemented by the absence of CPI. In contrast, the implementation of CPA in Canada as part of the October Crises demonstrates the significance of informal criminalisation, because although it did undermine state legitimacy, it did not escalate into further violence. This was because it was complemented by political accommodation, was contained to a particular timeframe, and was predominantly targeted against political violence and not political identity. Furthermore, Sri Lanka and

Turkey demonstrated how both formal and informal CPI undermined conflict transformation in the short and long-term through the challenges of audience costs and ethnic outbidding. By framing intergroup identities in terms of 'threat' this undermined the possibilities for political accommodation, and through ethnic outbidding led to increased intergroup polarisation. Additionally, by considering the development of CPE over the course of these conflicts they illustrated its reactive and evolving nature, as it shapes and is shaped by the wider conflict context. These cases, therefore, both develop and corroborate the findings of the earlier chapters providing further theoretical insights into the complex relationship between CPE and conflict transformation.

Research implications

The findings outlined above have a range of potential implications, for the study and practice of conflict transformation and criminalisation. The more general arguments which abstract from the cases regarding the relationship between CPE and conflict transformation can be generalised beyond the immediate cases, but the implications would therefore require further research in order to understand their contextualised implications (Pouliot, 2008). Instead this section will discuss their relevance primarily for the United Kingdom because of its proximity to the cases themselves to illustrate a number of specific areas of particular importance.

Criminalising non-violent extremism

Firstly, the analysis of state responses towards non-violent movements in chapter three relates closely to current policies regulating the freedom of expression and assembly. Specifically the issue of freedom of expression has recently been raised in relation to criminalising non-violent extremism in the United Kingdom. In 2015 the then Home Secretary Theresa May – now Prime Minister - wrote that where "non-violent extremism goes unchallenged, the values that bind our society together fragment" (May, 2015:7). Following this the Conservative Party sought to introduce new regulations on non-violent extremism through the Counter-Extremism and Safeguarding Bill, but this has not come to pass due to issues in defining extremism, as reflected in the conclusion

by a cross party committee: “The Government gave us no impression of having a coherent or sufficiently precise definition of either ‘non-violent extremism’ or ‘British values’” (Joint Committee on Human Rights, 2016:8). Yet again in the 2017 election manifesto of the Conservative Party it stated: “We will consider what new criminal offences might need to be created...to defeat the extremists” (Conservative Party, 2017). Therefore, the policy of criminalising non-violent extremism appears to still be ongoing.

But the problem with this approach is reflected in the findings of chapters three and five in particular, because targeting political expression – no matter how undesirable it is – closes down opportunities for dialogue, contributes towards a wider demonisation of associated communities, and makes these individuals even harder to engage with, and thereby further contributing towards their isolation. Such an approach then becomes counter-productive with alienation having been identified as important factor for some of those who choose to resort to political violence (Dalgaard-Nielson, 2010). While ‘formal’ criminalisation of non-violent extremism is unlikely due to insufficient political support, informal criminalisation represents a serious challenge (McGovern and Tobin, 2010). Therefore, this research would suggest that criminal justice needs to be orientated against the criminal behaviours of political violence, not ideologies, or else it is likely issues such as the “racialised practices of Muslim profiling” (Monaghan and Molnar, 2016:410) will become increasingly problematic.

Politicising crime through counter-terrorism

The convergence between counter-insurgency and counter-terrorism policies means that the contradictions discussed in chapter four have likewise a number of implications for contemporary counter-terrorism policies (Boyle, 2010). This is because, like the counter-insurgency policies discussed in chapter four, contemporary cases of counter-terrorism continue to politicise criminal offences. For instance, under the UK Terrorism Act 2000 the offence of terrorism requires a “political, religious, racial or ideological cause”, linking this to particular forms of political violence. While significant measures have been implemented to ensure human rights have greater protections than was historically the case (Dickson, 2009), this politicisation continues to embody the same theoretical contradictions as previous policies. For example, it is unclear whether this

