

Dealing with the Past?

An Overview of
Legal and Political Approaches
Relating to the Conflict
in and about Northern Ireland

Healing Through Remembering

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The views expressed herein do not necessarily state or reflect the personal views of all members of Healing Through Remembering

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Foreword

This report focuses largely upon the “top down” approaches to dealing with the past relating to the conflict in and about Northern Ireland. In discussing the range of key legal, statutory and political initiatives which have shaped the debate locally, Healing Through Remembering (HTR) is of course aware that there have been a wide range of civic, community-based or “bottom-up” processes some of which we have detailed in previous publications including the HTR 2006 report *Making Peace with the Past*. To capture fully the rich variety of community “bottom up” approaches in the areas of commemoration, living memorial museum, storytelling, truth recovery, acknowledgement, apology and reflection would have doubled what is already a lengthy report and we have therefore taken the decision to focus only on the key ‘top down’ initiatives.

This report is intended as a resource to inform the debate on dealing with the past. It assumes some basic knowledge both in terms of the conflict and also some of the better known relevant institutions. Again we have provided further detail on the origins and gestation of some of these initiatives in previous publications.

In considering this report the Board recognise that the societal response to dealing with the past needs to be addressed at a political level rather than through a purely legal approach and focus. As we have noted before, the current structures and processes, whilst largely based in the criminal justice system, have tended to focus on state actors and their activities rather than on the role of non-state actors in the conflict.

We hope that this report will enrich and stimulate the necessary on-going debate on how to deal with the past so as to build a better future both now and for the generations to come.

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BACKGROUND AND INTRODUCTION

Healing Through Remembering (HTR) is a cross-community organisation made up of a range of members with diverse political perspectives who share a common interest in exploring how to deal with the legacy of the past with regard to the conflict in and about Northern Ireland. The organisation was established in 2001, following a visit to Northern Ireland in 1999 by Alex Boraine, Deputy Chair of the South African Truth and Reconciliation Commission.

Since its inception, HTR has sought to contribute to the public debate in Northern Ireland on how to “deal with the past”. To that end, the organisation has held public consultations; organised events, seminars and conferences; provided training; and published a wide range of reports and other documents towards that overarching objective. In 2006 the organisation published *Making Peace with the Past: Options for Truth Recovery in and About Northern Ireland* which provided a detailed account of the local and international legal, social and political context of truth recovery. It also provided details on a range of practical options to deal with the past relating to the conflict in and about Northern Ireland (see Appendix One of this report) and discussed the advantages and disadvantages of each option. That report directly informed the deliberations of the government-appointed Consultative Group on the Past which reported in 2009.

The Consultative Group’s report will be discussed further below. At this point it is sufficient to say that it was not adopted. However, demands for the past to be excavated in the interests of truth and justice for a wide range of those who were impacted by the conflict have proliferated. In 2013, HTR decided that given the vast array of past-related initiatives which have occurred or are on-going, the organisation could make a further useful contribution to the public debate. Building upon the information contained in *Making Peace with the Past*, this report is therefore designed to offer an overview of key past-related legal, statutory and political developments in order to inform that on-going political and social debate.

Two important caveats should be borne in mind with regard to the discussions below.

As noted above, there is a vast array of on-going past-related work by grassroots community organisations which continues to make a huge contribution to “embedding” the process of conflict transformation in Northern Ireland, the Republic of Ireland and Great Britain. While some of that work is discussed briefly in this report, it is within the context of how such initiatives have intersected with the “top down” processes which are the primary focus of the report.

Second, given the scale and complexity of the work of some of the better known past-related legal and/or statutory institutions (e.g. the Historical Enquiries Team or the Office of the Police Ombudsman), again it is only possible to summarise key elements of each. However, readers who wish to delve more deeply into any of the initiatives discussed may do so by following up on the secondary sources cited in the bibliography.

REPORT OF THE CONSULTATIVE GROUP ON THE PAST AND POLITICAL REACTION

Although discussions on dealing with the past have been part of the public discourse since the negotiations which led to the Good Friday Agreement, the Consultative Group on the Past (CGP) was the first major government appointed body to attempt to develop an overarching strategy on the past. The Consultative Group on the Past (sometimes referred to as Eames Bradley, after its co-chairs Robin Eames and Denis Bradley) was established in June 2007 by then Secretary of State Peter Hain.¹ Its mandate was:

To consult across the community how Northern Ireland society can best approach the legacy of the events of the past 40 years; and to make recommendations, as appropriate, on any steps that might be taken to support Northern Ireland society in building a shared future that is not overshadowed by the events of the past.²

This report offers a brief overview of the recommendations of the CGP, considers some key elements of public reaction to its launch, in particular the recommendation with regard to a £12,000 recognition payment for those bereaved as a result of the conflict. It then outlines some of the principal findings of the government-led public consultation on the CGP report, as well as two further detailed considerations of its recommendation by the Northern Ireland Affairs Committee (NIAC) and the Commission for Victims and Survivors Northern Ireland (CVSNI). Finally we examine the responses of some of the other key political actors.

Following an extensive public consultation process,³ the Group launched its report in January 2009. The report included a total of 31 recommendations, the most important of which focused on the creation of a Legacy Commission with a mandate to oversee a range of processes designed to assist the process of reconciliation, justice and information recovery. The CGP Report envisaged that the Commission would operate for a timeframe of five years, that it would be chaired by an International Commissioner assisted by two other Commissioners and that the process would require an estimated budget of £300 million.

The Commission was envisaged as being mandated to carry out four strands of work:

- (a) to help society towards a shared and reconciled future through a process of engagement with community issues arising from the conflict;
- (b) to review and investigate historical cases;
- (c) to conduct a process of information recovery;
- (d) to examine linked or thematic cases emerging from the conflict.⁴

The element of the Legacy Commission tasked with identifying and engaging with community issues was also intended to administer appropriate funds designed to help build a shared and reconciled society. The CGP report also recommended that “Review and Investigation” of historical cases element of the Legacy Commission would subsume the investigative work previously carried out by the Historical Enquiries Team and the Office of the Police Ombudsman of Northern Ireland (discussed below). The Information Recovery element of the Legacy Commission was envisaged as involving both formal and informal efforts to provide answers to unresolved questions which are of importance to victims’ families, with the aim of bringing a measure of resolution. The forth strand of Thematic Examination was intended to explore themes emerging from historical cases and the conflict as a whole.

¹ “Press Statement: Hain announces group to look at the past”, *Northern Ireland Office (NIO)*, 22 June 2007. The other members of the Group were Jarlath Burns, Rev Lesley Carrol, Willy John McBride, James Mackey, Elaine Moore and David Porter

² *Report of the Consultative Group on the Past: Executive Summary*, http://cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report_sum.pdf.

³ The group received 290 written submissions, 2086 standardized letters and met privately with 141 individuals and groups.

⁴ “Report of the Consultative Group on the Past”, *Consultative Group on the Past (CGP)*, Belfast, 2009, p. 134, <http://go.qub.ac.uk/CGPreport>.

Figure 1 below illustrates the proposed Legacy Commission structure and the four strands of its mandate.

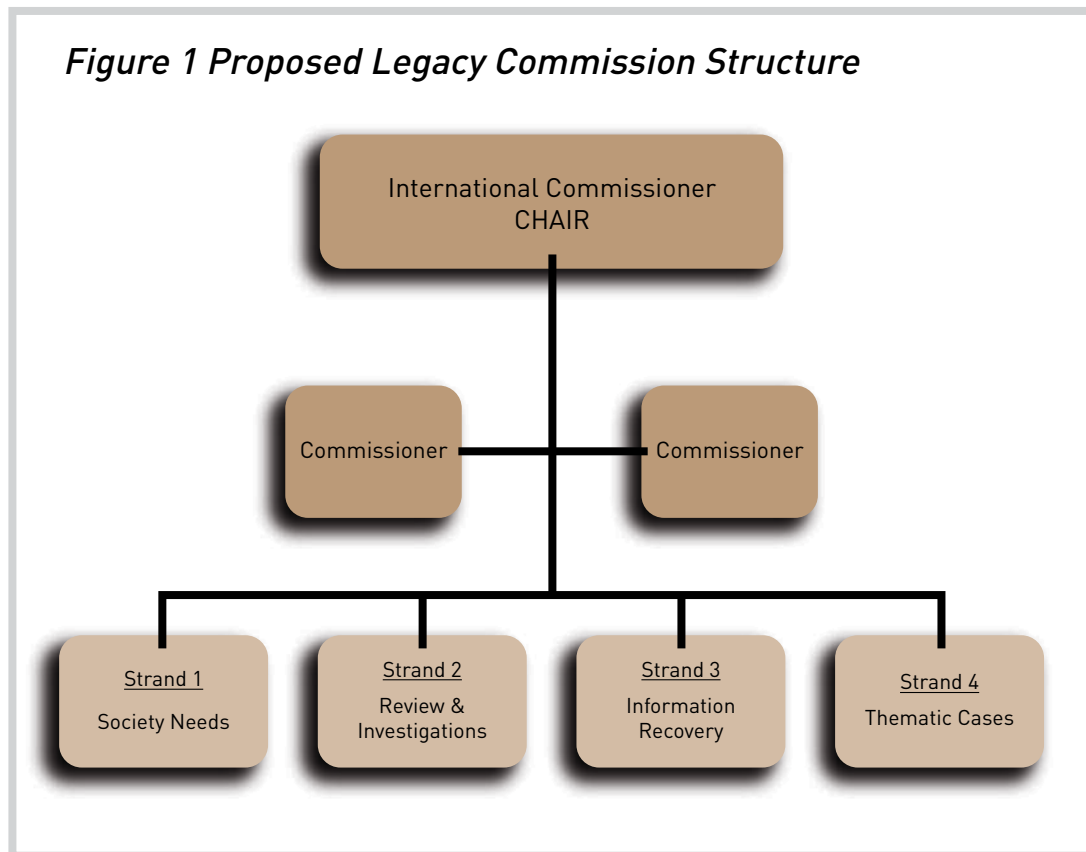


Figure 1 Proposed Legacy Commission Structure

The Report's detailed proposals were immediately overshadowed by the recommendation that a one-off "recognition payment" of £12,000 be paid to "[t]he nearest relative of someone who died as a result of the conflict in and about Northern Ireland, from January 1966" – in effect meaning that the families of Loyalist and Republican activists who were killed would also receive such a payment. The Report's launch at the Europa Hotel was marred by angry protests from different victims' groups.⁵ These were directed against the CGP members themselves, prominent Republicans present including Gerry Adams and other victims.⁶ The Recognition Payment issue was emblematic of the broader controversy over who could be termed a "victim" of the conflict, a dispute which continues to this day.⁷ As is detailed below, it appeared to shape the views of Unionist politicians, some elements of the victim sector as well as sections of the local media.⁸ The SDLP and the Alliance Party, which were otherwise supportive of the Report, criticised the recommendation and Sinn Féin referred to it as "a mistake".⁹

5 Owen Bowcott, "Protests disrupt launch of Northern Ireland Troubles payout proposals", *The Guardian*, 28 January 2009.

6 Footage of the launch is available at RTE, "Angry Scenes at Troubles Report Launch", 28 January 2009, <http://www.rte.ie/news/2009/0128/troubles.html>.

7 The definition of a victim adopted by the Consultative Group on the Past was the definition contained in the the Victims and Survivors (Northern Ireland) Order 2006, the legislation which established the Northern Ireland Commission for Victims and Survivors. Article 3 (1) of that Order states "In this Order references to 'victim and survivor' are references to an individual appearing to the [F1Commission] to be any of the following—

(a) someone who is or has been physically or psychologically injured as a result of or in consequence of a conflict-related incident;

(b) someone who provides a substantial amount of care on a regular basis for an individual mentioned in paragraph (a); or (c) someone who has been bereaved as a result of or in consequence of a conflict-related incident.

8 The previous weekend the front page of the Irish News had carried the headline "Butchers, Bombers, Victims – They are All the Same." The photographs below juxtaposed Lenny Murphy (leader of the UVF Shankill Butchers), Thomas Begley (the IRA member killed in the Shankill bomb) and 9 year-old Patrick Rooney, the first child killed in the conflict. See *Irish News*, 24 January 2009. The *News Letter* suggested that "Twisted Logic Flaws Report on Troubles" and carried a range of reports condemning the recommendation as an "insult to victims". *Newsletter*, 29 January 2009. The *Belfast Telegraph* editorial suggested that the recommendation was "misjudged, ham fisted and, to many people, an offensive suggestion which should be rejected by the government." It, nonetheless, concluded that, this recommendation apart, the CGP Report "deserved close scrutiny." *Belfast Telegraph*, 28 January 2009. See *BBC News*, 25 February 2009 for a range of political reactions to the report recommendations.

9 "Sinn Féin Conference Blow for Eames Bradley", *Belfast Telegraph*, 20 February 2009.

The Northern Ireland Commission for Victims and Survivors (CVSNI) was the main organisation to make an argument in favour of the recognition payment but its views were largely drowned out in the public clamour.¹⁰ Despite the Secretary of State's withdrawal of the proposal regarding a Recognition Payment within a month (and prior to the commencement of the formal consultation),¹¹ there is little doubt that the very public dispute significantly shaped public perceptions of the CGP Report as a whole. For example, in a public survey of attitudes to the CGP Report commissioned by the CVSNI in November 2009, 67% of respondents were aware of the £12,000 payment proposal but few stated an awareness of the Group's other recommendations. Indeed, only 36% stated that they had actually heard of the Consultative Group.¹²

The British government instigated a consultation between 24 June and 2 October 2009 and eventually published a summary of the findings in July 2010. A total of 246 responses to the consultation were received: 72 from organisations, parties or professionals and 174 from individuals. A summary of those responding yes or no to recommendations was subsequently made public but without the discursive elements of response. It indicated that a significant number of the individual respondents had indicated their "rejection of the Report in its entirety, without offering comments on the recommendations".¹³

The Northern Ireland Affairs Committee (NIAC) also responded to the recommendations made by the CGP. Having taken oral and written evidence from a wide range of interested parties, the NIAC praised the work of the CGP and issued a number of findings.¹⁴ It concluded;

- That the absence of cross-community consensus meant that the Legacy Commission was not viable at this juncture.
- That the proposed Legacy Commission would only add value if it were to take over the functions of bodies such as the Historical Enquiries Team (HET) and Office of the Police Ombudsman (OPONI). Unless it could be shown that a legacy commission taking on these functions would be more efficient, effective and economical, historical investigations should continue to be the responsibility of the HET and OPONI.
- That the proposed mechanisms for truth recovery and thematic examination did not represent viable courses of action with which families, victims and paramilitaries would engage.
- That the definition of a "victim" provided by the Victims and Survivors (Northern Ireland) Order 2006 should remain so until such time as an alternative gains cross-party support within the Assembly.
- That for truth recovery to work, it will require an open and honest engagement by those involved in past events. While such engagement may only be achieved if participants were guaranteed some amnesty in return for their openness and honesty, the Committee was not convinced that either Northern Ireland or the rest of the United Kingdom was ready at present to contemplate such a step.

As noted above, the other major organisation to respond in detail to the CGP recommendations was the CVSNI. In addition to commissioning a survey on public attitudes to the CGP recommendations published in December 2009 (discussed above),¹⁵ the CVSNI also embarked on a process of consultation with victims and interested members of the public, political parties, civic leaders, community activists, public bodies and agencies. Following that consultation, in June 2010 the CVSNI itself made a series of recommendations to the British government.¹⁶

With regard to the Legacy Commission, the CVSNI concluded that while "the Consultative Group identified the key ingredients for a comprehensive treatment of the past", the "implementation strategy was wrong", imposing a top-down structure that lacked the trust and confidence of key stakeholders.¹⁷ The suggestion of an amnesty was also rejected as "a formal denial of justice to victims and survivors".¹⁸

10 Commission for Victims and Survivors Northern Ireland (CVSNI), *Advice to Government : Dealing with the Past*, Belfast: Commission for Victims and Survivors, 2010.

11 "Woodward rules out Troubles Cash", *BBC News*, 25 February 2009.

12 CVSNI, *Public Opinion - Tribunals of Inquiry and Consultative Group on The Past*, Belfast: Commission for Victims and Survivors, 2009.

13 Northern Ireland Office, *Summary of Responses to Consultation. Dealing with the Past in Northern Ireland: The Recommendations of the Consultative Group on the Past*, 2010.

14 Northern Ireland Affairs Committee, *The Report of the Consultative Group on the Past in Northern Ireland*, London: Her Majesty's Stationary Office, 2009.

15 CVSNI, *Public Opinion*, 2009.

16 CVSNI, *Advice to Government*, 2010.

17 CVSNI, 2010: 15, 16.

18 CVSNI, 2010: 28.

The CVSNI also urged the British government to convene a six month time-limited talks process with the support of the Irish government, which would exclude the ministers of the Executive (so as not to interfere with the smooth running of government) but include members of civil society as well as victims and survivors. This “design process” would also consult with specialists and produce agreed proposals to go before the Northern Ireland Assembly and Dáil Éireann within a year of the commencement of the process.

The Response of the British Government

As noted above, it was the Labour government led by Tony Blair which established the CGP in 2007 and which instigated the consultation process on its recommendations in 2009. In the run up to the 2010 general election, little was done in terms of progressing the report, to the evident frustration of some of the CGP members. In addition to responding to the various public inquiries already underway and making a decision on the Finucane case in particular (discussed below), the only clearly stated position of the new government was to seek to avoid “any more costly open-ended inquiries”.¹⁹ After the Conservative/Liberal coalition government was formed in May 2010, one of the first major responsibilities of the new Prime Minister was to respond to the Saville Inquiry report into Bloody Sunday (discussed further below). In that debate Cameron stated:

....we do not agree with some parts of the Eames-Bradley report, particularly the idea of universal recognition payments; we do not think it is right to treat terrorists and others in the same way. I think that it is right to use, as far as is possible, the Historical Enquiries Team to deal with the problems of the past and to avoid having more open-ended, highly costly inquiries, but of course we should look at each case on its merits.²⁰

As previously discussed, the Coalition Government published the results of the Northern Ireland Office consultation on the CGP in July 2010. In the interim, the new Secretary of State for Northern Ireland Owen Paterson announced that he was engaging in a “listening process” considering the various options for dealing with the past.²¹ In October 2010, Paterson noted that the CGP report contained “many useful and interesting ideas” and represented “a highly significant contribution to the debate”. He also noted that the report was overshadowed by the Recognition Payment recommendation.²² As discussed further below (section on the current positions of the different political actors), there was significant cynicism across the political divide amongst Northern Ireland politicians and civil society about the level of political energy emanating from the British government on seeking an overarching process to deal with the past.

The Response of Other Political Actors to the CGP Report

As noted above, the immediate political responses to the CGP report were dominated across the political spectrum in opposition to the “Recognition Payment” recommendation.

The Democratic Unionist Party (DUP), in a formal response authored personally by DUP leader Peter Robinson, criticised the CGP’s failure to distinguish between “innocent victims” and terrorists and commented that “many had concluded [that the CGP Report] was already dead and buried under the weight of public scorn”.²³ The DUP went on to question whether “as a result of the divisions re-opened by Eames-Bradley, that attempts to force this issue of the past could directly threaten our current peace and our future prosperity and well-being”.²⁴ Robinson also questioned whether dealing with the legacy of the past, while a highly desirable goal, “may and probably will prove beyond us”.²⁵ In concluding that the CGP report did not provide the basis for dealing with the past, Robinson also noted his surprise that the suggestion of “a detailed proposal for an oral and video archive for victims and survivors of The Troubles” had not been taken up by the CGP.