politicisation contributes towards deterrence because of the complex and diverse motivations behind current political violence (Dalgaard-Nielsen, 2010; Ilardi, 2013). In other words, increasing the certainty of conviction may deter some, but not those who already are willing to die, as is the case for many (Long and Wilner, 2014). Retribution, in directing moral condemnation against the ideological basis behind political violence, relates directly to the issues of profiling and wider informal criminalisation (McGovern and Tobin, 2010). This particularly affects those within Muslim communities as law enforcement is directed against the criminalised political identity.

But these issues come together with respect to the principle of reform which continues to be problematic, illustrated by the challenges of prison 'radicalisation' (Home Affairs Committee, 2016). The Government has tried to respond to these issues through establishing the Extremism Unit as part of the National Offender Management System to "manage the risk these offenders pose", offenders referring to "terrorists, extremists and radicalisers" (NOMS, 2014:10). Even accounting for the challenges associated with what constitutes an extremist or a radicaliser (Sedgwick, 2010), the goal of 'reform' appears to have been displaced for a securitised focus on risk management. But reducing these actors to their 'risk' fails to properly address their underlying political objectives. Not engaging with the political motivations, therefore, means these individuals will continue to advance them through whatever opportunities they can develop. While criminal justice itself is unlikely to address these issues as outlined in chapter four, the current security focus will only ever be able to manage, not address, them. The analysis in chapter four cannot unfortunately offer solutions, just aid in diagnosing the issue, which is why further research into these areas would be of important policy relevance.

A reasonable objection to these challenges is that there are no better alternatives. From this perspective the security risk posed by these individuals – framed as terrorists - necessitates not only strong security responses, but also clear political ones as well. This raises the issue of audience costs once again, as for political leaders to be regarded as 'soft' on issues of terrorism would greatly undermine their own legitimacy, so instead they take on the audience costs of politicising crime (Bhatia, 2005). But there are two reasons why this is counterproductive. Firstly, assuming the main reason behind counter-terrorism is to prevent acts of terror then responses need to be considered as

part of the overall framework; they themselves can therefore contribute towards the problem as much as the solution. In other words, if politicising crime undermines counter-terrorism's main objective, this would indicate that it is not effective and requires to be reformed at the very least. Secondly, there are alternatives to politicising crime, but these would likely be unacceptable politically because they would involve removing the 'enemy' framing from counter-terrorism discourse undermining the political salience of security measures. But if adopted, a de-politicised approach to counter-terrorism would direct security practices against criminal behaviours, not political ideologies, and involve a wider reorientation of law enforcement onto community engagement. The UK's current counter-terrorism strategy CONTEST (2016), and in particular the Prevent component (2011), emphasises the necessity of such engagement, but so long as crime remains politicised it will continue to be constrained by these above challenges.

'Bottom-up' peace negotiations

Peace negotiations represent a complex process and the research provided in chapter five is by no means able to generalise to all cases. But the theoretical points made reaffirm wider academic research on negotiations with important policy implications, namely that the process of labelling, denouncing adversaries, or in this case criminalising them, greatly inhibits potential opportunities for dialogue and subsequent negotiations (Bhatia, 2005; Haspeslagh, 2013; Toros, 2008, 2012). However this relates primarily to CPI and CPA, and if a state signals a willingness to compromise through decriminalisation – reversing CPI and CPA – this could enhance the credible commitment of the state (Kirschner, 2010). On the other hand, such decriminalisation will be constrained by informal criminalisation as the reversal of criminalisation is often framed as 'giving in' to terrorism or criminality undermining the state, signalling audience costs associated with the label (Moon and Souva, 2016); for example with the DUP in Northern Ireland or the Conservative Party in South Africa. In such cases decriminalisation needs to be understood both as a top-down and bottom-up process to ensure it does not alienate political elites from their support base and destabilise the wider peace negotiations.