19 See e.g. Hansard, House of Commons Debates, 15 December 2010: Col. 891

20 Hansard, House of Commons Debate, 15 June 2010: Col. 743

21 “Paterson Engages on the Past”, *NIO Press Release*, 21 June 2010.

22 Owen Paterson, “Leonard Steinberg Memorial Lecture: Building The Future; Dealing With The Past”, 16 November 2010.

23 Democratic Unionist Party, *Dealing with the Past in Northern Ireland: The Recommendations of the Consultative Group On The Past. Response to the Northern Ireland Office Consultation Paper*, written by the Rt Hon Peter Robinson, MP MLA on behalf of the DUP, November 2009, p.4.

24 Ibid., p. 5.

25 Ibid., p.5.

By the summer of 2010 senior DUP representative Jeffrey Donaldson was describing the CGP report as “dead in the water”.²⁶ In its 2011 manifesto, the DUP repeated its commitment to seek to establish an oral and video archive for victims and survivors of the conflict in and about Northern Ireland. The Party also pledged to continue to support the work of the Historic Enquiries Team (HET), to support victims and to “resist attempts by Republicans and elements of the media to rewrite the history of the last four decades or justify terrorist campaigns.”²⁷

While the Ulster Unionist Party (UUP) did commit to giving “careful consideration to the full Eames Bradley report”, Sir Reg Empey suggested that the damage done by the Recognition Payment issue was such that:

...it is impossible to envisage how a report that has provoked such justifiable outrage with its failure to distinguish between terrorists and victims will be able to offer a way forward for our society in addressing the past.²⁸

Similar to the DUP, UUP representatives have continuously questioned the viability of a truth recovery process.²⁹ In June 2012 Party Leader Mike Nesbitt published a comprehensive outline of the party’s position on dealing with the past, discussed further below.³⁰ In discussing the CGP report, the Ulster Unionist Party disagreed with the need for either a Legacy Commission or a Reconciliation Forum, arguing that such “additional layers of governance” were unnecessary.³¹

Nevertheless, amongst the nationalist political parties, the reception of the CGP report has shifted markedly since the report was launched.

Sinn Féin’s initial reaction to the CGP report was highly critical. In a public debate in West Belfast shortly after the report was published Sinn Féin President Gerry Adams argued that the report was “...deeply flawed and incapable of establishing the Independent International Truth Commission which we believe is necessary”.³² Adams pointed out that that the CGP had been appointed by and given its terms of reference by the British Government, which (he stated) significantly undermined its neutrality. He also suggested that the appointment of a Legacy Commission by the British Government, as suggested by the report, would fall far short of what was required of an independent and international truth recovery institution.³³ While Sinn Féin has continued to insist on the need for an independent truth commission to deal with the past, there has been a perceptible softening of the party’s stance on elements of the CGP proposals in the intervening years. For example, in July 2010 Sinn Féin MLA Raymond McCartney noted that it was “hardly surprising” that there was a lack consensus on the CGP recommendations and that the ensuing lack of agreement was being used as an “excuse to park this issue” by the British Government. McCartney also said that such political consensus “should not be elevated to the status of a precondition”.³⁴

26 “Eames Bradley is Dead in the Water”, *News Letter*, 21 July 2010.

27 DUP, *Manifesto 2011: Moving Forward*, p. 21.

28 Ulster Unionist Party, “Press Release: Report Fails to Distinguish Between Victims and Terrorists”, 29 January 2009.

29 “Despite all of the talk about a truth commission or truth recovery process, does anyone here believe that he or she would get the truth from someone who went out and murdered his or her neighbour and who is still in self-denial about it? Absolutely not; it is absolute nonsense. I will tell you what one would get from a truth recovery process. One would get some truths from certain people; I acknowledge that. One would get half-truths from others. From the vast majority, however, one would get only a bundle of lies or an absolute blank where nothing whatsoever is told. It is time that people acknowledge the situation.” Tom Elliot MLA, Northern Ireland Assembly Official Report, 10 October 2011.

30 “Ulster Unionists launch paper on ‘Dealing with the Past’”, 11 June 2012, available at <http://uup.org/news/902/21/Ulster-Unionists-launch-paper-on-Dealing-with-the-Past>.

31 *Ibid.*, p.8.

32 “Consultative Group on the Past report is deeply flawed – Adams”, 25 March 2009, available at <http://www.sinnfein.ie/contents/15634>.

33 “*Dealing with the Legacy of Conflict: What Does West Belfast Need?*”, Public debate organised by Relatives for Justice, Coiste na n-Iarchimi, and the Falls Community Council, 25 March 2009, reported in *An Phoblacht*, 26 March 2009.

34 Derry Sinn Féin, “McCartney Comments on Eames/Bradley Consultation Release”, 20 July, 2010.

The other major nationalist political party, the SDLP, has been more positive about the work of the Consultative Group since it was established. Justice Spokesperson Alex Attwood referred to the CGP as “the last best hope for dealing with the past” while the Group was still engaged in its process of deliberation and consultation.³⁵ The then SDLP leader Mark Durkan called for the report to be given “full consideration and careful reflection in and around and in its specific recommendations”. He also suggested that given the level of the engagement by the group with a range of victims and others, “...it should not have its work completely rubbished by those who have a poorer record in engagement or sensitivity”.³⁶ Although other Party Members appeared more ambivalent,³⁷ this broadly supportive approach from the SDLP has continued.

The Alliance Party has also been quite active on matters relating to dealing with past. In its formal response to the CGP Report, the Party was broadly supportive of the report. Alliance leader David Ford said:

The controversies surrounding the £12K recognition payment have shadowed the real value that does lie within the report of the Consultative Group on the Past. While we are not uncritical of particular aspects of the report, we believe that it is a credible platform on which to build. We do endorse the central recommendation for a legacy commission with four separate elements, namely: reconciliation; investigations; information recovery; and thematic issues.³⁸

Alliance was also critical of the Northern Ireland Affairs Committee Report on the work of the CGP, criticising it as a missed opportunity to show leadership on the issue. Reiterating the party’s view that the CGP recommendations provided “a foundation upon which to build”, Justice spokesperson Stephen Farry said:

... Rather than take the opportunity to offer some fresh thinking and provide leadership to overcome the considerable political differences on the way forward, the NI Affairs Committee has essentially accepted the status quo and used political differences as a rationale for inaction.³⁹

Finally, with regard to in terms of the Irish Government, the former Taoiseach Bertie Ahern welcomed the establishment of the CGP and met with the group during its consultation process.⁴⁰ After the launch of the report, the then Minister for Foreign Affairs Micheál Martin met with the families of those killed by the British Army in Ballymurphy (discussed below) and said that the Irish government would “reflect carefully” on the report before deciding on the way forward. He also stated that he was not surprised at the reaction to the Recognition Payments recommendation, notwithstanding the fact that a similar payment in the Republic had generated little publicity. Martin continued:

The pity though is that that one proposal has masked some of the most substantive proposals, such as the legacy commission . . . It is a pity that the rest of the report has been overshadowed by the controversy surrounding the payments issue.⁴¹

In his subsequent evidence to the Oireachtas Joint Committee on the Implementation of the Good Friday Agreement, CGP Vice-chair Denis Bradley reported that he had originally asked the Republic’s Department of Foreign Affairs (DFA) to contribute financially towards the work of the CGP (which the DFA declined to do) and that since the CGP had been established “...the Department has worked very closely and constructively with us and we have been in regular contact with its representatives”.⁴²

35 SDLP Press Release, “Attwood: Eames/Bradley Last Best Hope For Dealing With The Past”, 29 May 2008.

36 SDLP Press Release, “Durkan Comments On Eames Bradley Report”, 29 January 2009.

37 SDLP Press Release, “Attwood: Many Concerns On Eames/Bradley Proposals”, 29 January 2009.

38 Alliance Party, “Submission on Dealing with the Past”, 1 October 2009.

39 Alliance Party, “Press Release: Alliance Disappointed with Commons Report on Dealing with the Past”, 16 December 2009.

40 Statement by the Taoiseach, Mr. Bertie Ahern T.D., in Dáil Éireann on 30 January, 2008. At a speech to the New York-based Council on Foreign Affairs the previous year, Mr Ahern had indicated his support for a South Africa-style truth commission or some other truth recovery mechanism. See “Ahern Backs South Africa-Style Truth Review”, *Irish Times*, 14 March 2007.

41 “Government to Reflect Carefully on Eames Bradley Says Martin”, *Irish Times*, 30 January 2009.

42 Joint Committee on the Implementation of the Good Friday Agreement Debate, “Report of the Consultative Group on the Past: Discussion”, 5 March 2009.

Conclusion

In summary, the report of the Consultative Group on the Past continues to provide an important framework within which to have any informed or substantive discussions on dealing with the past relating to the conflict in and about Northern Ireland. That said, there is almost universal political recognition, including by some of the Group members themselves, that the “recognitions payment” issue together with the choreography of the launch itself seriously undermined the potential for measured discussion on the actual contents of the report itself at a political or societal level. The change in government in Britain, from Labour which had established the CGP to the Conservative/Liberal Coalition, and the economic preoccupations of the government in the Republic, clearly further reduced the possibility of the report’s recommendations being “pushed” by the two governments.

POSITION OF POLITICAL ACTORS ON “DEALING WITH THE PAST”

The section below offers an up to date overview of the stated positions of the different political actors on “dealing with the past” relating to the conflict in and about Northern Ireland. It also examines whether there is space for “teasing out” the respective stances adopted by the different political stakeholders as part of the on-going Panel of the Parties negotiations.

The British Government

As noted above, the current British Government has previously expressed some reservations about the CGP (CGP) report as a method of dealing with the past. In a major speech on the past in 2010, then Secretary of State Owen Paterson discussed a number of options. In that speech, like Prime Minister David Cameron, he praised the on-going work of the Historical Enquiries Team. He pointed out that the Billy Wright Inquiry (discussed below) had cost £30 million over six years but failed to answer some basic questions and not satisfied the family. He appeared to rule out simply “drawing a line under the past”. Referring to the “Pact of Oblivion” in Spain following the Spanish Civil War, Paterson noted that he “remained doubtful whether Northern Ireland was ready to shut down its past in this way”. He also pointed out that an amnesty had been central to that process in Spain and noted that such an initiative “would not be appropriate or acceptable in the United Kingdom”.⁴³

With regard to the CGP’s recommendation to establish a Legacy Commission, Paterson also cast doubt as to whether or not paramilitaries would engage, raised the issue of costs – “potentially hundreds of millions” – and also raised the issue of consensus, saying:

If there is no consensus on a Legacy Commission then I doubt there would be a strong appetite in Northern Ireland for a full blown Truth and Reconciliation Commission on the South African model.⁴⁴

Paterson went on to commend “some kind of mechanism for information sharing and recovery”. Citing the Spanish legislation introduced in 2007 which included provision to establish a Historical Memory Documentary Centre in Salamanca with public access to archives and documents, the then Secretary of State went on to suggest that such a process would be contingent upon “the involvement of all those involved in the events of the past forty years” including government, and that there might “ultimately be a role for a panel of historians to interpret all the available material with a view to producing the authoritative history of the troubles”. Pledging to continue to explore all of these ideas with relevant parties and to make further announcements in the New Year (2011), Paterson concluded “historians might just have more appropriate skills than lawyers in helping to resolve the past”.⁴⁵

At the Conservative Party Conference in October 2011, Paterson argued again that “I do think the HET route is the right one” and that there was no need for a “shiny, glossy new organisation”.⁴⁶ He also appeared to rule out international involvement in a truth recovery process, saying that a process chaired by “some blond Finn of impeccable integrity” would not get to the truth.⁴⁷ During his tenure as Secretary of State⁴⁸ Paterson continuously stressed his view of the role of the British Government is an enabling one: “We do not own the past, however. We can help facilitate, but ultimately the solution is very much in local hands and depends on local groups and local parties reaching consensus”.⁴⁹

In January 2012, Paterson announced that he was commencing a series of meetings with local political parties to discuss ways of dealing with the past.⁵⁰ In February 2012, he confirmed to a Dáil Committee that, in his view, “the Eames Bradley Group had failed because there was no consensus”.⁵¹ Paterson continued to maintain that he was engaged in meeting with local parties in Northern Ireland on dealing with the past, although, as noted, some of the local parties themselves disputed that any serious engagement was taking place.⁵²

43 For a detailed discussion on the applicability of amnesties or amnesty like measures in Northern Ireland, see K.McEvoy, L. Mallinder, L. Moffatt and G. Anthony, *Amnesties, Prosecutions and the Public Interest in Northern Ireland*, Belfast: Queens University Belfast, 2013.

44 Owen Paterson, “Leonard Steinberg Memorial Lecture... Dealing With The Past”, p. 19.

45 Ibid., p. 20.

46 “Paterson: Truth body will not work for Northern Ireland’s Troubles legacy”, *Belfast Telegraph*, 5 October 2011; “Paterson Rules Out Truth Commission”, *UTV News*, 4 October 2011.

47 “Owen Paterson Runs Into Trouble Over Truth Commission Jibe”, *Daily Mirror*, 5 October 2011.

48 Paterson was replaced as Secretary of State for Northern Ireland by Theresa Villiers in a cabinet reshuffle in September 2012.

49 “Legacy of the Past”, Hansard Debates, House of Commons, 25 January 2012: col. 281.

50 “Sinn Féin Signs up for Owen Paterson’s Troubles Legacy Initiative”, *Belfast Telegraph*, 11 January 2012.

51 *Developments in Northern Ireland: Discussion with Secretary of State for Northern Ireland*, Oireachtas Joint Committee on the Implementation of the Good Friday Agreement, 2 February 2012.

52 Hansard Written Answer, House of Commons Debate, 14 May 2012, c2W.

Owen Paterson was replaced by Theresa Villiers as Secretary of State for Northern Ireland in September 2012. Villiers has kept quite a low profile on past-related matters compared to Paterson. However in September 2013, she made a speech at the Annual British Irish Association Conference where she rejected the criticism that “nothing was happening on the past,” rejected the further use of public inquiries and stated that the lack of an “overarching process” was because of the lack of local consensus on the issue.

Villiers also went on to stipulate:

Any mechanisms for dealing with the past needs to be fully consistent with maintaining the integrity of the rule of law. They must have regard to the fiscal position in which the UK government finds itself as a result of the deficit. And as our manifesto set out and the Prime Minister re-iterated in his statement on Bloody Sunday, we will never put those who uphold the law on the same footing as those who seek to destroy it. For us, politically motivated violence from whatever side was never justified and we will not be party to attempts to re-write history by legitimising terrorism.⁵³

In summary, the position of the current British Government in terms of dealing with the past since the publication of the CGP has had a number of strands. This has entailed continuous praise for the work of the Historical Enquiries Team;⁵⁴ a clear opposition to the establishment of new public inquiries; opposition to the CGP suggestion of a legacy commission or an equivalent truth commission-like body, particularly one which involves international actors; a repeated emphasis on the lack of local political consensus in Northern Ireland as the justification for no substantive new developments in terms of dealing with the past; support for a historical or archival based approach to truth recovery, and a continuous emphasis on the need for consultation and dialogue with local stakeholders – albeit without clear direction or stewardship of such a process on the part of the British Government.

The Irish Government

The current Irish Government has remained publicly engaged on a number of the themes concerning Northern Ireland’s past. For example, as is discussed further below, the current Taoiseach has given fulsome support to the family of Pat Finucane in their campaign for a public inquiry into his murder and disagreed strongly with the British Government’s refusal to grant such an inquiry.⁵⁵ The Taoiseach has also raised issues relating the British Government’s position on the the Ballymurphy killings, the lack of full cooperation from the British authorities on the Dublin/Monaghan bombings and a range of other matters.⁵⁶

The Tánaiste, Eamon Gilmore, responding to the DUP call for an apology from the Irish government regarding the origins and approach to Republican violence, stated that “[s]uccessive Irish governments worked very hard to crack down, and very successfully crack down, on the IRA and on terrorist organisations”.⁵⁷ Notwithstanding these activities, there has been a strong sense that given the economic downturn in the Republic and its associated social and political consequences, legacy issues related to Northern Ireland have perhaps been less dominant in terms of government priorities than they once were.⁵⁸

In September 2013, the Irish Tánaiste and Minister for Foreign Affairs acknowledged that both the British and Irish Governments (and not just the devolved NI Executive) continue to bear responsibilities for the past. He went on to say that both governments must be open to “ask questions of ourselves and our own role”.⁵⁹

53 Theresa Villiers, “Keeping Northern Ireland on a Steady Footing”, 6 September 2013. Available at <https://www.gov.uk/government/speeches/keeping-northern-ireland-on-a-steady-footing>.

54 The implication of recent developments regarding the public credibility of the HET are discussed further below.

55 “Taoiseach and Prime Minister Clash Over Finucane Inquiry,” *Irish Examiner*, 13 March 2012.

56 “Irish PM Anglo-Irish Relations are Better than Ever”, *Daily Telegraph*, 12 January 2012.

57 “Republic Should Apologise for IRA Role”, *UTV News*, 18 September 2012. The leader of the Fianna Fáil opposition Micheál Martin also rejected the call, stating that it was “a fiction too far” on the part of the DUP that his party was the “mid-wife to the Provos” as claimed by DUP MLA Gregory Campbell. See “Martin rejects claim Fianna Fáil was ‘Midwife of Provos’”, *Irish Times*, 25 September 2012.

58 A. Pollak, “Dangerous for Dublin to Turn Away from the North”, *Irish Times*, 3 January 2012.

59 “...we [the Irish government] need to acknowledge the neglect and disappointment of nationalists who feel that Irish governments did too little to address, or even recognise, their plight in the decades before the Troubles, notwithstanding the ground breaking initiatives undertaken by Seán Lemass. We need to assure them that this Irish government is engaged and will continue to be. We need to acknowledge those unionists who feel that, notwithstanding the sacrifices made by members of an Garda Síochána and the Irish Army throughout the Troubles, the Irish state could have done more to prevent the IRA’s murderous activities in border areas. We also need to find new ways of approaching our history – not simply a decade of commemoration but a decade of reconciliation too.” Eamon Gilmore, “Speech at the British Irish Association Conference”, 7 September 2013. Available at <http://www.dfa.ie/home/index.aspx?id=89773>.

The Democratic Unionist Party

In its 2011 manifesto, the DUP repeated its commitment to seek to establish an oral and video archive for victims and survivors of the Troubles. The DUP also pledged to continue to support the work of the HET, to support victims and to “resist attempts by Republicans and elements of the media to rewrite the history of the last four decades or justify terrorist campaigns.”⁶⁰ In February 2012, just before a meeting with the Secretary of State on dealing with the past, the DUP confirmed their opposition to an amnesty process, questioned whether a truth process would be viable and suggested the need for suitable venue for any story telling archive.⁶¹ More recently the DUP has joined a number of victims groups from the Unionist community, most notably the families affected by the Kingsmills murders (discussed below), in calling for an official apology from the government of the Republic of Ireland for its role in the origins of the Provisional IRA and for what the DUP perceived as a lack of application on the part of successive governments in pursuing IRA suspects living in that jurisdiction.⁶²

The Ulster Unionist Party

Similar to the DUP, UUP representatives have consistently questioned the viability of a truth recovery process.⁶³ In June 2012 Party Leader Mike Nesbitt published a comprehensive outline of the party’s position on dealing with the past. The UUP restated its continued support for reviewing historical cases (with a view to prosecution) but suggested that historical reviews should not be limited to cases which resulted in a death. Noting the CGP discussion on information recovery rather than truth recovery, the UUP interpreted this expression as evidence that “even the CGP could not foresee truth recovery”. The UUP recommended that the Secretary of State should explore the possibility of a series of “acknowledgement statements” from all sides, including “some recognition of the impact and hurt caused by their actions”. The Party also stated its support for “story-telling initiatives” including that “all sides should record their memories and experiences”. It further suggested that the current mechanisms for dealing with the past are untenable - “...imperfect, incomplete and imbalanced, and are serving to re-write history, painting the state and its security force personnel as the villains”.⁶⁴ The UUP concluded with a direct criticism of the British governments position (regarding the lack of local consensus on dealing with the past) by asserting “...it is unacceptable to hide behind the assertion that these matters are now devolved, not least because many of the legal issues are European and best addressed by sovereign governments, not devolved administrations”.⁶⁵

60 DUP, “Manifesto 2011”, p. 21.

61 “What would be the purpose of having a truth commission when we know without a doubt that the terrorists will not be coming forward to tell the truth? All you would get, once again, would be the police and army in the dock and history being distorted. For any talks to succeed there must be an acceptance that part of the problem in dealing with the past in Northern Ireland is the refusal by some to accept the part they played in creating these problems. Any process dealing with the past must not include an amnesty or proposal which could allow some individuals to escape justice for their actions.” Speech by Peter Robinson to Newry and Armagh DUP Association Annual Dinner, reported in “Truth Agency Would Fail. Says Robinson,” *Irish Times*, 27 February 2012. See also “Maze Site Could be Troubles Story-telling Archive”, *BBC News*, 28 February 2012. While the DUP had originally suggested that the Maze/Long Kesh might be a suitable venue for such a storytelling archive, in August 2013, Mr Robinson withdrew DUP support for the Maze/Long Kesh project. “DUP Withdraws Support For Peace Centre On Maze Prison Site”, *Irish Times*, 15 August 2013.

62 “Republic Should Apologise for IRA Role”, *UTV News*, 18 September 2012.

63 “Despite all of the talk about a truth commission or truth recovery process, does anyone here believe that he or she would get the truth from someone who went out and murdered his or her neighbour and who is still in self-denial about it? Absolutely not; it is absolute nonsense. I will tell you what one would get from a truth recovery process. One would get some truths from certain people; I acknowledge that. One would get half-truths from others. From the vast majority, however, one would get only a bundle of lies or an absolute blank where nothing whatsoever is told. It is time that people acknowledge the situation.” Tom Elliot MLA, Northern Ireland Assembly Official Report, 10th October 2011.

64 Ulster Unionist Party, *Dealing with the Past*, 11 June 2012, p. 8.

65 Ibid., p.8.

Sinn Féin

In his Ard Fheis speech of 2011, Deputy First Minister Martin McGuinness stated the Republican preference for an international truth commission.⁶⁶, a call made a number of times before and since. In March 2012 Sinn Féin chairperson Declan Kearney published an article in *An Phoblacht* where he urged Republicans not to shy away from “uncomfortable conversations” which needed to be had in the interests of reconciliation.⁶⁷ In the same piece, he suggested:

regardless to the stance of others, we should recognise the healing influence of being able to say sorry for the human effects of all actions during the armed struggle...This is a time for republicans to free up our thinking, to carefully explore the potential for taking new and considered initiatives in the interests of reconciliation.

Kearney has subsequently held a number of public discussions in which the relationship between apology, truth, reconciliation and a number of the other themes discussed in the CGP report were openly debated.⁶⁸ At the 2012 Ard Fheis, McGuinness confirmed media speculation that the process led by Kearney included engagement by Republicans in a process of dialogue with prominent Protestant church leaders, victims, Loyalist leaders and others concerning ways of dealing with the past.⁶⁹

Kearney made another speech at Westminster in October 2012 on the need for reconciliation which also received significant media attention. Kearney was highly critical of what he termed a “failure of leadership” amongst political unionism regarding their attitude to dealing with the past as well as the British Government which he accused of using the precondition of gaining a consensus on dealing with the past as “aimed at pursuing gridlock, by making a demand which cannot be delivered on”.⁷⁰ In September 2013 Sinn Féin leader Gerry Adams reiterated the criticism made by Martin McGuinness in 2012 that the British government had “shelved” the CGP proposals, stating that it was part of a broader strategy designed to “frustrate finding a way forward for dealing with the past”.⁷¹

The SDLP

In May 2010, following the release of the Saville Report into Bloody Sunday (discussed below), Mark Durkan urged that the CGP Report should be revisited, stating that “[w]hilst there are some of the specific recommendations that would have to be tweaked here and there, Eames-Bradley can work”.⁷² In its 2011 manifesto the SDLP did not discuss the issue of truth recovery or the other key themes in the CGP report, focusing instead upon support for victims.⁷³ However in 2012, speaking at a rally to commemorate the “Ballymurphy Massacre” (discussed below), the party’s spokesperson on victims, Alex Attwood, called for “the Irish Government to “join with us in the SDLP as well as victims and families to lead the argument for a robust process of truth”.⁷⁴ In June 2013, as part of a heated Assembly debate which ultimately led to the exclusion of former politically motivated prisoners from taking positions as Special Advisors at Stormont, SDLP leader Alistair McDonnell again reiterated his party’s support for the CGP. He stated:

To my mind, the Eames/Bradley proposals were the most significant approach that we have seen over the years in dealing with the past. They were side-tracked on a single financial issue, not on their main substance. It is time to examine them again. It is time to commit to a sustained, honest and open approach to victims that is honourable and worthy of alleviating their continued distress.⁷⁵

66 “...let us be realistic the current status quo is not working for victims and is not working for the wider process....The British government shunted the issue onto Eames/Bradley and then quietly placed their report on the shelf. It seems to me that the biggest obstacle to properly dealing with the past is a continuing refusal at the very top of the British system to acknowledge their combatant role in the conflict. This needs to change. And republicans need to realise that dealing with the past will not be an easy process for us – Republicans inflicted much hurt during the conflict – but if we are to build a new Republic and a new future it is necessary and it is a road none of us should be afraid to go down.” Martin McGuinness, “Speech to Sinn Féin Ard Fheis”, 9 September 2011, Belfast Waterfront Hall.

67 Declan Kearney, “Uncomfortable Conversations are Key for Reconciliation,” *An Phoblacht*, 2 March 2012.

68 See e.g. “The Big Sorry Debate” available at <http://eamonnmallie.com/2012/03/live-at-the-lyric-the-big-sorry-debate-featuring-jackie-mcdonald-declan-kearney-cast/>, 10 March 2012.

69 Martin McGuinness, “Speech to Sinn Féin Ard Fheis”, 25 May 2012.

70 Declan Kearney, “Speech at Westminster: National Reconciliation in Ireland – The Need For Uncomfortable Conversations”, 24 October 2012.

71 Gerry Adams, “British Government’s Pre-Emptive Strike at Haass Talks – Unacceptable Intervention”, *An Phoblacht*, 9 September 2013.

72 SDLP Press Release, “Durkan : Eames Bradley Should Be Revisited”, 18 June 2010.

73 SDLP, “Manifesto 2011: Uniting People, Building Prosperity”.

74 “Rally Calls for Inquiry into Ballymurphy Killings by Soldiers,” *Belfast Telegraph*, 13 August 2012.

75 Northern Ireland Assembly, Hansard transcript, 3 June 2013.

Alliance

The Alliance Party has continuously criticised the British Government with regard to its perceived “hands off” approach to dealing with the past since the publication of the CGP report.⁷⁶ As Alliance MP Naomi Long summed up, stating “...consensus will not simply emerge of its own accord. Rather, it needs to be actively pursued with local parties and I believe the SoS [Secretary of State] has a duty to drive that process forward”.⁷⁷

The debate on the past held in the Northern Ireland Assembly in October 2011 was sparked by an Alliance Party proposal “[t]hat this Assembly calls on the Secretary of State to convene talks between the political parties to broker an agreement on how to deal with the legacy of the past”.⁷⁸ Included with this vision was the establishment of an independent, coordinating body, with possible international involvement, to take forward issues of investigation, information recovery, thematic examination and storytelling. While traditional party enmities and well-worn arguments characterised this debate, the Alliance Party’s motion was unopposed (though no formal vote was actually taken) and the Secretary of State was called upon to convene cross-party talks. As noted above, the Secretary of State rejected the call for cross-party talks on the grounds of a lack of consensus and instead opted for a series of bi-lateral meetings in the Spring of 2012 which took place without any clear outcome.⁷⁹

Conclusion: Spaces for Exploration?

Until the establishment of the Panel of the Parties negotiations in mid-2013 by the Northern Ireland political parties themselves, it could be argued that there was a lack of political direction on dealing with the past. That said, what is evident in even the brief review of the positions of the various actors is that there appears to be considerable space for dialogue in “teasing out” their views beyond their respective headline positions.

For example, unlike in 2006 when Healing Through Remembering produced the *Making Peace with the Past* discussion document, none of the major political actors in Northern Ireland are still arguing that the best solution is simply to “draw a line under the past”. This represents a significant shift.

There are other areas of obvious commonality. Sinn Féin, the SDLP and the Alliance Party all appear, broadly, in favour of some form of truth recovery process although there are different shades of emphasis in how this might be achieved. The primary concern for Republicans appears to be that whatever method is chosen should be independent from the British government and international involvement is the key method to achieving such independence. The DUP policy of establishing an oral and video archive for victims and survivors of the Troubles appears largely uncontested by the other political parties. All of the parties are supportive of measures designed to help victims of past conflict.

On the issue of truth recovery, broadly this has been questioned most loudly by the main Unionist parties. However in looking more closely at their various policy statements, speeches and press releases, there does not appear to be an outright opposition to a truth recovery process per se. Rather, there is a widespread cynicism about whether such a process is feasible and whether other actors (particularly Republicans) would actually come forward to offer truthful accounts of past.

As was noted above, the DUP question what would be the point of a truth commission when “we know without a doubt that the terrorists would not be coming forward to tell the truth”.⁸⁰ The Ulster Unionist Party, while expressing similar misgivings, have set out a number of tests that would have to be met, namely: “How do you persuade those who hold the truth to divulge what they know; What mechanism would facilitate this; How do you ensure society can have confidence that what is happening truly represents a truth process”. In particular both

76 “Paterson On Defensive Over Stance On The Past”, *Belfast Telegraph*, 26 November 2011; “Slow Progress In Tackling Northern Ireland’s Past”, *Belfast Telegraph*, 30 August 2011; “Alliance Brings Need For Party Talks On The Past To The Assembly”, *Alliance Party Press Release*, 7 October 2011; “MP Demands All-Party Talks On Past”, *Belfast Telegraph*, 23 September 2011; “Alliance Call To Deal With NI Past”, *UTV News*, 10 October 2011.

77 “MP Demands All-Party Talks On Past”, *Belfast Telegraph*, 23 September 2011.

78 Northern Ireland Assembly, Hansard transcript, 10 October 2011. According to the motion sponsor Chris Lyttle, the objective of this debate was not to “incite party political debate o the complexities of our past”, but ‘to offer political parties in the Assembly an opportunity to send out a clear message that we can at least agree on the need to deal with our past and to commit to urgent and inclusive talks to progress this important matter.’

79 “Owen Paterson Under Fire For Rebuffing Talks On Past,” *Belfast Telegraph*, 8 November 2011.

80 Peter Robinson, “Speech to Newry and Armagh DUP Association Annual Dinner”, reported in “Truth Agency Would Fail. Says Robinson,” *Irish Times*, 27 February 2012.

parties point to Martin McGuinness' evidence before the Saville Inquiry when he refused to answer certain questions and to Gerry Adams' continued denial of his membership of the IRA as evidence that Republicans cannot be trusted to tell the truth.⁸¹

While it is certainly true that McGuinness refused to answer some questions at the Saville Inquiry, as is discussed further below (see Saville Inquiry Section), a careful review of the actual testimony suggests that his position was somewhat more complex than is often suggested. Moreover, McGuinness has repeatedly stated that in the event of a truth commission being established in which he had confidence, he would give a full account of his past in the IRA and urge other Republicans to do the same.⁸² On the question of Adams admitting his previous membership of the IRA, in the absence of a truth commission and some associated form of amnesty or immunity (of the sort afforded to McGuinness when he made his admission to the Saville Inquiry), it is difficult to see how Adams could do so without leaving himself vulnerable to prosecution for having been a member of a proscribed organization.⁸³ If convicted, Adams could, theoretically at least, serve a maximum of two years.⁸⁴ Adams has made similar commitments to McGuinness regarding Republicans cooperating with such a process.⁸⁵

Of course, whether Republicans, Loyalists, members of the security forces or indeed other institutional actors or other actors would, in fact, divulge the full truth could really only be judged once a truth recovery had actually commenced its work. However, it is hardly beyond the bounds of political imagination to envisage a series of interrelated confidence-building measures linked to the establishment of such a body.

Testing the bona-fides of the different actors is a generic design challenge for any truth process in any transitional context.⁸⁶ However, as any observer of the peace process will be aware, these are all precisely the kind of obstacles which have previously been overcome. Issues of confidence building, sequencing, design (including methods of censure if parties or actors are not deemed to be fulfilling their commitments) which were faced and overcome throughout the lengthy negotiations of the Good Friday and St Andrews Agreements, on the question of decommissioning, the devolution of policing and justice powers and so forth. If there is genuine political will amongst the various political parties, and a willingness on the part of the British and Irish Governments to show leadership on this issue, the challenges are certainly surmountable.

While the names of the different mechanisms may be changed, and the issue of recognition payments will certainly not feature as a headline component, the themes explored in the CGP report will form an integral part of any such serious deliberations. In the interim, the rest of this report offers a synopsis of some of the other major "dealing with the past" initiatives which have continued despite the stagnation of the CGP recommendations.

81 "Unionists Question Sinn Féin's Commitment To Truth And Genuine Reconciliation", Irish Times, 25 May 2012.

82 Ibid.

83 A number of other senior Republicans have recently been charged with historical membership of a proscribed organization after it was alleged that they had made public admissions to being members of the IRA. "Five to Stand Trial Accused of Provisional IRA Membership", *Belfast Telegraph*, 2 September 2013.

84 One possibility which has been previously suggested is that he might make some form of general admission in Dail Eireann using his parliamentary privilege as a TD. However on closer examination, it does not appear that such an admission would protect Mr Adams from prosecution in the Republic, let alone Northern Ireland, where it certainly would not. See http://www.citizensinformation.ie/en/government_in_ireland/national_government/houses_of_the_oireachtas/privileges_of_tds_and_senators.html.

85 Sinn Féin, "Press Release: Truth Commission Needed – Adams", 17 May 2011.

86 See e.g. E. Wielhaus-Brahm, *Truth Commissions and Transitional Societies*, London: Routledge, 2010.

PUBLIC INQUIRIES

For many families who have suffered as a result of violence in the conflict in and about Northern Ireland, calls for a public inquiry to discover the truth about such event has become almost a default option. In addition to those discussed below, such calls have been in relation to the killings in Kingsmills,⁸⁷ Ballymurphy,⁸⁸ the Omagh bomb,⁸⁹ and Loughinisland⁹⁰ and a range of other prominent violent incidents which occurred during the conflict. As has been documented previously, such calls have a strong historical resonance given the plethora of previous inquiries.⁹¹ Although there were only three full scale public inquiries under the 1921 Tribunal of Inquiry (Evidence) Act,⁹² researchers Bill Rolston and Phil Scraton document a further 23 different styles of inquiry into different aspects of state policy concerning the conflict. Most of those inquiries dealt with the ways in which the criminal justice system and police and military responded to the campaigns of political violence.⁹³ Often as Rolston and Scraton argue, the terms of reference of such inquiries were deliberately narrow and appeared to avoid obvious and objective conclusions which might show the security forces in a bad light.⁹⁴

For the purposes of this report, only a brief overview of the major public inquiries which have occurred during the transitional phase is offered – namely the Saville (Bloody Sunday) Inquiry, the Robert Hamill Inquiry, the Rosemary Nelson Inquiry, the Billy Wright Inquiry and the on-going Smithwick Tribunal in the Republic. Inquiries and reviews which occurred during the conflict are not discussed.

The Saville Inquiry

The events of Bloody Sunday have been well-discussed elsewhere.⁹⁵ For the purposes of this report, however, it is important to note that on 29 January 1998, former British Prime Minister Tony Blair announced the establishment of a public inquiry into the events of Bloody Sunday in 1972, when 13 civilians were killed and a further 13 injured (one of whom subsequently died) by members of the 1st Battalion, Parachute Regiment of the British Army. The original inquiry, chaired by Lord Widgery, was established immediately after the killings, and largely exonerated the Army as well as concluding that there was “strong suspicion” that a number of those killed had been nail-bombers or handling weapons prior to their deaths (Widgery 1972, conclusion 10). These findings had been repeatedly challenged over a 26 year campaign. In 1992, the then Prime Minister, John Major, sent a letter to John Hume as MP for the area indicating that, “at the time that they were shot,” those killed should be regarded as innocent of any allegation that they were handling weapons or nail-bombs. In announcing the Inquiry, Blair paid tribute to the families’ campaign to overturn the Widgery Tribunal findings and emphasised that the purpose of this fresh inquiry was to seek the truth and reach closure rather than punish those involved.⁹⁶ The Inquiry was established on the basis that a range of new evidence as well as advancement in forensics and other relevant scientific techniques meant that the events should be looked at afresh.⁹⁷

87 “Kingsmills Families Demand Full Inquiry Into Massacre”, *BBC News*, 21 June 2011.

88 “Campaigners Angry at Rejection of Public Inquiry into Ballymurphy Deaths”, *The Guardian*, 20 June 2012.

89 “Inquiry Call To Uncover Omagh ‘Secrets’”, *UTV*, 18 June 2012.

90 “Call for Public Inquiry into UVF Massacre”, *News Letter*, 25 November 2010.

91 B. Rolston and P. Scraton, “In the Full Glare of English Politics: Ireland, Enquiries and the British State”, *British Journal of Criminology*, 2005: 45/4, pg. 547-564.

92 The Saville Tribunal into Bloody Sunday, the Scarman Inquiry into the violence and civil disturbances of 1969, and the Widgery Inquiry also into Bloody Sunday. As is discussed below, the precise legal basis for the establishment of the most recent public inquiries has been a matter of some controversy.

93 For example, internment, interrogation, rules of evidence, proscription of paramilitary organisations, the abolition of jury trials and amendment of rules of evidence, and the ending of political status led to nine inquiries; Compton, Parker, Diplock, Gardiner, Shackelton, Bennett, Jellicoe, Baker and Colville.