The current negotiations over the reforming the Northern Ireland Executive illustrate a number of these challenges with the 'issue' of criminalisation still remaining firmly on the agenda in terms of the prosecutions of former state personnel, or more informally in terms of the debates over the Irish language. The recent speeches of Arlene Foster, leader of the DUP, and Gerry Adams, President of Sinn Fein, illustrate these points. For instance, speaking at the DUP party conference, Foster accused Sinn Fein of glorying "in the murder of the IRA", before going on to refer to the "many thousands of innocent victims" who suffered because of them (Foster, 2017). Therefore, the criminal framing still remains firmly embedded in political discourse and its impact is framed in terms of ongoing intergroup conflict: "[Sinn Fein] have shown nothing but disdain and disrespect for the national flag, the Royal Family, the Armed Forces, British symbols, the constitutional reality and the very name of this country" (Foster, 2017). In contrast, Gerry Adams reaffirmed the legitimacy of the Republican struggle stating: "Republicans had been at the heart of a culture of resistance - correctly standing strong against the brutality of the British state", before then also accusing the DUP of the same obstructionism with respect to language rights: "The DUP's opposition to these basic rights means there is no Executive" (Adams, 2017). The issues being negotiated are accordingly framed within the wider context of continuing intergroup polarisation. Even since CPE has been formally reformed the informal social reality it created remains. CPE at least gave expression to these tensions contributing towards the perception of intergroup threat, and so long as the informal framing continues to dominant the wider narratives it will be unlikely to get resolved.

Criminal record expungement and informal decriminalisation

Chapter six has already outlined a number of recommendations in relation to criminal record expungement in Northern Ireland and South Africa, arguing that the criminal records for non-violent offences typically represent a marginalised opportunity for conflict transformation. The high political costs associated with the records for violence offences are significantly lower for non-violent ones providing a potential opportunity for shared interests transcending intergroup rivalries. Moreover, if not addressed these records can contribute towards wider socio-economic issues which can undermine post-agreement peacebuilding, as has been the case in South Africa (Gear, 2003) and in

Northern Ireland (Jamieson, Shirlow and Grounds, 2010; McEvoy and Shirlow, 2009a). Therefore, this research would suggest that the expungement of records for non-violent offences should be raised as an important trust building measure in peace negotiations. This would apply to cases such as Sri Lanka where many individuals have criminal records for offences relating to their political opposition to the state.[1]

On the other hand, the records for violent offences are much more contentious. Such records are often mapped onto the political divisions and result in victims being played off one another. The victimhood debate in Northern Ireland demonstrates this with distinctions being drawn between legitimate and illegitimate victims (Brewer and Hayes, 2015; McEvoy and McConnachie, 2013). But the problem with this is that it reduces criminal record expungement to binary zero-sum 'solutions'. Instead, taking criminal records to represent a spectrum, a 'thicker' conceptualisation could enable many opportunities for political compromise which would increase the likelihood for an agreeable solution, at least for the main actors. Therefore, while the issue of criminal records for violent offences may not be resolved, its impact could be partially mitigated through, for instance, no longer making ex-prisoners declare their records in insurance or job applications. Psychosocial and socioeconomic issues could likewise be addressed without necessarily having to compromise on the formal record. However, this research acknowledges that the 'line' between violent and non-violent offences is not straightforward and will itself represent a central point of contention. For instance, is someone who finances an armed group guilty of a violent offence by association or in writing an article calling on people to engage in political violence? This thesis does not seek to resolve these distinctions but sets out a theoretical framework to at least begin to understand them.

[1] This could have been in relation to offences under Chapter XV of the Penal Code which criminalising "uttering words with deliberate intent to wound religious feelings" or under the Prevention of Terrorism Act 1978 Part V which proscribed certain publications.