94 Rolston and Scraton, 2005: 558.

95 See e.g. E. McCann *Bloody Sunday in Derry: What Really Happened*. Dingle: Brandon, 1992; E. McCann, *The Bloody Sunday Inquiry: The Families Speak Out*, London; Pluto, 2005; D. Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland*, Basingstoke: Macmillan, 2000; A. Hegarty, “Dealing With The Past: The Government Of Memory: Public Inquiries And The Limits Of Justice In Northern Ireland,” *Fordham International Law Journal*, 2003: 26/4, 1148-1192; A. Hegarty, “Truth, Law and Official Denial: The Case of Bloody Sunday,” *Criminal Law Forum*, 2004:15/1-2, 199-246.

96 Tony Blair, Hansard, House of Commons Debate, 29 January 1998: Col 503.

97 “The time scale within which Lord Widgery produced his report meant that he was not able to consider all the evidence that might have been available. For example, he did not receive any evidence from the wounded who were still in hospital, and he did not consider individually substantial numbers of eye-witness accounts provided to his inquiry in the early part of March 1972. Since the report was published, much new material has come to light about the events of that day. That material includes new eye-witness accounts, new interpretation of ballistic material and new medical evidence. Last year, the families of those killed provided the previous government with a new dossier on the events of Bloody Sunday. The Irish Government also sent this government a detailed assessment that analysed the new material and Lord Widgery’s findings in the light of all the material available” Tony Blair, Hansard, House of Commons Debates, 29 January 1998: Col 502.

The Saville Inquiry, chaired by Lord Saville of Newdigate and assisted by two international judges, was established under the Tribunal of Inquiry (Evidence) Act 1921, which gave it the same legal powers to compel the production of evidence and the attendance of witnesses as a High Court.

The Saville Inquiry opened on 3 April 1999. Hearings commenced in March 2000 and the final witness did not give evidence until January 2005. Statements were taken from around 2,500 people, 922 of whom gave oral evidence.⁹⁸ Soldiers who gave evidence did so in London, following a Court of Appeal ruling that it would be unsafe for them to give evidence in Derry/Londonderry.⁹⁹ As is discussed further below, an incentive for witness cooperation included a ruling by the Attorney General that no evidence from a witness could be used to prosecute that person in any subsequent criminal proceedings. Although the protection against self-incrimination may have been influential in persuading witnesses to give honest evidence before the inquiry,¹⁰⁰ it did not preclude all further criminal action, since, for example, evidence provided by other witnesses or other forensic evidence could still be used in a criminal court case.¹⁰¹

Having cost over £200 million, the Saville Inquiry finally published its findings in June 2010. The report concluded that the paratroopers were responsible for the causing the deaths of 13 people and injury to a similar number,¹⁰² "...none of whom was posing a threat of causing death or serious injury."¹⁰³ It concluded that the paratroopers had "lost control" by killing and injuring fleeing civilians and those who tried to aid ones who had previously been shot by the army. The report also concluded that soldiers had "knowingly put forward false accounts"¹⁰⁴ in an attempt to justify their actions and that, contrary to previous beliefs, none of the soldiers fired in response to attacks by petrol bombers or stone throwers.¹⁰⁵ The report repeatedly stressed the innocence of those who were killed or injured and the unjustifiability of the army firing upon them.¹⁰⁶ It examined evidence put forward on behalf of the paratroopers that the actions of Republican paramilitaries had justified the soldiers opening fire and concluded that no such actions justified the soldiers' shootings. It also concluded that while Martin McGuinness "probably" had a Thompson sub-machine gun on the day, and that it was "possible" that he had fired it, neither did this justify the actions of the soldiers.¹⁰⁷

Although a great deal of attention prior to the publication of the Saville Inquiry Report had focused upon the cost of the inquiry,¹⁰⁸ other than with regard to Gerard Donaghy (discussed below) once the report itself was published, there was little substantial dispute as to the findings themselves. David Cameron's fulsome apology on behalf of the British Government won him significant plaudits across the political spectrum. Similarly Cameron's praise of the commitment and dignity of Bloody Sunday families was widely echoed. For the families themselves, they variously described the report as having "brought the truth home at last", "vindicated" the innocence of those who were killed and injured and of the long campaign for justice, having exposed the "lies" of the Army and confirmed their long held view of the original Widgery report as a "white-wash".¹⁰⁹

98 Broken down by occupation oral testimony was gathered from: 505 civilians; 9 experts and forensic scientists; 49 members of the media (including photographers); 245 members of the military; 35 paramilitaries or former paramilitaries; 39 politicians and civil servants (including intelligence officers); 7 priests; 33 members of the RUC.

99 *R v Lord Saville*, ex parte A, [1999] 4, All ER 860.

100 see Hegarty (2004) op cit above at p. 230.

101 <http://webarchive.nationalarchives.gov.uk/20101103103930/http://www.bloody-sunday-inquiry.org/>.

102 *Report of the Bloody Sunday Inquiry*, Vol 4, Chapter, 1, 4.1.

103 *Ibid.*, Vol 1, Chapter 5, 1.5

104 *Ibid.*, Vol 1, Chapter 3, 3.82

105 "Despite the contrary evidence given by soldiers, we have concluded that none of them fired in response to attacks or threatened attacks by nail or petrol bombers. No-one threw or threatened to throw a nail or petrol bomb at the soldiers on Bloody Sunday. There was some firing by republican paramilitaries (though nothing approaching that claimed by some soldiers) which we discuss in detail in this report, but in our view none of this firing provided any justification for the shooting of the civilian casualties." *Ibid.*, Chapter 3, 3.76

106 In the case of Gerard Donaghy - who was killed and taken by the army by car to a regimental aid post - he was found with four nail bombs in his pocket. The Inquiry considered whether he had those nail bombs in his pocket when he was shot or whether they were subsequently planted by the army. The Inquiry concluded that the nail bombs were "probably" on Donaghey when he was shot. However, Lord Saville and his colleagues also concluded "we are sure that Gerald Donaghey was not preparing or attempting to throw a nail bomb when he was shot; and we are equally sure that he was not shot because of his possession of nail bombs. He was shot while trying to escape from the soldiers." *Ibid.*, 3.111. The Inquiry also concluded that he was the only person killed or injured who was a member of a paramilitary organisation - he was a member of the youth wing (Fianna) of the Provisional IRA.

107 "In the course of investigating the activities of the Provisional and Official IRA on the day, we considered at some length allegations that Martin McGuinness, at that time the Adjutant of the Derry Brigade or Command of the Provisional IRA, had engaged in paramilitary activity during the day. In the end we were left in some doubt as to his movements on the day. Before the soldiers of Support Company went into the Bogside he was probably armed with a Thompson sub-machine gun, and though it is possible that he fired this weapon, there is insufficient evidence to make any finding on this, save that we are sure that he did not engage in any activity that provided any of the soldiers with any justification for opening fire." *Ibid.*, 3.119.

108 The Bloody Sunday Inquiry website notes a total cost of £190.3 million by February 2010.

See <http://webarchive.nationalarchives.gov.uk/20101103103930/http://www.bloody-sunday-inquiry.org/questions-and-answers/>. In 2012 former Lord Chief Justice Woolf suggested that the cost of Bloody Sunday could have been curtailed if the inquiry had been run differently. "Lord Woolf: Contain Length and Cost of Public Inquiries", *BBC News*, 23 May 2012.

109 "Relatives Reactions to Bloody Sunday Report", *BBC News*, 15 June 2010.

Martin McGuinness continued to deny that he had a machine gun on the day¹¹⁰ and the family of Gerard Donaghy and other witnesses continued to insist vehemently that the nail bombs had been planted on him by the Army.¹¹¹ Other than these disagreements, Nationalist and Republicans universally welcomed the report. A number of Unionist politicians pointed to the need for balance and an appreciation of the context in which events occurred – noting that two RUC officers had been killed in Derry in the days before Bloody Sunday. They also expressed fears that the report would be used to justify the actions of Republicans and arguing that the IRA had not been subjected to an equivalent inquiry concerning their past actions as the soldiers.

Other than stressing these broader themes and criticising Lord Saville for his failure to focus on such matters, few appeared to question the detailed findings.¹¹² Although the families are divided as to whether or not prosecutions should flow from the Saville Inquiry, the PSNI announced a major murder investigation in 2012 which would involve up to 30 detectives over a four-year period into the events of that day.¹¹³

However, in September 2013, 14 months after the instigation of the PSNI investigation no soldier had been interviewed by the police, as only over the summer of 2013 were resources made available and 12 PSNI detectives assigned to the case.¹¹⁴ In October 2013, with rumours that arrests and questioning of soldiers from the Parachute Regiment were imminent, public debate renewed as to whether formal murder charges were the best way forward in dealing with the legacy of Bloody Sunday.¹¹⁵

Martin McGuinness' Evidence to the Saville Inquiry

Although 922 people gave oral evidence, probably the witness whose evidence was most discussed was that of the current Deputy First Minister and former IRA leader Martin McGuinness. Given the importance attached to his testimony, particularly with regard to the design of any future truth recovery process in and about Northern Ireland, it is worth examining in a little more detail. In particular, McGuinness' evidence speaks to (a) the importance of trust and actors, be they state or non-state, could be relied upon to give truthful evidence in any such process and (b) the importance of the terms of any guarantee of non-prosecution in helping or hindering such a truth recovery process.

Much of the discussion of McGuinness' evidence has focused upon criticisms of what some commentators have called the IRA's "code of omerta" which McGuinness claimed had inhibited the giving of a full account of his recollections with regard to Bloody Sunday.¹¹⁶ While McGuinness did claim in the immediate aftermath of giving evidence that he would "rather die" than break the IRA's code of honour,¹¹⁷ a close analysis of the transcripts of McGuinness' evidence to the Saville Inquiry does suggest a more complex picture than is sometimes assumed.¹¹⁸

McGuinness' evidence to the tribunal ran over two days and is contained in over 460 pages of transcript. McGuinness initially distinguished between events which he considered relevant to the terms of reference of the tribunal and the events of Bloody Sunday and events significantly before or after Bloody Sunday. McGuinness confirmed the size of the IRA in Derry/Londonderry on the day of Bloody Sunday (four battalions) and numbers involved (40-50), his own position as an adjutant (second in command) in the Provisional IRA, and that he had joined the IRA nine months before the introduction of internment. He also answered a range of detailed questions about weapons, the movement of individuals, orders issued, role of the Fianna (IRA youth wing), and so forth.

110 "McGuinness ; 'No Substance to Gun Allegations", *BBC News*, 15 June 2010.

111 See Bloody Sunday Trust and Pat Finucane Centre, *Gerald Donaghey — The Truth About The Planting Of Nail Bombs On Bloody Sunday*, Derry : Bloody Sunday Trust and Pat Finucane Centre, 2012. See also play re-examining the evidence available on YouTube <http://www.youtube.com/watch?v=RxCIOqnHQvY>.

112 "Bloody Sunday Report: Reaction", *News Letter*, 15 June 2010; "The Bloody Sunday Inquiry - the Unionist View," *BBC News*, 14 June 2010. The reaction of local DUP MP and MLA Gregory Campbell to the Saville Report, in turn, led to a number of Facebook sites being established which threatened Mr Campbell and accused him of sectarianism. In July 2011 one man was successfully prosecuted for posting offensive comments against Mr Campbell. Belfast Telegraph, "Man Convicted of Menacing DUPs Gregory Campbell With Post On Facebook." 23rd June 2011.

113 The Guardian "Bloody Sunday Murder Inquiry to be Launched." 5 July 2012.

114 "Paratroopers still to be quizzed by PSNI", *UTV News*, 24 September 2013.

115 "Police begin Bloody Sunday investigation", *UTV News*, 20 October 2013; "Anger as Bloody Sunday soldiers could face criminal prosecution", *The Telegraph*, 21 October 2013; "Bloody Sunday prosecutions would be disastrous, says DUP MP Gregory Campbell", *Belfast Telegraph*, 21 October 2013.

116 e.g. "Provo Code of Honour Hides the Truth – SDLP", 12 November 2013; "Editorial: Stonewall McGuinness", *Daily Telegraph*, 6 November 2003.

117 "No Contempt Charges Seen Despite IRA Honour Code", *Republican News*, 11 November 2003.

118 Testimony of Martin McGuinness to the Saville Inquiry, 4-5 November 2003, available at; <http://webarchive.nationalarchives.gov.uk/20101103103930/http://report.bloody-sunday-inquiry.org/evidence-index/>.

He initially refused to answer questions relating to whether or not he had previously been a member of the Official IRA and when he became Officer Commanding in Derry after Bloody Sunday, citing concerns through his lawyers that his immunity might be jeopardised. However, once reassurances were forthcoming from Lord Saville concerning his immunity, he subsequently admitted originally being a member of the Official IRA and that he became OC of the Provisional IRA within two weeks of Bloody Sunday.¹¹⁹ Yet, citing the Republican “code of honour”, he continued to refuse to answer questions identifying any other members of the IRA or specific addresses where IRA guns or explosives were stored or other premises used as “safe-houses” by the IRA. McGuinness did, however, acknowledge an IRA safe house 200 yards from the Bogside Inn, but when pressed to give a specific address, McGuinness said:

Well, I feel I cannot answer that question because there is a Republican code of honour. The people who would have allowed us to use their houses, such as the two occasions that you have identified to me, are people who would have placed great faith in those IRA members who were using the house. For me to identify who these people are would be a betrayal, in my view. On many occasions over the course of the last three decades I have been in interrogation centre after interrogation centre, sometimes for a week at a time, and I have never ever, on any occasion, given the name of a single person who was associated with me or with the IRA.¹²⁰

Lord Saville subsequently asked McGuinness whether he would get in touch with the owners of the safe-house and ask them whether McGuinness could be relieved of his perceived code of honour to assist the Tribunal. The following day McGuinness confirmed that the previous evening he had been in touch with the families associated with the two premises in question, that they had requested that he not reveal their names or the location of the premises and that in such circumstances he would not divulge either their names or locations.¹²¹ On the second day of evidence he did, however, confirm that evidence already given by another IRA member to the Tribunal who McGuinness had initially refused to confirm as a member was true.¹²² McGuinness refused to name any other individual IRA member and he also refused to answer specifically when he left the IRA, answering only in vague terms that he left “in the early 1970s”.¹²³

In reviewing McGuinness’ detailed testimony, a number of points are worth noting in terms of current discussion on dealing with the past. In particular, the testimony appeared to be shaped by the nature and extent of the guarantee of non-prosecution under which the inquiry operated. That guarantee, in the form of a written commitment by the Attorney General to the Saville Inquiry, gave an undertaking that:

...in respect of any person who provides evidence to the Inquiry, that no evidence he or she may give before the Inquiry relating to the events of Sunday 30 January 1972, whether orally or by written statement, nor any written statement made preparatory to giving evidence, nor any document produced by that person to the Inquiry, will be used to the prejudice of that person in any criminal proceedings (or for that purpose of investigating or deciding whether to bring such proceedings) except proceedings where he or she is charged with having given false evidence in the course of this Inquiry or with having conspired with, aided, abetted, counsel procured, suborned or incited any other person to do so.¹²⁴

First, as noted above, McGuinness appeared concerned about whether or not events in which he was involved and which happened before or after Bloody Sunday were “covered” by the guarantee of non-prosecution. Following reassurances from Lord Saville, further details were provided as requested. Second, as noted above, he refused to name other individual members of the IRA or identify people who had provided ancillary support to the IRA. Based on the wording above, clearly any evidence provided by McGuinness which named such individuals might ultimately form part of a subsequent prosecution against them and this was not something he

119 “Well, I appreciate the fact that Lord Saville has clarified for my legal representatives that I am immune from prosecution on these issues. There was some considerable doubt coming into this Tribunal as to how far the questions would stretch and what the implications of those questions would be, but I am now satisfied, on the basis of what has transpired, transpired between Lord Saville and Richard Ferguson [McGuinness’ lawyer], to answer those questions. I was a member of the Official IRA for a few weeks. I joined it at the very end of 1970 and I left very quickly and joined the Irish Republican Army. At the time of Bloody Sunday I was adjutant of the 25 Derry command of the IRA. Within two weeks of Bloody Sunday, I became O/C of the Derry command of the Provisional IRA.” Testimony of Martin McGuinness to the Saville Inquiry, 4 November 2003, p.52.

120 Testimony of Martin McGuinness to the Saville Inquiry, 4 November 2003, at p.51.

121 Testimony of Martin McGuinness to the Saville Inquiry, 5 November 2003, at p. 2.

122 “...I have reflected overnight on the situation in relation to Sean Keenan, junior. I am conscious of the fact that he has made a very forthright statement to this Tribunal and I can confirm that what Sean Keenan has said in relation to Columbcille Court was the truth. I am also conscious that he has in his statement said that he was an explosives officer for the IRA, so I think I am at liberty, in the context of his statement to the Tribunal, to confirm that.” Testimony of Martin McGuinness to the Saville Inquiry, 5 November 2003, at p.5.

123 Testimony of Martin McGuinness to the Saville Inquiry, 5 November 2003, p. 141.

124 Available at <http://www.ppsni.gov.uk>.

appeared willing to countenance. Third, in his evidence to the Saville Inquiry, McGuinness distinguished between the Bloody Sunday proceedings and the broader debate about a truth and reconciliation process, arguing that he thought Republicans should contribute to such a debate.¹²⁵ Of course, as discussed above and in a similar fashion to the other political, security force and paramilitary actors, the bona-fides of his contribution or that of other Republicans would have to be tested by any truth recovery process which emerged. Many people will be understandably sceptical. That said, the key point is that it is not enough to dismiss the viability of such a process on a partial or second-hand understanding of the evidence which McGuinness gave to the Saville Inquiry.

The Cory Collusion Inquiries

Largely as a result of the sustained campaigns by the families of Patrick Finucane, Rosemary Nelson, Robert Hamill and Billy Wright as well as the human rights NGOs who supported them, the issue of collusion between paramilitaries and the security forces rose to the top of the political agenda in the negotiations regarding the implementation of the 1998 Agreement (also known as the Good Friday Agreement or Belfast Agreement, hereafter the Agreement). During the Weston Park negotiations in 2001, the British and Irish Governments agreed to appoint a judge of international standing to investigate allegations of state collusion with paramilitary organisations into the deaths of Pat Finucane, Rosemary Nelson, Robert Hamill, Billy Wright, Chief Superintendent Breen and Superintendent Buchanan, Lord Justice and Lady Gibson. It was agreed that “in the event that a Public Inquiry is recommended in any case, the relevant Government will implement that recommendation”.¹²⁶

Former Canadian Supreme Court judge, the Honourable Justice Peter Cory, was appointed in May 2002. Cory delivered his reports on the Finucane, Nelson, Hamill and Wright cases to the British government on 7 October 2003, and on Breen, Buchanan and the Gibson cases to the Irish government at the same time. In all but the Gibson case, Cory found there was sufficient evidence that, “if accepted, could be found to constitute collusion” and recommended public inquiries.¹²⁷ The Irish government published Cory’s report immediately and established a state inquiry – The Smithwick Tribunal – into the deaths of Chief Superintendent Breen and Superintendent Buchanan in compliance with Cory’s recommendations.

Cory’s reports on the killings of Finucane, Hamill, Nelson and Wright were made public by the British Government in April 2004 after some intense political pressure, not least from Justice Cory himself. In all four cases, Cory concluded that there was sufficient evidence of state collusion in the killings to warrant the holding of a public inquiry. He detailed criteria by which public inquiries might be deemed credible and also suggested that inquiry time and counsel costs can be easily and reasonably controlled with a modicum of forethought.¹²⁸

Following publication of the Cory Report, the British Government announced that public inquiries would be established into the cases of Hamill, Nelson and Wright, but that on-going criminal prosecutions would have to be concluded in relation to the killing of Pat Finucane before inquiry procedures were announced for that case. The way for the Finucane Inquiry was cleared with conviction of UDA man and Special Branch informer Ken Barrett in September 2004,¹²⁹ and, meanwhile, the Wright, Hamill and Nelson inquiries were established with powers of subpoena equal to those of the Saville Enquiry.¹³⁰ Cory had argued that a public inquiry could be conducted alongside the Finucane prosecution case but, instead of following his recommendations, the Government instead introduced new legislation under which it said the Pat Finucane Inquiry would be established.

125 Testimony of Martin McGuinness to the Saville Inquiry, 4 November 2003, p. 14.

126 NIO & Department of Foreign Affairs, “Implementation of the Good Friday Agreement”, Para 19 at <http://cain.ulst.ac.uk/events/peace/docs/bi010801.htm>.

127 Justice Cory defined collusion as the state security services “ignoring or turning a blind eye to the wrongful acts of their servants or agents or supplying information to assist them in their wrongful acts or encouraging them to commit wrongful acts.” *Cory Collusion Inquiry Report: Patrick Finucane*, London: HMSO / The Stationery Office (TSO), 1 April 2004, 21. Available at <http://cain.ulst.ac.uk/issues/collusion/cory/cory03finucane.pdf>.

128 *Cory Collusion Inquiry Reports*, 1.305; 2.265; 3.231; 4.254. All reports are available <http://cain.ulst.ac.uk/issues/collusion/index.html>.

129 “Finucane’s Killer Jailed Amid Clamour for Inquiry”, *The Guardian*, 17 September 2004. 130 The Billy Wright Inquiry was established under the Prison Act (Northern Ireland) Act 1953. The Robert Hamill and Rosemary Nelson Inquiries were established under the Police (Northern Ireland) Act 1998.

130 The Billy Wright Inquiry was established under the Prison Act (Northern Ireland) Act 1953. The Robert Hamill and Rosemary Nelson Inquiries were established under the Police (Northern Ireland) Act 1998.

However, on 7 April 2005 – less than a week after the publication of the Cory reports and on the final day of session before Parliament closed – the Government replaced the Tribunals of Enquiry (Evidence) Act 1921 under which the Saville Inquiry was established (which, as was noted above, gives tribunals of inquiry established under it the same evidential power as the High Court) with the Inquiries Act 2005, which effectively allows Executive control over all aspects of a public inquiry.

For inquiries established under the Inquiries Act 2005, Ministers control appointment and dismissal of an inquiry panel, set the temporal and substantive terms of inquiry, control inquiry funding and control access to evidence and dissemination of inquiry findings (or omission of evidence from a final report). These controls diverge significantly from Justice Cory's minimum basic standards for a public inquiry. Despite criticisms from a broad range of human rights groups and some senior judicial figures (including Lord Saville), the Government "converted" the Billy Wright Inquiry into an inquiry under the new legislation on 23 November 2005 and the Hamill Inquiry in March 2006. Nevertheless, the Finucane family insisted that they would not take part in an inquiry established under the terms outlined in the Inquiries Act.¹³¹

The Rosemary Nelson Inquiry

Rosemary Nelson was a Lurgan-based solicitor who was killed by Loyalist paramilitaries in March 1999. Nelson, whose clients included the Republican activist Colin Duffy and the Garvaghy Road Residents Association, had received a range of death threats from police officers and Loyalist groupings and had given evidence to the US Congress regarding her concerns for her safety before her murder.¹³² Immediately after her death, concerns that the security forces had been implicated began to surface.¹³³

Chaired by Sir Michael Moreland, the public inquiry into her death began to its oral hearings in 2004 and reported in May 2011.¹³⁴ 147 witnesses were called to give evidence and, in total, the inquiry cost £46.5 million.¹³⁵ In addition the Inquiry also had access to the files relating the original murder investigation and to intelligence information and briefings from RUC Special Branch, some of which are detailed in the report. The Inquiry concluded that:

There is no evidence of any act [emphasis in original] by or within any of the state agencies we have examined (the Royal Ulster Constabulary (RUC), the Northern Ireland Office (NIO), the Army or the Security Service) which directly facilitated Rosemary Nelson's murder. But we cannot exclude the possibility of a rogue member or members of the RUC or the Army in some way assisting the murderers to target Rosemary Nelson. In addition: We are sure that some members of the RUC publicly abused and assaulted Rosemary Nelson on the Garvaghy Road in Portadown in 1997, having the effect of legitimising her as a target. We believe that there was some leakage of intelligence which we believe found its way outside the RUC. Whether the intelligence was correct or not, the leakage increased the danger to Rosemary Nelson's life. We believe that some members of the RUC made abusive and/or threatening remarks about Rosemary Nelson to her clients. This became publicly known and would have had the subsequent effect of legitimising her as a target in the eyes of Loyalist terrorists. There were *omissions* [emphasis in the original] by state agencies, which rendered her more at risk and more vulnerable. The two agencies of the State that had ample knowledge of Rosemary Nelson were the RUC and the NIO.¹³⁶

The Report went on to say that the omissions by state agencies rendered Rosemary Nelson more at risk and more vulnerable; and that the combined effect of these omissions by the RUC and the NIO was that the state failed to take reasonable and proportionate steps to safeguard the life of Rosemary Nelson. If Rosemary Nelson had been given advice about her safety and offered security measures, and assuming that she had accepted such advice and security measures, the risk to her life and her vulnerability would have been reduced. Following publication of the Report, the then Secretary of State Owen Paterson apologised saying:

131 "Family Reject Legislation", Press Release, 26 November 2004. Available at <http://www.patfinucanecentre.org>

132 For an overview see K. McEvoy, "What the Lawyers Did During the War?", *Modern Law Review*, 2011:74/3, 350-384.

133 On the evening of her murder graffiti appeared in Lurgan which read "Rosemary Nelson – the people's voice – murdered by the RUC-RIR", *The Independent*, 16 March 1999; RUC and RIR refer to the Royal Ulster Constabulary and the Royal Irish Regiment.

134 *The Rosemary Nelson Inquiry Report*, London: HMSO, May 2011.

135 Hansard, House of Commons Debates, 23 May 2011: col 644.

136 *Ibid.*, p. 463.

I am profoundly sorry that omissions by the state rendered Rosemary Nelson more at risk and more vulnerable. It is also deeply regrettable that, despite a very thorough police investigation, no one has been charged for this terrible crime.¹³⁷

Rosemary Nelson's husband Paul welcomed the report and its criticisms of the RUC in aligning her with the interests and actions of her clients and thus rendering her a target for Loyalist paramilitaries.¹³⁸ However, Nelson's family were critical of the then Secretary of State's comments, which they claimed "glossed over" the criticisms of the RUC and NIO in the report, concerns that were mirrored by the Shadow Secretary of State Sean Woodward and a range of human rights NGOs.¹³⁹ PSNI Chief Constable Matt Baggott also apologised to the Nelson family for the police failure to protect Nelson.

The Billy Wright Inquiry

Billy Wright was a former leader of the Loyalist Volunteer Force who was shot dead in a prison van by three Irish National Liberation Army (INLA) prisoners in 1997 as he went on a visit inside the Maze/Long Kesh prison. Wright was a vocal opponent of the peace process. The Northern Ireland Prison Service had acceded to his demands that his faction be granted their own wings of the prison – Wing C and D of H6 – despite the fact INLA prisoners were held on Wings A and B of the same block and that such prisoners had made clear their intention to attack the LVF if given an opportunity.¹⁴⁰ Judge Cory concluded that these and other circumstances, including the fact that weapons had been smuggled into the prison and other lapses in security which allowed the INLA prisoners to access Wright, meant that "taken together they have satisfied me that there is sufficient evidence of collusive acts by prison authorities to warrant the holding of a public inquiry".¹⁴¹

Chaired by Lord MacLean, the Billy Wright Inquiry was established:

To inquire into the death of Billy Wright with a view to determining whether any wrongful act or omission by or within the prison authorities or other state agencies facilitated his death, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; and to make recommendations.¹⁴²

The inquiry opened in May 2007 and its findings were made public on 14 September 2010. The inquiry cost £29.8 million.¹⁴³

The inquiry rejected the suggestion that collusion played a part in the death of Billy Wright, saying "we were not persuaded...that in any instance there was evidence of collusive acts or collusive conduct".¹⁴⁴ It concludes by stating, it is "[t]o our regret no explanation emerged in the evidence as to how the two firearms were introduced into the prison and put into the hands of his INLA murders".¹⁴⁵ Where failings in the conduct of the prison authorities were identified, they were judged to be the result of negligence rather than intentional acts.¹⁴⁶ Such failings or wrongful acts included the decision to allocate Billy Wright and the LVF to H 6 alongside INLA prisoners and that the RUC's failure to communicate a key piece of intelligence which was judged "a wrongful omission which facilitated the death of Billy Wright in a way that was negligent rather than intentional".¹⁴⁷ The report was also critical of the PSNI, describing its "slow and reluctant" approach to providing information as

137 Hansard, House of Commons Debates, 23 May 2011: col 644.

138 "I very much welcome this thorough and comprehensive report which I believe vindicates Rosemary's publicly expressed view that elements within the RUC were unable to identify her as a professional lawyer and distinguish her from the alleged crimes and causes of her clients." *UTV Live*, 23 May 2011.

139 See comments by Rosemary Nelson's brother from *UTV Live*, 23 May 2011. See Hansard, House of Commons Debates, 23 May 2011: col 647 for comments by Shadow Secretary of State Woodward. Several human rights NGOs noted that by focusing on the fact that there was "no evidence that the state conspired in or planned the death of Rosemary Nelson" Paterson had deliberately narrowed sought to narrow the definition of collusion which, as noted above, had included both acts of commission and omission on the part of the state. For example, British and Irish Rights note that the term collusion was not included in the terms of reference for the Nelson Inquiry and argue that the criticisms of the RUC detailed in the report could cumulatively meet the definition proffered by Judge Cory. See British and Irish Rights Watch, *Report To BIRW Board: Research And Policy Report : Report Of The Rosemary Nelson Inquiry*. 2011. Available <http://www.birw.org/inquiries/RosemaryNelsonInquiryReport.pdf>.

140 *Report of The Billy Wright Inquiry*, London: HMSO, 2010, chapter 15.

141 *Ibid.*, p. 91.

142 See: <http://webarchive.nationalarchives.gov.uk/20101210142120/http://www.billywrightinquiry.org>.

143 http://www.nio.gov.uk/bwi_-_total_cost.pdf

144 See: *Report of The Billy Wright Inquiry*. See also, Billy Wright Inquiry, Hansard, House of Commons Debates, 14 September 2010: column 743; "Wright Inquiry", *Irish Times*, 14 September 2010.

145 *Report of The Billy Wright Inquiry*, London: HMSO, 2010, p. 652.

146 "Billy Wright murder finds 'serious failings'", *The Telegraph*, 14 September 2010.

147 "Security failings blames for Billy Wright murder", *The Telegraph*, 15 September 2010.

causing the Inquiry's "greatest difficulties".¹⁴⁸ The possibility that there may have been "deliberate malpractice" concerning the destruction of audit trails and concealment of evidence was raised.¹⁴⁹ Three recommendations concerning the retention of prison records; whether any relevant lessons can be learnt for HMP Maghaberry; and whether a process similar to the Patten reforms should be established for the NI Prison Service were made.

Billy Wright's father, David Wright, was unconvinced by the finding that collusion did not play a part in his son's murder:

The inquiry adopted a narrow interpretation of collusion. Having considered the factual findings, it looks like collusion, it sounds like collusion and in my mind amounts to firm and final proof of collusion by state agencies in acts and omissions.¹⁵⁰

The report's findings were welcomed by both the Northern Ireland Prison Service and the PSNI. The former Director General of the Prison Service claimed that the report "dispels a cloud that has unfairly hung over the Service since the allegation was first made".¹⁵¹ The Secretary of State welcomed the finding that there was no collusion, but also apologised for the murder:

There was no collusion. But, as the panel make clear, Billy Wright was in the protective custody of the state at the time of his death. Whatever horrendous crimes Billy Wright or the LVF committed, his murder in a high-security prison should never have happened. It was wrong and I am sincerely sorry that failings in the system facilitated his murder.¹⁵²

In subsequent discussions on dealing with the past, Paterson repeatedly referred to the Wright family's rejection of the inquiry findings as evidence that some families would remain unsatisfied regardless the efforts or expenditure to uncover the truth about the past.¹⁵³

The Robert Hamill Inquiry

Robert Hamill was a Catholic civilian who was kicked to death by a group of Loyalists in Portadown in April 1997. Hamill's murder took place while an RUC Land Rover was parked a short distance away and the police therein did nothing to intervene. It was subsequently alleged and, likewise, explored in Judge Cory's report that, in addition, to their failure to intervene to protect Hamill, one of the Reserve Constables present directly obstructed the subsequent murder investigation by instructing one of the chief suspects (with whom the police officer was already familiar) that he should burn the clothes that he was wearing during the assault.¹⁵⁴ Given the alleged actions of this officer, the failure by the police to intervene or, indeed, to secure the scene until the following morning and a range of other factors, Judge Cory decided that the "cumulative effect" of all of these actions was "to convince me that there is sufficient evidence of police collusion to warrant the holding of a public inquiry".¹⁵⁵

Chaired by Sir Edwin Jowitt, the public inquiry into the death of Robert Hamill commenced formal proceedings on 6 January 2009. Its terms of reference were:

To inquire into the death of Robert Hamill with a view to determining whether any wrongful act or omission by or within the Royal Ulster Constabulary facilitated his death or obstructed the investigation of it, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; whether the investigation of his death was carried out with due diligence; and to make recommendations.¹⁵⁶

148 "Negligence not collusion led to Billy Wright murder", *BBC News*, 14 September 2010.

149 Ibid.

150 "Wright's father rejects finding as 'firm proof of collusion'", *Irish Times*, 14 September 2010; "Wright's father claims report is 'proof of collusion'", *BBC News*, 14 September 2010.

151 Ibid.

152 Statement by Secretary of State Owen Paterson "Billy Wright Inquiry Report", Hansard, House of Commons Debates, 14 September 2010: col 743.

153 Owen Paterson, "Leonard Steinberg Memorial Lecture", p. 18.

154 *Cory Collusion Report: Robert Hamill*, London: HMSO, 2004, p.71.

155 Ibid., p. 76.

156 See: <http://www.roberthamillinquiry.org/>

The Report was completed on 25 February 2011 at an estimated cost of £35 million.¹⁵⁷ Its findings have not yet been made public after the Public Prosecution Service (PPS) confirmed in December 2010 that three people are to be charged in connection with this case: two for the offence of conspiracy to pervert the course of justice and one person for an offence of doing an act with intent to pervert the course of justice.¹⁵⁸ In advance of the report's publication, the then Secretary of State Paterson announced that he had commissioned a small team of officials to check that it complied with human rights standards and national security matters.¹⁵⁹ At the time of writing, further details on the progress of the legal proceedings or hence the timetable for publication of the report are not available.

The Smithwick Tribunal

Judge Cory also recommended the establishment of a public inquiry in the Republic of Ireland to investigate allegations of Gardai collusion in the murder of RUC officers Harry Breen and Robert Buchanan – both of whom were killed by the IRA as they returned back across the border after a meeting with Gardai colleagues in Dundalk. Having considered a range of relevant factors (including the precision of the ambush), various intelligence reports, including evidence provided by a former military intelligence agent within the IRA code-named “Kevin Fulton”, Judge Cory also concluded that these “documents reveal evidence that, if accepted, could be found to constitute collusion”.¹⁶⁰

The resultant Smithwick Tribunal was established in March 2006. Its terms of reference are to investigate “suggestions that members of An Garda Síochána or other employees of the State colluded in the fatal shootings of RUC Chief Superintendent Harry Breen and RUC Superintendent Robert Buchanan”.¹⁶¹ In his opening statement, Judge Smithwick further remarked:

I can say at this stage that the issue of collusion will be examined in the broadest sense of the word. While it generally means the commission of an act, I am of the view that it should also be considered in terms of an omission or failure to act...I intend to examine whether anybody deliberately ignored a matter, or turned a blind eye to it, or to have pretended ignorance or unawareness of something one ought morally, legally or officially to oppose.¹⁶²

Public hearings began in June 2011. In May 2012 the total cost to date for the tribunal was estimated at €9 million (£7.23 million).¹⁶³ As of October 2012, evidence had been heard from 200 witnesses, with a few more still to testify.¹⁶⁴ Witnesses have included former members of the IRA, former Garda commissioners and high level RUC officers, former agents and politicians.

A number of allegations from different witnesses have subsequently found their way into the media, though the Tribunal has yet to rule on their veracity. They include the claim that two years prior to his murder, Superintendent Buchanan raised concerns that Gardai detective sergeant Owen Corrigan was passing on information to the Provisional IRA and that similar concerns were later raised by Harry Breen;¹⁶⁵ a suggestion that a number of the IRA personnel responsible for the murder of Breen and Buchanan were British agents (raising the question of whether their deaths could have been prevented);¹⁶⁶ a charge that the RUC were blocked from investigating the IRA bomb at Narrow Water where 18 soldiers were killed and the bomb was apparently detonated from the Republic, and that the bomb site was interfered with, destroying forensic evidence (the Garda officer in charge of the scene was Corrigan), and that there was sufficient criminal evidence to charge those responsible for the bombing.¹⁶⁷

157 Healing Through Remembering. *Paper on Dealing with the Past: Cost to Date and for 2010-2014*. Belfast: Healing Through Remembering, 2010.

158 “Press Release: Publication of Report”, *Robert Hamill Inquiry*, 31 January 2011.

159 “Press Release: Inquiry Report”, *Robert Hamill Inquiry*, 25 February 2011.

160 *Cory Collusion Report: Chief Superintendent Breen and Superintendent Buchanan*, London: HMSO/The Stationery Office (TSO), 1 April 2004, p. 48. para 2.162. Available at <http://cain.ulst.ac.uk/issues/collusion/cory/cory03breenbuchanan.pdf>.

161 <http://www.smithwicktribunal.ie/smithwick/HOMEPAGE.html>.

162 Ibid.

163 “Judge Says Smithwick Tribunal ‘Needs More Time’”, *BBC News*, 21 May 2012.

164 “Smithwick Tribunal: Inquiry Gets Extension”, *Irish Independent*, 16 October 2012.

165 “Smithwick Tribunal So Far”, *BBC News*, 9 March 2012; “An Inquiry Dreaded By All In Ulster’s Dirty War”, *Belfast Telegraph*, 8 June 2011; “RUC Concerns Were Passed To Garda”, *RTE News*, 29 June 2011.

166 “Smithwick Tribunal Told Spymasters Could Have Averted Double Murder”, *The Guardian*, 11 September 2011.