Concluding Remarks

> "I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb. I have taken a moment here to rest, to steal a view of the glorious vista that surrounds me, to look back on the distance I have come. But I can rest only for a moment for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended" (Mandela, 1994a:751).

Mandela recognised that even having achieved the tremendous outcome of being the first Black President of South Africa, there still remained a multitude of challenges to address. Having overcome imprisonment, state repression, and legalised discrimination, the wider underlying issues of criminalisation persisted. This is reflected by the relationship between criminalising political expression and conflict transformation, as while certain formal measures can be reformed, the wider social realities persist. Transforming conflict does not end with the first 'hill', but requires both seeing the 'vista' behind and the challenges ahead. This thesis has, accordingly, sought to do both.

Through an in-depth analysis of new evidence regarding criminalising political expression this thesis has sought to reframe the conceptual understanding of criminalisation and its implications for conflict transformation. Looking backwards it has analysed CPE in four important conflict contexts, across two in-depth case studies, providing original theoretical arguments, thereby contributing towards the wider field of conflict analysis in terms of theory as well as new empirical evidence. Moreover, it analysed four further cases to demonstrate the evolving and reactive nature of CPE as it responds to and shapes the conflict context. In this way, the social realty constructed by CPE is used reactively to respond to new developments in the conflict, while also shaping the practices which follow. Furthermore, looking forwards the research provides a range of insights into the theory and practice of conflict transformation, which inform a wide range of state practices in terms of addressing political expression. This thesis has, therefore, highlighted the challenges and opportunities CPE poses for conflict transformation, providing an important theoretical base for further research to build upon.

Appendix 1. Interview Consent Form

I volunteer to participate in a research project conducted by Daniel Kirkpatrick from the University of Kent. I understand that the project is designed to gather information about perceptions of criminalisation from individuals within and following a conflict. I will be one of approximately 60 people being interviewed for this research.

1. My participation in this project is voluntary. I understand that I will not be paid for my participation. I may withdraw and discontinue participation at any time without penalty.

2. If I feel uncomfortable in any way during the interview session, I have the right to decline to answer any question or to end the interview.

3. The interview will last approximately 30-45 minutes. Notes will be written during the interview. An audio tape of the interview and subsequent dialogue will be made.

- ☐ **If I don't want the interview to be audibly recorded, please cross this box**

4. I agree to the following level of confidentiality

[Please check one of the following options]

- ☐ Full anonymity, all identifiable details will be removed or changed in the transcript to ensure that I will not be identified.
- ☐ No anonymity, I am happy to be identified by name and for my transcript to be transcribed directly.

5. I understand that the data from my interview relevant to this research project will be transcribed and I will be sent a copy of the transcript for approval before it is used in any publication.

[Please check one of the following options]

- ☐ I do not want to be sent a written version of my transcript and give my approval for it to be used in publication as agreed during my interview
- ☐ I would like a written version of my transcript to be sent to me

6. I understand that this research study has been reviewed and approved by the University of Kent's Ethical Review Board.

7. I have read and understand the explanation provided to me. I have had all my questions answered to my satisfaction, and I voluntarily agree to participate in this study.

8. I have been given a copy of this consent form.

_____	_____
My Signature	Date
_____	_____
My Printed Name	Signature of the Researcher

For further information, please contact: Daniel Kirkpatrick dk275@kent.ac.uk

Appendix 2. Sample interview questions for a South African lawyer[1]

1. As a defence attorney what do you find to be the most pressing issues for the criminal justice system in South Africa at present?

2. What do you understand by the term criminalisation?
    a. What do you believe its purpose or intention to be?

3. I understand that you've practiced law since before the end of Apartheid.
    a. What were the main challenges for you as a lawyer practicing under the Apartheid legal system?
    b. You were then involved in the writing the new constitution in 1994. What significance do you think the constitution held?
    c. Historically the relationship between the state and the judiciary was very close and led to perceptions of it being politicised. Do you think this was addressed and if so how?