167 “Garda Co-operation ‘Non-existent’”, *Irish Times*, 28 February 2012; “‘Narrow Water Bomb Evidence Interfered With’, Smithwick Tribunal told”, *BBC News*, 16 February 2012; and Jenifer O’Leary, “Forensic Chief’s ‘Surprise’ At No Prosecutions After Bomb”, *BBC News*, 4 October 2012.

In an interim report made to the Irish Government in March 2012, the Tribunal suggested that a:

...small number of potentially very important witnesses" have refused to give evidence, including "British authorities in Northern Ireland intelligence" who had "highly relevant and potentially significant information but could not agree with the Tribunal on how to put that information into evidence."¹⁶⁸

Both the PSNI and the IRA have been criticised for a failure to fully cooperate with the work of the Tribunal. In 2013 PSNI Assistant Chief Constable Drew Harris gave oral evidence to the Tribunal but the PSNI refused to hand over the original intelligence documentation upon which he testified.¹⁶⁹ Three members of the IRA also met with the legal team of the Inquiry and submitted a statement denying that the IRA had any assistance in the murders of Breen and Buchanan. However, the IRA members refused to give oral evidence to the Tribunal.¹⁷¹ The Inquiry hearings were completed in June 2013 and the report is due to be published in late 2013.¹⁷²

The Pat Finucane Case

The most high profile of the cases of alleged collusion examined by Judge Cory was that of the Belfast-based solicitor Pat Finucane, murdered by the Ulster Freedom Fighters in 1989. A comprehensive review of Finucane's murder is beyond the scope of this report, but some of the details are worth reproducing. RUC officers had consistently urged Loyalist paramilitaries during interrogation that he and other defence lawyers should be killed. Less than a month prior to the murder, Conservative Junior Minister Douglas Hogg announced in the House of Commons that "there are in Northern Ireland a number of solicitors who are unduly sympathetic to the IRA".¹⁷³ Hogg later acknowledged that this statement was based on a Special Branch briefing.

The intelligence which led to Finucane's murder was co-ordinated by Brian Nelson, a UDA member and a British Army's Force Research Unit agent. The principal weapon was supplied by another RUC Special Branch agent, William Stobie. Ken Barrett, one of the prime actors later convicted of the Finucane murder in 2004, was also an RUC informer. Furthermore, when Brian Nelson was arrested in 1990 and faced 34 charges including two counts of murder (after speculation that he would expose the British Army's role in open court), counsel for the Attorney General told the court that after "a rigorous examination of the interests of justice", 15 charges were to be dropped including the two counts of murder.¹⁷⁴ As discussed below, these facts have been the subject of three investigations by the former Chief of the Metropolitan Police Sir John Stevens, an independent report by Judge Cory, and, most recently, a review conducted by Desmond De Silva QC who all found that collusion had taken place. De Silva's review is dealt with in more detail below.

The family of Pat Finucane have long campaigned for a public inquiry into the role of state collusion in his death.¹⁷⁵ However, as noted above, they were unwilling to have such an inquiry conducted under the terms of the Inquiries Act 2005. In 2011 it appeared that an accommodation had been reached between the British government and the Finucane family. Press speculation, subsequently confirmed by Geraldine Finucane, suggested that the compromise involved would see an inquiry established similar to the Baha Moussa Inquiry in England i.e. while the inquiry would be established under the terms of the Inquiries Act, the government would guarantee the independence of the inquiry chair who would, in turn, decide on key matters including whether any evidence should be restricted.¹⁷⁶

168 "Smithwick Tribunal: Some Witnesses Refused To Give Evidence", *BBC News*, 9 March 2012.

169 "PSNI Evidence To Smithwick 'Nonsense On Stilts' - Lawyers For Garda Commissioner Say Families Of Murdered RUC Let Down By PSNI", *Irish Times*, 21 June 2013.

170 "IRA 'Had No Help From Anyone In Garda' In Murder Of RUC Officers", *Irish Times*, 2 February 2013.

171 "IRA Smithwick Evidence Move 'Significant' - Adams", *News Letter*, 3 February 2013; "Judge Unhappy IRA Will Not Give Oral Evidence On RUC Murders To Tribunal", *Irish Times*, 1 February 2013.

172 "Smithwick Tribunal: Garda counsel criticises PSNI", *BBC News*, 22 June 2013.

173 Hansard, Standing Committee B debate, 17 January 1989, col 508

174 See Committee on the Administration of Justice *Additional Submission to the Criminal Justice Review (in relation to the Pat Finucane Case)* 1999. Belfast : British and Irish Rights Watch (BIRW) *Justice Delayed : Allegations of State Collusion in the Murder of Pat Finucane and Others*. London : BIRW 2000; J. Stevens (2003) Stevens III: Overview and Recommendations; Lawyers Committee for Human Rights *Beyond Collusion : The British Security Forces and the Murder of Pat Finucane*. New York : Lawyers Committee for Human Rights 2003.

175 "Pat Finucane family 'expecting full inquiry'", *BBC News*, 13 May 2011.

176 "A Breakthrough on the Horizon for the Finucanes?", *The Detail*, 7 October 2011. The Baha Mousa Inquiry examined the death of an Iraqi civilian who died in who died in the custody of British soldiers in Basra in 2003. In 2006, seven service personnel were charged with ill-treatment including war crimes, one of whom was convicted. In 2008, the government admitted to 'substantial breaches' of the European Convention of Human Rights over the death and paid compensation to the family. The Secretary of State established a public inquiry led by Sir William Gage which reported in 2011. See further <http://www.bahamousainquiry.org>.

The family were invited to London in October 2011 by the British Prime Minister David Cameron. Cameron accepted that collusion had occurred in the Finucane murder and apologised to the family. However, instead of a public inquiry along the lines of the Baha Moussa Inquiry as previously discussed with Northern Ireland Office officials, Cameron told the family that De Silva would conduct another review of the relevant documentation, the process would take place in private and De Silva would not be able to call or interrogate any witnesses. The then Secretary of State Paterson later told the House of Commons:

The Government accepts the clear conclusions of Lord Stevens and Judge Cory that there was collusion. Mr. Speaker, I want to reiterate the Government's apology in the House today. The Government is deeply sorry for what happened. Despite the clear conclusions of previous investigations and reports, there is still only limited information in the public domain. That is why my Rt. Hon. Friend the Prime Minister and I have committed to establishing a further process to ensure that the truth is revealed. Accepting collusion is not sufficient in itself. The public now need to know the extent and nature of that collusion. Mr. Speaker, I have, therefore, asked the distinguished former United Nations War Crimes Prosecutor, Sir Desmond de Silva QC, to conduct an independent review to produce a full public account of any state involvement in the murder.¹⁷⁷

This decision was widely condemned by the Finucane family and their legal and political representatives.¹⁷⁸ Speaking three days after the Government's decision, Geraldine Finucane spoke of their shock, humiliation and disappointment at having been called to a meeting in Downing Street only to be told that there would not be a public inquiry into the murder of her husband:

Even now, days after the event, we still feel humiliated and insulted by the ordeal we were made to endure...When we learned that the Prime Minister wished to meet with us in Downing Street, we assumed, as did many others, that the Government was going to confirm its commitment to the promise of a public inquiry...We could not bring ourselves to believe that we were being invited as guests to the Prime Minister's home just to be refused the public inquiry promised many years ago. The fact that David Cameron did so and in such a public fashion ranks as one of the most cruel and devastating experiences of my life.¹⁷⁹

The reasons behind the Government's apparent change of mind have been the subject of some speculation. In an attempted judicial review challenge to the decision,¹⁸⁰ the family claimed that, at the meeting in October 2011, Cameron stated, "It is true that the previous administration could not deliver a public inquiry and neither can we. There are people in buildings all around here who won't let it happen".¹⁸¹ However in June 2012, this statement and part of the case was withdrawn after Cameron denied the comments and sworn statement by his private secretary blocked any cross-examination of the Prime Minister.¹⁸²

The De Silva report was launched in December 2012. Totalling 829 pages, the first volume details De Silva's findings with the second volume publishing classified documents related to Pat Finucane's death, which had not previously been submitted into the public domain.

The report finds that the different state agencies involved in the handling of agents within paramilitary organisations in Northern Ireland were doing so without an appropriate policy or legal framework.¹⁸³

¹⁷⁷ Hansard, "Pat Finucane", House of Commons Debates, 12 October 2011.

¹⁷⁸ See for example: "Mansfield slams government over Finucane 'travesty'", *BBC News*, 13 October 2011; "Pat Finucane's family anger after PM rules out inquiry", *BBC News*, 11 October 2011; "Pat Finucane's family's anger over inquiry decision", *The Guardian*, 11 October 2011; "Finucane's Angry At Refusal To Hold Public Inquiry", *Irish Times*, 12 October 2011; "Pat Finucane Case", *Northern Ireland Assembly*, Private Members Business, 7 November 2011; "Pat Finucane Centre response to Finucane meeting with Prime Minister", 11 October 2011, available at: <http://www.patfinucanecentre.org/>.

¹⁷⁹ "Statement by Geraldine Finucane on behalf of the Finucane Family", 14 October 2011. Available at: <http://www.patfinucanecentre.org/>.

¹⁸⁰ Application for judicial review available at: http://www.patfinucanecentre.org/pf/ger_order53.pdf. "Pat Finucane's family win right to judicial review", *BBC News*, 13 January 2012.

¹⁸¹ "Finucane Application for Judicial Review Re Failure to Establish Public Inquiry", 13 January 2012, p 9. Available at: http://www.patfinucanecentre.org/pf/ger_order53.pdf.

¹⁸² "Finucanes withdraw claims that PM said others blocking inquiry", *Irish News*, 9 June 2012.

¹⁸³ Desmond De Silva, "Pat Finucane Review: Executive summary and principal conclusions", para. 21-26. Available at: <http://www.patfinucanereview.org/report/volume01/executive-summary-and-principal-conclusions/>.

Individuals within RUC, UDR and British Army's Force Research Unit provided intelligence assistance to Loyalist paramilitaries, and while 270 "information leaks" which accounted for 85% of UDA's intelligence were "not institutional nor systematic, ... they could be described as widespread".¹⁸⁴ Reference is also made to other killings by the UDA, such as Terrence McDaid and Gerard Slane in 1988, where the RUC had failed to take action against the group in order to protect their informants.¹⁸⁵ As De Silva sums up, "...taken as a whole, an extraordinary state of affairs was created in which both the Army and the RUC Special Branch had prior notice of a series of planned UDA assassinations, yet nothing was done by the RUC to seek to prevent these attacks".¹⁸⁶

In line with the previous findings of Lord Stevens and Justice Cory, the De Silva report did find that there was collusion particularly within the RUC Special Branch in the murder of Pat Finucane. De Silva opined: "on the balance of probabilities... an RUC officer or officers did propose Patrick Finucane... as a UDA target when speaking to a Loyalist paramilitary..".¹⁸⁷ He also confirmed that two of those involved in the killing were state agents at the time (William Stobie and Brian Nelson) and that a third (Ken Barrett) was later to become a state agent when the RUC Special Branch decided to recruit him instead of prosecuting him for the murder in 1991.

Additionally, RUC Special Branch failed to act on intelligence from an informer who supplied the weapon that there was a planned attack on a high profile target on the day of Pat Finucane's death, which, if acted on, would have prevented his murder.¹⁸⁸ De Silva also found that ministers were misled by the British Army and RUC and that there were sustained efforts by the RUC Special Branch and senior army personnel to thwart the subsequent investigations. In concluding, De Silva stated that:

I am left in significant doubt as to whether Patrick Finucane would have been murdered by the UDA in February 1989 had it not been for the different strands of involvement by elements of the State. ... The real importance, in my view, is that a series of positive actions by employees of the State actively furthered and facilitated his murder and that, in the aftermath of the murder, there was a relentless attempt to defeat the ends of justice.¹⁸⁹

However, De Silva found that there was no high-level ministerial collusion or "over-arching State conspiracy".¹⁹⁰

In response to the finding, Geraldine Finucane called the report a "sham" and a "whitewash" saying that:

It's a report into which we have had no input, ... The British government has engineered a suppression of the truth behind the murder of my husband. At every turn it is clear that this report has done exactly what was required – to give the benefit of the doubt to the state, its cabinet and ministers, to the army, to the intelligence services and to itself. ... At every turn, dead witnesses have been blamed and defunct agencies found wanting. Serving personnel and active state departments appear to have been excused. The dirt has been swept under the carpet without any serious attempt to lift the lid on what really happened to Pat and so many others. This report is a sham, this report is a whitewash, this report is a confidence trick dressed up as independent scrutiny and given invisible clothes of reliability. But most of all, most hurtful and insulting of all, this report is not the truth.¹⁹¹

In light of De Silva's findings, David Cameron in the House of Commons accepted again the finding of collusion and repeated his apology to the Finucane family.¹⁹² Nonetheless, the Prime Minister rejected the calls for any further inquiry which he argued would not shed any more light on the murder and would be a costly exercise.¹⁹³ Labour leader Ed Milliband responded by stating that Labour remained in favour of a full public inquiry, a position mirrored by the SDLP and Sinn Féin.¹⁹⁴

184 Ibid., para. 46.

185 Ibid., para. 60.

186 Ibid., para 40.

187 Ibid., para. 74.

188 Ibid., para. 91.

189 Ibid., para. 115.

190 Ibid., paras. 109 & 116.

191 "Pat Finucane's widow calls de Silva Report 'a Whitewash'", *The Guardian*, 12 December 2012.

192 Hansard, House of Commons Debates, 12 December 2012: col 297.

193 "PM Rejects Finucane Inquiry Calls", *Belfast Telegraph*, 12 December 2012.

194 "Milliband Calls for Finucane Inquiry", *Belfast Telegraph*, 12 December 2012.

Amongst the Unionist political parties, Nigel Dodds MP (DUP) restated that party's opposition to an public inquiry stating it elevated the murder of Pat Finucane over others and "would send out to countless other victims, many of whom have seen little or nothing done to investigate crimes which still affect them today".¹⁹⁵ A UUP statement called upon the Secretary of State "to consider urgently how to end this disjointed, piecemeal approach to dealing with the past, and convene talks to discuss an inclusive and comprehensive way forward".¹⁹⁶ PSNI Chief Constable Matt Baggott accepted the report's findings and also apologised to the Finucane family. He also stated his intention to hold talks with the Police Ombudsman and the Public Prosecution Service to see if any other individuals should be prosecuted for the murder of Pat Finucane.¹⁹⁷

Conclusion

The public inquiries into particular events associated with the conflict in and about Northern Ireland have been an important element in the overall mosaic of past-related initiatives. The Saville Inquiry detailed the innocence of those killed and injured on Bloody Sunday and the unjustifiability of the soldiers' actions. While the PSNI and Public Prosecution Service are examining the viability of follow-up prosecutions, at the time of writing it is unclear whether such prosecutions will be possible.

The inquiries into the deaths of Rosemary Nelson and Billy Wright found that there was no collusion involved in their respective deaths, though still criticising state agencies in both contexts, and they were also followed by Government apologies in both cases. The Robert Hamill Inquiry was completed but its publication is delayed until the relevant trials are completed. The Government reneged on the commitment by the previous administration to hold an inquiry into the killing of Pat Finucane – replacing it with the De Silva documentary review which reported in December 2012. Finally, the Smithwick Tribunal inquiry into the murders of Harry Breen and Robert Buchanan will report in late 2013.

At some level, the benefits of a public inquiry are all evidenced by the Inquiries discussed above. As is suggested in the relevant literature, the purported positives of a public inquiry in a settled democracy include the fact that the strong legal powers associated with such processes, when rigorously exercised, can establish the "facts" as well as provide the basis to "learn from such events". In addition, the public nature of the hearings as well as the legal authority with which they are imbued are designed to publicly provide accountability and reassurance, to encourage some form of catharsis or closure for affected families and communities, as well as offer a means of re-establishing political confidence in the political system.¹⁹⁸

Obviously in a post-conflict society such as Northern Ireland, the achievement of some of these objectives is particularly challenging. Some Unionists have tended to view them as state-centric initiatives which do not capture the context of paramilitary violence in which state abuses occurred. Some Republicans and Nationalists make the argument that they focus on individual events while obscuring broader patterns and structural abuses. Moreover, the generic limitations of public inquiries – including that they can become highly legalistic and adversarial, that they are often very costly – have also been clearly evident in the Northern Ireland transition.

¹⁹⁵ "PM Rejects Finucane Inquiry Calls", *Belfast Telegraph*, 12 December 2012.

¹⁹⁶ *Ibid.*

¹⁹⁷ "Police chief plans Finucane talks," *Belfast Telegraph*, 12 December 2012.

¹⁹⁸ See e.g. Centre for Effective Dispute Resolution (CEDR), *Inquiry into Public Inquiries: Reinventing the Public Inquiry*, http://www.cedr.com/docslib/CEDR_Inquiry_into_Public_Inquiries_Prospectus.pdf; J. Beer, ed., *Public Inquiries*, Oxford: Oxford University, 2011; A. Burgess, "The Changing Character Of Public Inquiries In The (Risk) Regulatory State", *British Politics*, 2011:6, 3-29.

THE DISAPPEARED

The Independent Commission for the Location of Victims Remains (ICLVR) was established by the British and Irish Governments to facilitate the recovery of the remains of individuals who were murdered and “disappeared” by Republican paramilitaries in the 1970s and 1980s. Under the Northern Ireland (Location of Victims’ Remains) Act 1999 and equivalent legislation in the Republic, a commission was established to assist with the recovery of the bodies of these victims. Despite Government protestations to the contrary, this legislation arguably amounted to a de facto amnesty act in both jurisdictions. The respective Acts created de facto immunity from prosecution by providing that no evidence gleaned by the commission was admissible in criminal proceedings, that forensic testing could only be carried out to facilitate identification and that the information could only be passed on to other authorities for the purpose of assisting with locating the remains.¹⁹⁹ In introducing the Bill, the British government emphasised that:

...this Bill is designed to help those families [of the disappeared]. Its sole purpose is to bring to an end the suffering they have endured for far too long. They simply want to know what has happened to their loved ones and to give them a decent burial.²⁰⁰

Prior to the establishment of the ICLVR, having come under considerable political pressure with regard to this from families of the victims and their supporters, the IRA leadership had already established an internal investigation into those deaths for which it acknowledged responsibility.²⁰¹ In that statement the IRA claimed responsibility for the abduction, murder and secret burial of nine individuals from 1972 to 1981. The IRA have subsequently admitted responsibility for a number of additional disappearances. Another name was added to ICLVR’s list in 2010 after disillusioned former IRA leader Brendan Hughes claimed that the IRA had also court-martialled, killed and disappeared IRA member Joe Lynskey for the attempted murder of another IRA man in 1972.²⁰² There are currently 16 individuals listed as falling under the remit of ICLVR.²⁰³ Of these disappearances, the IRA has now claimed responsibility for 13, one has been claimed by the INLA, and two disappearances have not been admitted by any group.²⁰⁴

To date, the remains of nine the “disappeared” have been recovered²⁰⁵. The remains of Eamon Molloy, John McClory and Brian McKinney were recovered in 1999. Molloy’s remains were found in a coffin that had been left at a cemetery by the IRA in Faughart near Dundalk. It is not known where the body was buried prior to this. McClory and McKinney were found buried together in bogland at Colgagh, Co. Monaghan on 29th June 1999. In August 2003, Jean McConville’s remains were recovered from Shelling Beach in Co. Louth after being discovered by accident by a dog-walker following extensive searches by the Commission of Templetown Beach based on information provided by the IRA which had been unsuccessful.²⁰⁶ In November 2008, Danny McIlhone’s remains were recovered from bogland in Ballynultagh, Co. Wicklow. The remains of three further victims were recovered in 2010: Charlie Armstrong’s body was recovered from bogland in Colgagh, Co. Monaghan in July, the remains of Gerry Evans were retrieved from Castleblaney in Co. Monaghan in October, and Peter Wilson’s remains were recovered from Waterfoot beach in Co. Antrim in November.

Seven of those on ICLVR’s original list remain to be found. The remains of Seamus Wright and Kevin McKee are thought to be buried in the Coghalstown area of Co. Meath. However searches in this area have been unsuccessful. The location of Joe Lynskey and Brendan Megraw’s burial sites remains unknown. An extensive search took place in a forest in Rouen, France for the remains of INLA victim Seamus Ruddy, but this search yielded nothing. Those convicted of Robert Nairac’s murder claim they do not know where the body is buried,

199 Northern Ireland (Location of Victims’ Remains) Act 1999, ss 3-5 and Criminal Justice (Location of Victims’ Remains) Act 1999, s 5.

200 Lord Dubbs, Hansard, House of Lord Debate, 18 May 1999: col. 154.

201 “In March 1999 the leadership of Óglaigh na hÉireann [IRA] revealed the outcome of an 18 month investigation to locate the graves of nine people executed and buried by the IRA from 1972 to 1981. In initiating that investigation our intention was to do all within our power to redress injustices for which we accept full responsibility and to alleviate the suffering of families, particularly those families who have been unable to properly bury or mourn their relatives.” “Text of IRA statement”, *An Phoblacht*, 4 September 2003.

202 E. Moloney, *Voices from the Grave*, 112-116.

203 Cases which fall outside the Commission’s remit include those who were disappeared but found before the Commission was established, or because they have disappeared since 1998, for instance Lisa Dorrian, who disappeared from a caravan park in Ballyhalbert, Co. Down, in 2005.

204 Website of the Independent Commission for Victims Remains is at <http://www.iclvr.ie>.

205 One additional body - that of Gareth O’Connor - was recovered in 2005. Mr O’Connor had disappeared from Newry in 2003. Mr O’Connor, an alleged member of the Real IRA, was not included in the remit of the ICLVR. His family claim he was murdered by the Provisional IRA, a claim disputed by Sinn Féin. “Gareth o’Connor Murder Investigation ; 16,000 Pages of Evidence Uncovered”, *Newry Times*, 15 January 2012.

206 “Beach Remains ‘Found by Accident’”, *BBC News*, 1 September 2003.

because other IRA members removed his body for burial.²⁰⁷ In their 1999 statement the IRA said they had been unable to locate Nairac's body. The most recent search undertaken by ICLVR has been for the remains of Columba McVeigh, believed to be buried in Co. Monaghan. Searches for McVeigh's remains took place in April and May of 2012, and began again in September 2012, but ended without success in September 2013.²⁰⁸

Conclusion

The way in which the issue of the "disappeared" has been handled is instructive with regard to more general discussions on dealing with the past for a number of reasons. First, it is illustrative of the political and moral power of victim-focused initiatives in this field since the campaign of the families and their supporters was directly responsible for the legislative actions of the two governments and for the establishment of the IRA internal investigation. Second, as outlined above, the respective Acts created de facto amnesties in both jurisdictions, in so far as no evidence acquired as a result of the work of the commission could be used to prosecute those involved.²⁰⁹ Third, as has been publicly stressed by its staff, the work of ICLVR is premised upon the confidentiality of the process and over the years "significant relationships of trust" have been developed between ICLVR staff and their IRA, or former IRA, interlocutors.²¹⁰ It is difficult to envisage a successful mechanism designed to achieve a form of truth recovery which did not include the development of such a legislative framework as well as methods of working in which former combatants or members of the security forces could place their trust.

207 J Parker, *Death of a Hero: Secret Life and Death of Captain Robert Nairac*, London: Metro Books, 1999, p. 253; M. Dillon, *The Dirty War*, London: Arrow Books, 1991, p. 180.

208 "Search Resumes in Monaghan Bog for IRA Victim Columba McVeigh," RTE, 17th September 2012; and "Disappeared search for Columba McVeigh ends in failure", BBC News, 30th September 2013.

209 "Our sole purpose is the recovery and repatriation of bodies. We are not looking for evidence. Nothing we hear, nothing we find will end up being used in a court case. None of our records will end up in Boston College, either." Geoff Knupfer, Commission for the Relocation of Victims Remains, interviewed Irish Times, April 23rd 2012 "Team of Many Skills on the Trail of the Disappeared."

210 Geoff Knupfer, Amnesties, Immunities and Prosecutions: International Perspectives on Incentivising Truth Recovery Conference Queens University Belfast, 22/23rd June 2009.

THE OFFICE OF THE POLICE OMBUDSMAN FOR NORTHERN IRELAND (OPONI)

The Office of the Police Ombudsman (OPONI) for Northern Ireland replaced the former Independent Commission for Police Complaints (ICPC) in 2000. The ICPC had been widely discredited for its slowness, ineffectiveness, lack of independence and apparent inability to substantiate alleged police malpractice.²¹¹ Following a review by Maurice Hayes, the recommendations contained in that report were implemented for the creation of a Police Ombudsman office.²¹² The OPONI was established under Part VII of the Police (Northern Ireland) Act 1998 and alongside dealing with around 3,500 complaints per annum regarding allegations of contemporary police misconduct, OPONI plays an active role in investigating historical conflict-related to cases of police misconduct. Complaints involving historic cases are accepted by OPONI in accordance with Regulation 6(1) RUC (Complaints etc) Regulations 2001, as being a complaint that is investigated because of the gravity of the matter or the exceptional circumstances. Such complaints are then investigated under Section 56 of the Police (Northern Ireland) Act 1998. The OPONI is currently reviewing over 121 historical cases referred to it, comprising complaints from the public and referrals from the PSNI Chief Constable in relation to deaths and other serious matters believed to have involved members of the RUC between 1969 and 1998.²¹³

To facilitate this volume of investigatory work, an additional £10 million was allocated in 2012 to assist with the historical work of OPONI.²¹⁴ In 2011 the then Ombudsman Al Hutchinson maintained that it would take as much as another 25 years to deal with the backlog of historical cases.²¹⁵ However, more recent estimates (assuming that there is not a dramatic rise in fresh historical cases coming before OPONI) suggest that the historic cases backlog could be completed in approximately seven years.

There are a number of salient issues concerning the work of OPONI. While historical cases account for just 20% of the work conducted by OPONI, they are by far the most controversial and account for most of the public comment and debate that the office attracts. Since 2011 (and this may be subject to change under the new OPONI Director), a team of 13 investigators and one Director of Historical Cases work on these cases and none are former PSNI or military members in accordance with OPONI stated policy with regard to fulfilling Article 2 obligations under the European Conventions on Human Rights (discussed further below).²¹⁶

While OPONI had been involved in some controversial historical cases previously under the leadership of Nuala O'Loan, including most notable a highly critical report into the RUC/PSNI investigation of the Omagh bombing,²¹⁷ a number of matters came to a head in 2011 which seriously damaged the credibility of the organisation regarding its capacity to deal with difficult historical cases. Given the centrality of OPONI to current past-related initiatives, it is worth exploring these matters in some detail. In particular, the perceived failings of OPONI regarding a number of high profile cases, the resignation of the former Chief Executive as well as critical reports into the organisation by local human rights NGO, Committee on the Administration of Justice (CAJ), and the Criminal Justice Inspectorate (CJI) cumulatively led to the resignation of former Ombudsman Al Hutchinson and his ultimate replacement by Michael Maguire.

211 For example, in 1997 only one complaint from the public alleging police malfeasance was substantiated from the approximately 5,500 submitted. See M. O'Rawe and L. Moore, "Accountability and Police Complaints in Northern Ireland: Leaving the Past Behind", in A. Goldsmith and J. Lewis (eds) *The Civilian Oversight of Policing: Governance, Democracy and Policing*. Oxford: Hart, 2000, p. 279.

212 Hayes concluded "It is hard to rebut the comment of one demoralised complainant who asked why, if nothing was wrong, was all that money being paid out; and if all this money was being paid out, why nobody had been disciplined." See M. Hayes, *A Police Ombudsman for Northern Ireland? A Review of the Police Complaints System in Northern Ireland*. Belfast: HMSO, 1997, p. 5. According to figures given to Hayes by the Police Authority for Northern Ireland, approximately £500,000 was paid out in civil actions each year on cases which alleged police assault, wrongful arrest, false arrest or over-holding (p. 20).

213 "Office of the Police Ombudsman for Northern Ireland: Annual Business Plan", 2012-2013 <http://www.policeombudsman.org/publicationsuploads/Annual%20Business%20Plan.pdf>, accessed 18/10/2012.

214 "Press Release: Police Ombudsman's Office To Double Staff Working On Historical Cases", 27 March 2012 http://www.policeombudsman.org/modules/press/press.cfm/press_ID/308/action/detail/year/2012/month/9 The OPONI may also be called in to investigate a historical case by the Northern Ireland Policing Board, the Department of Justice or the Secretary of State for Northern Ireland (in excepted or referred matters).

215 *BBC Spotlight*, aired on 20 October 2011.

216 See Criminal Justice Inspection Northern Ireland, *An Inspection Into The Independence Of The Office Of The Police Ombudsman For Northern Ireland*, Belfast: CJINI, 2011, p.11.

217 That report found that, in common with other cases, significant intelligence information held by the RUC Special Branch was not shared with either the original Omagh investigating team or a subsequent internal police review of the investigation. It also included a strongly worded criticism of former Chief Constable Ronnie Flanagan and other senior officers. O'Loan concluded "...with great sadness, that the judgement and leadership of the Chief Constable and ACC Crime have been seriously flawed. As a result of that, the chances of detaining and convicting the Omagh Bombers have been significantly reduced. The victims, their families, the people of Omagh and officers of the RUC have been let down by defective leadership, poor judgement and a lack of urgency. This should not have been the response to an incident which resulted in the death of twenty-nine people and two unborn children." OPONI, *Statement by The Police Ombudsman For Northern Ireland On Her Investigation Of Matters Relating To The Omagh Bombing On August 15th 1998*, Belfast: OPONI, 12 December 2001, p. 12.

Claudy Bombing

In August 2010 the Ombudsman's Office released the report into the IRA bombing of Claudy in 1972 which killed nine people and injured more than 30 others. Although the IRA denied responsibility, for many years relatives of those killed believed that a priest (now deceased) was involved in the bombing and the State had colluded in covering it up.²¹⁸ An investigation into the bombing was established in 2002 by the Ombudsman. The Ombudsman's report in 2010 into the Claudy bombing found that while the RUC had knowledge that Father James Chesney was involved in the IRA before the Claudy bombing, the police had no evidence which could have helped them to prevent the bombing.²¹⁹ After the Claudy bombing, the police had concluded that Father Chesney was the IRA's Director of Operations in South Derry and was involved in other bombings. However, the Ombudsman's report established that the police had failed to follow this evidence up with further investigations into Father Chesney's role in the Claudy bombing.

Furthermore, the Assistant Chief Constable in charge of Special Branch at the time had written to the Secretary of State to make him aware of the actions of Father Chesney and "what action, if any, could be taken to render harmless a dangerous priest".²²⁰ Subsequently, the Secretary of State suggested to Cardinal Conway to have the priest relocated outside of Northern Ireland. Father Chesney was moved to Donegal in late 1973 after the bombing. The Ombudsman concluded that the failure to follow up the evidence on Father Chesney and the engagement with senior members of the Catholic Church, compromised the investigation into the Claudy bombing. As such, the Ombudsman found that the actions of the police amounted to a collusive act; nevertheless, no criminal intent had been on the part of the Secretary of State or the Catholic Church.

The relatives of those killed and those individuals who were injured in the bombing welcomed the report, but demanded further information from the police, British government and the Catholic Church, as well as a public inquiry into the bombing.²²¹ Mary Hamilton, one of those injured in the bombing, said:

...it is clear that there are many others who have questions to answer, ... I would appeal to those within our own Assembly, the NIO, the Catholic Church, the British Government and the now PSNI to come forward with any information. These families deserve the truth ... [the Ombudsman's] report is far from a resolution, but it gives a platform from which to move forward.²²²

After the release of the report, the then Secretary of State Owen Paterson apologised for the British government's role in not properly investigating Father Chesney, but rejected any public inquiry.²²³ After the release of the report, the Historical Enquiries Team approached the relatives of those killed and those individuals injured to conduct new investigations into the bombing.²²⁴ However, on the 40th anniversary of the bombing in August 2012, the victims were still awaiting a response from the HET or police on any progress of the investigation, and some had accepted the likelihood of no further truth or justice with regard to the bombing.²²⁵ As Gordon Miller, whose father, David Miller was killed in the bombing, said:

After the [Police Ombudsman report] there maybe was a bit of hope, but that is gone now. It has been the same thing for 40 years, you are given a little bit of hope now and again, but it never comes to anything.²²⁶

In October 2013, the PSNI suspended criminal investigations into the bombing, citing a lack of new evidence. No further investigations will take place unless new evidence is put forward.²²⁷ However, two families have begun civil litigation by suing the British government, PSNI, and the Catholic Church. They state that they are suing "not only suing for damages, but also for full disclosure of documents which could shed further light on Claudy".²²⁸

218 "Campaigners now feel vindicated Claudy was the forgotten atrocity though rumours about Fr James Chesney persisted", *Irish Times*, 21 December 2002.

219 OPONI, "Press Release: Claudy Report", 24 August 2010.

220 Ibid.

221 "Relatives Demand A Fresh Investigation Into Killings," *Belfast Telegraph*, 25 August 2010.

222 "Claudy Report: Survivor Calls For More Information," *News Letter*, 24 November 2010.

223 "Claudy Report – Reaction", *Derry Journal*, 25 August 2010.

224 "Historical Enquiries Team contacting Claudy relatives", *BBC News*, 27 August 2010.

225 "1972 Claudy bombings remembered 40 years on", *Derry Journal*, 3 August 2012.

226 Michael McGlade, "No hope of Claudy Bombing truth", *News Letter*, 30 July 2012.

227 "Claudy bomb investigation suspended", *UTV News*, 13 October 2013.

228 "Claudy families to sue Church and State", *UTV News*, 14 October 2013.

McGurk's Bar

The OPONI report into the 1971 bombing of McGurk's bar in 2011 was the first of the major historical investigations to call into question the competence of the OPONI. McGurk's Bar was a pub that was bombed, killing 15 people, and was originally described by the police as an IRA "own goal". In 1977, a UVF member admitted to driving the getaway car from the scene. In 2010, OPONI published a report on the police investigation of the bombing but were then forced to withdraw that report after serious concerns were raised by family members. As is recounted in the CJI report on the OPONI (at p. 14), families had seen previous drafts of the report which were critical of the police, but in the version they saw in 2010 these criticisms were reduced. The families pointed out several factual errors in the report (including the names of the 15 victims) and expressed their outrage that the report cleared the RUC of failing to investigate the attack properly given the police insistence that it was an IRA rather a UVF attack.²²⁹ Patrick McGurk, whose father owned the bar and who also lost his mother and sister, described the report's conclusion (that "on the balance of probabilities", the police conducted a "reasonably thorough investigation") as "patently ridiculous".²³⁰ After consultation with victims' families, a new version of the report was made public on 21 February 2011 which reverted to being more critical of police actions. It found that while there is no evidence that the RUC assisted those responsible for the bombing, the police investigation had such a predisposition towards the view that the IRA were responsible for the bomb that this became an investigative bias. While this fell short of collusion, it did preclude an effective investigation of the atrocity.²³¹ Other findings included that the police gave selective briefings to the Government and media that Republican paramilitaries were responsible and that an effective/satisfactory explanation as to why successive Chief Constables have not addressed this problem could not be identified.²³² It was also noted that "[t]he inference that victims of the bombing were culpable in the atrocity has caused the bereaved families 'great distress' over the years. A correction would be a significant step".²³³

While some family members spoke of a "sense of victory and vindication - the official findings are there - the police were biased", ²³⁴ the response of the PSNI themselves has caused further controversy. Chief Constable Matt Baggott rejected OPONI's claim that there was "investigative bias".²³⁵ One family member responded:

The Chief Constable has rejected the Ombudsman's report. He has set himself up as judge, jury, prosecutor and chief constable. How any reasonable, intelligent human being could argue there was no investigative bias is beyond belief. The RUC, with no evidential basis, blamed the IRA.²³⁶

In August 2013, the McGurk's families began legal proceedings to view the closed HET report into the bombing, which was completed in December 2012, and won the right to a judicial review in September. As of 5 November 2013, a high court has heard that the McGurk families could potentially see an edited version of the HET report soon. Lawyers representing PSNI Chief Constable Baggott were granted a two week adjournment to carry out further work on the report and follow leads linked to the case.²³⁷

Loughinisland

In June 2011, the OPONI published a report into police investigation of six men murdered by the UVF in a sectarian attack on a pub in Loughinisland in 1994.²³⁸ That report was condemned by victims' families, nationalist politicians and the families' solicitor as "timid, mild and meek".²³⁹ Having made their complaint in 2006, the families' central allegation was that at the time of the atrocity, the police investigation was impeded by

229 "Ombudsman Pulls Report Into 1971 Car Bomb", *BBC News*, 9 July 2010.

230 *Ibid.*

231 OPONI, *Public Statement Under Section 62 Of The Police (Northern Ireland) Act 1998 Relating To The Complaint By The Relatives Of The Victims Of The Bombing Of McGurk's Bar, Belfast On 4 December 1971*. Belfast: OPONI, 2011.

232 *Ibid.*

233 OPONI, "Press Release: Investigative Bias Undermined Police Inquiry: Police Ombudsman", 21 February 2011.

234 "McGurk's Bomb Ombudsman Report: Baggott Criticized", *BBC News*, 22 February 2011.

235 "Northern Ireland Police Chief Fails To Condemn RUC Bomb Investigation Bias", *The Guardian*, 22 February 2011; "McGurk Families May Sue Baggott", *UTV News*, 1 September 2011.

236 "McGurk Families Hit Out At Baggott", *Belfast Media Group*, 2 September 2011.

237 "McGurk's bar massacre: Families may be given redacted HET report into bombing", *Belfast Telegraph*, 5 November 2013.

238 OPONI, *Statement Under Section 62 Of The Police (Northern Ireland) Act 1998 Relating To The Complaint By The Victims And Survivors Of The Murders At The Heights Bar, Loughinisland On 18 June 1994*. Belfast: OPONI, 2011.