4. One issue which has been raised before is there being a historical 'criminal' narrative, whereby the Apartheid state continually sought to criminalise political groups and actions.
    a. What impact do you think it would have had historically?
    b. Does this still exist in any way do you think?
    c. How do you think it was best addressed or could be addressed?

5. One frequently raised issue in Northern Ireland was that criminalising political acts - through censorship, banning of organisations, restrictions on events - blurred the boundaries between crime and politics historically but also now in the contemporary environment.
    a. Do you think this has been an issue for South Africa?
    b. Does it continue at all today and if so how has it developed from its historical nature under Apartheid?
    c. Did it affect public trust and confidence in the police or in the rule of law?
    d. What do you think would be best ways of addressing this?

6. A number of others interviewed have raised issues around historical crimes from Apartheid not being pursued.
    a. Do you think this is the case and if not why do you think people perceive it to be an issue still?
    b. In Northern Ireland prosecutions for those who committed politically motivated offences is deeply contested and polarised. Do you find the same to be true here?

7. My research looks at the politicising of criminal acts whereby an ordinary criminal offence is linked explicitly to a political motivation. And by linking a political

[1] As the interview methodology was semi-structured interviews, these questions were only used as a guide, not as a structured framework. They were designed to ensure all the central topics were covered in a way that engaged with the interviewees context, but only deferred to if the interview itself was going off topic.

motivation to an offence, the state essentially criminalises it alongside the act. For example it could be committing a murder for a particular organisation.

a. Why do you think the apartheid Government decided to do this historically - linking a political motivation to an offence - under the Terrorism Act and the various other pieces of legislation?
b. Do you think contemporary legislation - the Terrorism Act - continues to do this at all?

8. Do you think the issues of criminalisation are unique to South Africa or are there other cases which demonstrate similar patterns?

9. Having heard what it is I'm researching are there any particular individuals or organisations you would recommend contacting? If so, how would you recommend getting in touch with them?

Appendix 3. Risk assessment completed for South Africa

Hazard	Existing control measures
Travel delays/ disruption	Student engaging in fieldwork will complete the University on-line travel insurance notification form.
Ill health	Overseas Travel Health Questionnaire to be completed in advance of travel. University travel insurance covers medical expenses. Information is on University insurance WebPages – these should be read before travel. All recommended vaccinations will be taken. Student should consider personal safety and security when planning the trip and follow any advice given by interviewees.
Personal safety	Detailed itinerary should be left with family and office. Prepare travel routes in advance. Arrange for contact with office if away for more than one week. All interviews will be held in either public locations, university institutions, or else coordinated through trusted contacts in advance.
Road Travel	Due to crime on public transport a car will be rented for part of the fieldwork. Travel advice for driving will be consulted in advance and insurance cover will be purchased. Road standards are mostly very good, but some roads in remote areas are less well maintained and may have potholes. Drive cautiously, obey speed limits and avoid unfamiliar rural areas at night. Thieves have been known to employ various methods to make a vehicle stop (e.g. placing large stones in the middle of the road) enabling them to rob the occupants. Park in well-lit areas. Don't pick up strangers or stop to help apparently distressed motorists, as this is a technique sometimes used by hijackers.
Emergencies	Ensure office has an up-to-date copy of 'Personal Contact in the Event of an Emergency' form. Ensure mobile phone works in destination country. Check FCO website for guidance on travel in destination country. Local news will be checked regularly to avoid any protests or riots.
Crime	Police contact details will be noted for each location. Keep large amounts of money, expensive jewellery, cameras and phones out of sight. Don't change or withdraw large sums of money in busy public areas including foreign exchange facilities or ATMs. Thieves operate at international airports, and bus and railway stations. Keep your valuables safe and baggage with you at all times. Public transport will not be used. Travel will be contained to daytime. Travel and meeting will primarily be concentrated in public areas unless accompanied by a trusted local contact.

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