239 "Loughinisland families 'shocked' at Ombudsman finding", *BBC News*, 24 June 2011; "Anger as Loughinisland shootings report rejects security force collusion", *The Guardian*, 24 June 2011; "Loughinisland: Police Ombudsman's Report", *Northern Ireland Assembly Debates*, 27 June 2011.

its desire to protect informers within the ranks of the UVF. The car used in the attack was found abandoned in a field in Crossgar the following morning and approximately seven weeks later, a hold-all containing the clothing, weapons and ammunition believed to have been used in the attack and a rifle were also found. Sixteen people have been arrested since the attack, but none have been convicted.²⁴⁰

The OPONI report found there were failings in the RUC's investigation of the incident, namely a lack of diligence, focus and leadership, but the report concluded there was "insufficient" evidence of collusion.²⁴¹ The victims' families responded that, in their view, the report itself actually proved collusion, since the RUC made "no real attempt to catch the killers" and that Al Hutchinson "performed factual gymnastics to ensure there was no evidence of collusion in his conclusion".²⁴² Their solicitor Niall Murphy has claimed that publishing the report has given the families "no sense of satisfaction".²⁴³ The CJI Report into OPONI (discussed further below) examined the Loughinisland investigation process and was critical of its handling, highlighting a lack of consistency in the way the report was checked for quality and inaccuracies, in the way the investigation was managed, in the way the families were kept informed of progress and in how cases were prioritised. The families are now pursuing a civil action against the PSNI and the MOD alleging, amongst other things, that one of the weapons used was part of a shipment brought from South Africa by a known British agent and that these weapons were subsequently divided between Loyalist factions, resulting in a huge upsurge in Loyalist murders.²⁴⁴ In December 2012, the new Police Ombudsman Michael Maguire (discussed below) announced that his office would re-open the Loughinisland investigation.²⁴⁵ At the time of writing, there are no new developments since this announcement.

The Resignation of OPONI Chief Executive Sam Pollock

In addition to controversies concerning the handling of specific historic cases, OPONI was also affected by the resignation of its Chief Executive Sam Pollock following a number of critical reviews of its work.

In March 2011, OPONI Chief Executive Sam Pollock resigned from his post. Amongst the reasons for his resignation, as outlined in a letter to the Permanent Secretary of the Department of Justice, were that he felt that there had been a "significant lowering of the professional independence between our operations (OPONI) and those of our key stakeholder, the PSNI".²⁴⁶ Pollak also alleged that Department of Justice (DoJ) officials "have interfered and meddled in the affairs and governance of the Office;"²⁴⁷ and, therefore, the Department of Justice established an independent review to examine the relationship between OPONI and DoJ. That review, by former senior civil servant Tony McCusker, found a number of issues which gave cause for concern, including that an agreement on the strategic direction of the Office appeared to have been concluded between the Senior Director of Investigations and a middle ranking official of the NIO without either the imprimatur of the Ombudsman or the knowledge of the Chief Executive.²⁴⁸ Pollock's resignation also led to the Criminal Justice Inspectorate review outlined below.

The Criminal Justice Inspectorate Report

As noted above, following the resignation of former OPONI chief executive Sam Pollock, the then Director asked the Criminal Justice Inspectorate to review the operational independence of OPONI. That report also raised a number of serious concerns about OPONI.²⁴⁹ It outlined inconsistencies in the investigation process; a varied approach to communication with stakeholders; divisions amongst the senior management team; that reports into historic cases were altered or rewritten to exclude criticism of the RUC; that senior officials in the Office requested to be disassociated from reports into historic matters after original findings were dramatically altered without reason; that staff investigating some of the worst atrocities believe police had acted as "gatekeepers" to

240 OPONI, "Press Release: 'Loughinisland Investigation Lacked Diligence, But Insufficient Evidence Of Collusion': Police Ombudsman", 24 June 2011.

241 OPONI, 2011. Op Cit.

242 "Loughinisland Report: Families Devastated By Findings", *BBC News*, 24 June 2011; "Loughinisland Families 'Angry And Disgusted' At Report Findings", *Belfast Telegraph*, 25 June 2011.

243 Ibid.

244 "UK Accused Of Helping To Supply Arms For Northern Ireland Loyalist Killings," *The Guardian*, 14 October 2012.

245 "Police Ombudsman Opening New Investigation Into Loughinisland", *The Detail*, 19 December 2012, available at <http://www.thedetail.tv/issues/158/new-loughinisland-investigation/police-ombudsman-opening-new-investigation-into-loughinisland>.

246 Tony McCusker, "Police Ombudsman Investigation Report", The Office Of The Minister Of Justice, 16 June 2011.

247 CJI (2011) op cit at p. 3.

248 Tony McCusker, op cit.

withhold key intelligence from them and that there were major inconsistencies in the Ombudsman's investigations of Loughinisland, McGurk's Bar and Claudy.²⁵⁰ Echoing the views of the retirement letter from Pollock, the report stated:

Our overall conclusion is that the flawed nature of the investigation process in historic cases, the divisions within senior management, and concerns around the handling of sensitive material have undermined confidence in the work of the OPONI among some staff and key stakeholders. These issues have led to a lowering of the operational independence of the OPONI.²⁵¹

The Criminal Justice Inspectorate went on to make six recommendations including the suspension of investigation of historical cases; a full review of the Confidential Unit and the protocol for dealing with sensitive information; the review and clarification of the policy for the investigation of State related deaths; an immediate skills and competency audit of everyone having significant input into complex cases; a review and consultation into the Strategic Plan for the Historic Investigations Directorate.

Following the Criminal Justice Inspectorate report, as well as a damning BBC Spotlight documentary and calls for his resignation by a range of politicians and NGOs working in the field, Ombudsman Al Hutchinson announced his resignation in September 2011.²⁵² The OPONI also accepted in full all six recommendations made by the CJI and the historical work of OPONI was suspended.²⁵³ In April 2012, Michael Maguire (the primary author on the critical report of OPONI in his role as Chief Criminal Justice Inspector) was confirmed as the new Police Ombudsman, and he has held the role since July 2012.²⁵⁴ Maguire has subsequently confirmed that he will return OPONI to utilising the same definition of collusion as was drawn up by Justice Cory and as was previously deployed by O'Loan during her tenure as Ombudsman.²⁵⁵ In January 2013, in the wake of a follow-up review of OPONI by the Criminal Justice Inspectorate which deemed that the Ombudsman's Office was now fit to recommence historical investigations,²⁵⁶ Maguire announced that such investigations were beginning again.

Conclusion

The Office of the Police Ombudsman is one of the key organisations for investigating the past in Northern Ireland. As Ombudsman Maguire has frankly acknowledged, the events which led to the resignation of Sam Pollock and Al Hutchinson seriously damaged public confidence in the capacity of the office to deal with historical cases. One of the consequences of the controversy and criticism has been the setting up of a new Historical Investigations Directorate within OPONI with a new structure and processes to deal with historic cases. This unit is designed to be detachable from OPONI should an overarching body for dealing with the past be established.²⁵⁷ A review is also under way concerning the prioritization of historical cases and revised procedures are being implemented.²⁵⁸ OPONI's Annual Business Plan for 2012 – 2013 has also confirmed an increase in funding over the next six years to deal with historical cases wherein the Historical Directorate will be doubling in size.

The importance of OPONI is underlined by the fact that it formed a key element of the British government's case in response to the McKerr Cases which went to the European Court of Human Rights (see further HET section below) to demonstrate that past-related investigations into allegations of state involvement in unlawful killings were compliant with Article 2 of the European Convention. In August and September 2011, various local non-

249 CJINI (2011) op cit.

250 CJNI (2011) ibid.

251 Ibid., p. 34.

252 "Police Ombudsman Al Hutchinson To Stand Down In January", *BBC News*, 21 October 2011.

253 See: OPONI, *Police Ombudsman Response to Recommendations made in the Criminal Justice Inspection Report*, 2011. Available at: <http://www.policeombudsman.org/Publicationsuploads/Response%20to%20Recommendations%20made%20by%20CJI.pdf>.

254 "The Police Ombudsman: Staff Biographies", OPONI website, available at http://www.policeombudsman.org/modules/pages/staffbio/bio_Michael_Maguire.cfm.

255 Speech by Michael Maguire, CAJ Annual General Meeting, November 2012.

256 Criminal Justice Inspectorate NI, *Independence of the Office of Police Ombudsman: A Follow-Up Review of Inspection Recommendations*, Belfast: CJINI, 2013.

257 "Toxic Residue Of Troubles Still Claiming Victims", *Sunday Times*, 12 September 2011.

258 See: OPONI, "Historic Investigations prioritization – introductory explanation", 2011, available at <http://www.policeombudsman.org/Publicationsuploads/History%20prioritisation.pdf>. In consultation with bereaved families, advocacy groups and legal representatives, a draft policy was been drawn up to help ensure a consistent and fair method of prioritizing historical investigations. It has a number of elements – Stage 1: Gravity of Specific Offences (for example, does the alleged conduct by the police represent criminal behaviour or misconduct); Stage 2: Nature of Conduct (e.g. conspiracy or murder); Stage 3: whether court or inquest proceedings are pending; Stage 4: a qualitative statement detailing issues such as the age or infirmity of parents, partners or siblings of the deceased and the length of time the complaint has been with the OPONI.

Government organisations had expressed their concerns to the European Committee of Ministers regarding the efficacy of OPONI and whether it was Article 2 compliant.²⁵⁹ The UK government defended the Ombudsman, stating that the Minister of Justice David Ford has made clear his commitment to ensuring that action is taken to ensure that the issues raised in the report are dealt with so that public confidence in the Office of the Police Ombudsman is maintained.²⁶⁰

Like its predecessor the ICPC, the key issue for OPONI is its independence. Although criticisms of OPONI have been taken on board with the resignation of Al Hutchinson, the appointment of Maguire and creation of the Historical Investigations Directorate, challenges still remain in reforming the office to effectively investigate the misconduct of police officers in the past. A key issue across many past-related investigations is the length of time they have taken. In addition, as is illustrated from the examples above, even when a report is completed by the Ombudsman, often further steps are demanded by victims to more effectively investigate the misconduct of the police, whether through HET, inquiries or litigation.

Finally, the controversy over OPONI's operational practices has raised a number of questions of relevance to the broader truth recovery debate. The previous Ombudsman Hutchinson repeatedly stated his view that an overarching mechanism to deal with the past should be found.²⁶¹ Hutchinson also argued that such an overarching mechanism should include a conditional amnesty, driven by individual victim's needs and demands.²⁶² Maguire's views on this question are as yet unclear.

259 "Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) & the Pat Finucane Centre. (PFC) in relation to the supervision of Cases concerning the action of the security forces in Northern Ireland", February 2012

260 Ibid.

261 "One of the most significant challenges facing this Office is dealing with historic cases, with each involving a disproportionate amount of time, effort and media attention...there is not enough time or resources to deal adequately with each case in a timely fashion. The Office is essentially standing as a proxy to deal with an issue, which has not been resolved through politics or within civil society...It is critically important that society finds an accepted and alternative way of dealing with the past." Al Hutchinson quoted in OPONI, "Annual Report and Accounts", Belfast: OPONI, 2011, p. 5.

262 "Amnesties Should be Option in Northern Ireland: Al Hutchinson", *BBC News*, 12 February 2012.

THE HISTORICAL ENQUIRIES TEAM

The Historical Enquiries Team (HET) was set up in 2005 at the behest of the then Chief Constable of the PSNI Hugh Orde. The HET is a special unit of the Police Service of Northern Ireland (PSNI) and Orde was explicit that he saw the initiative as a policing contribution to dealing with the past. As he explained in his Longford lecture in 2009:

....if we were to move policing on in the new world post-Belfast Agreement, our history would act as an unwelcome anchor unless we thought very carefully about how we, as a police service, could contribute to a process that brought some resolution to the many victims' families who had so many unanswered questions about the circumstances surrounding the deaths of their loved ones. I was clear that to achieve a lasting peace the difficult territory of the past had to be confronted.²⁶³

With initial funding of £32 million, the HET began its work in 2006. The remit of the HET is to re-examine all deaths in Northern Ireland related to the conflict between 1968 and 1998; 2,002 of which were never solved.²⁶⁴

The HET is a unique institution both in policing terms given the scale of its operation in reviewing historical murder cases and also as a police-led transitional justice mechanism with a broader remit than simply seeking evidence to secure convictions.²⁶⁵ Although the HET does gather evidence with a view to a prosecution if one is deemed viable by the PPS, given the difficulties associated with historical prosecutions the HET have always claimed that they have been careful to manage the expectations of victims in this regard.²⁶⁶ The HET has also repeatedly stated that while they will “ensure that all investigative and evidential opportunities are examined and exploited”, their primary objective is to “assist in bringing a measure of resolution to those families of victims affected by deaths attributable to ‘The Troubles’ between 1968 and April 1998”.²⁶⁷

The focus of the HET is to “assist in provide a family-centred approach, to identify and address unresolved questions from the families’ perspective, working to the principle of ‘maximum permissible disclosure’”.²⁶⁸ What this means in practice is that the HET are supposed to disclose the maximum information possible, subject to limitations such as where the life of another person might be put at risk as a result of the disclosure.

The HET employs retired police officers and civilians from Northern Ireland and other parts of the UK, who are all supported by other intelligence and analytical staff.²⁶⁹ The original structure envisaged by the HET was that non-local officers (i.e. not from Northern Ireland) would deal with cases where families preferred officers from outside Northern Ireland to handle their relative’s case, while local officers would work on the other cases when families expressed no preference. However, as is discussed further below, there have strong criticisms over the years about the extent to which the independence of HET investigations were guaranteed in practice.

263 Sir Hugh Orde, “War is easy. Peace is the difficult prize”, Eight Longford Trust Lecture at Church House, Westminster, Dec 2009, <http://www.longfordtrust.org>.

264 The initial scope of the HET’s work had been considerably narrower, focusing only upon unsolved murders and excluding killings which involved the security forces. However, following a series of interventions by NGOs the organization extended its remit to include all deaths including those involving the security forces.

265 For a detailed overview of the work of the HET see P. Lundy (2009) “Can the Past Be Policed? Lessons From the Historical Enquiries Team Northern Ireland,” *Law and Social Challenges*, 11, 109-171; P. Lundy (2009) “Exploring Home-Grown Transitional Justice and Its Dilemmas: A Case Study of the Historical Enquiries Team, Northern Ireland”, *International Journal of Transitional Justice*, 3,3, 321-40; P. Lundy (2011) “Paradoxes and Challenges of Transitional Justice at the ‘Local’ Level: Historical Enquiries in Northern Ireland.” *Contemporary Social Science*, 6, 1, 89-105.

266 “... the likelihood of solving cases was clearly going to be slight. Witnesses would be old or dead. Exhibits, if still available, could be contaminated or inadmissible. Informants and agents would be in the mix; the original paperwork incomplete or missing. None of this surprised me at all. At the height of the Troubles, 497 people were murdered in one year. The forensic laboratory was blown up twice. Numerous police stations were blown up, stations housing much of the investigative material. ... It rapidly became clear that the family liaison role would be critical to our success. The fact that evidential opportunities lost at the time would be hard to recover did not render the initiative worthless. We had to shift the focus to ensure that, mindful of our primary role as investigators, the driving force behind this initiative would be to deliver a meaningful outcome for the families.” Orde (2009), op cit, p. 9.

267 <http://www.psnipolice.uk/historical-enquiries-team>

268 Lundy (2009), op cit.

269 HET, “Structure”, available at <http://www.psnipolice.uk/historical-enquiries-team/het-structure.htm>.

The HET has developed a protocol for processing cases, involving four stages:

1. The recovery and examination of existing records and exhibits;
2. The examination of the case to determine whether any further investigative or evidential opportunities exist;
3. The following-up of any new evidence or lines of inquiry, which may be referred to the PSNI Crimes Operations Department if criminal proceedings are undertaken; and
4. "Resolution" for the HET could involve judicial processes where this is deemed viable. Regardless whether a prosecution results from the investigation, the HET are to provide a review summary report to the family, which details the circumstances of death, details of the investigations, and attempts to answer any questions the family have asked. The process is voluntary and participants can opt out at any time, unless their case is part of a linked series of events.²⁷⁰

Working in a chronological fashion with occasional exceptions, by mid-2013 the HET had re-opened 2,068 cases which related to the deaths of 2,682 people and have completed 1,713 cases which related to the deaths of 2,209 people.²⁷¹ It is anticipated that all investigations will be completed by 2014.²⁷² Of those cases investigated to date, 26 have been referred to the PSNI for further investigation.²⁷³ However, it should be noted most of the arrests and reports to the PPS have actually emanated from the Police Ombudsman's Operation Ballast investigation into collusion and the misuse of informants.²⁷⁴ That follow-up investigation to the OPONI Report was initially handled by the HET but, as is discussed further below, was then passed to section C2 (Serious Crime Unit) of the PSNI – a move which provoked significant controversy. The cost of running HET is roughly £6 million a year.²⁷⁵ The HET's initial budget of £32 million was augmented in 2011 when an additional two years funding of £13 million was agreed by the Department of Justice.²⁷⁶

HET and the Views of Families

Perhaps, unsurprisingly, given the nature and scale of the undertaking, there have been mixed assessments regarding the performance of the HET. Government ministers have consistently lauded the work of the HET and repeatedly referred to polls which suggest that 90.5% of families who have engaged with the HET have been "very satisfied" or "satisfied" with its performance.²⁷⁷ However, some concerns have been raised about the methodology deployed in conducting these surveys.²⁷⁸ In addition, as researcher Patricia Lundy argues,²⁷⁹ and as has been acknowledged by the HET themselves, the quality and depth of HET reports improved when NGOs or other representatives with experience in casework assisted the affected families.

Indeed, some family members (e.g. those interviewed by Lundy in 2009 and 2011) have confirmed that they had positive experiences with the HET and that they considered the process to have been beneficial, views which are mirrored by the family members interviewed on the HET's own website. For example, on the latter video which includes some very moving testimony from victims' families, one son of a murdered father sums up "...we found out why my father was killed, the circumstances surrounding it, the matter we feel is concluded now in that the facts satisfied all the family members without equivocation".²⁸⁰ Another whose three brothers were killed in a

270 <http://www.psnipolice.uk/historical-enquiries-team>

271 For example if an elderly relative is in ill health or if a number of events are linked, see "Operating Protocols", the HET website, available at <http://www.psnipolice.uk/historical-enquiries-team/het-operating-protocols.htm> <http://www.psnipolice.uk/historical-enquiries-team/het-operating-protocols.htm>

272 Hansard, House of Commons Debates, 30 November 2011.

273 Hansard, House of Commons Debates, 7 March 2012.

274 "Police Ombudsman Public Statement and Report on Operation Ballast – RUC/PSNI Collusion with the UVF in North Belfast", 2007 available at <http://www.patfinucanecentre.org/collusion/ballast.html>.

275 Hansard, House of Commons Debates, 7 March 2012.

276 "Funding Reprieve for the HET", *UTV News*, 11 February 2011.

277 Hansard, House of Commons Debates, 30 November 2011.

278 "...we have some concerns about how the families are selected. We have found that not all the families who receive a final RSR are selected to participate in the satisfaction survey. In addition, the selection process also excludes those who did not wish to engage with the HET; those who disengaged along the way; and those who are still awaiting a report." HMIC, *Inspection of the Police Service of Northern Ireland Historical Enquiries Team*. London: Her Majesty's Inspectorate of Constabulary, 2013, p.13.

279 P. Lundy, "Can the Past Be Policed? Lessons From the Historical Enquiries Team Northern Ireland," *Law and Social Challenges*, 2009:11, 109-171; P. Lundy, "Exploring Home-Grown Transitional Justice and Its Dilemmas: A Case Study of the Historical Enquiries Team, Northern Ireland", *International Journal of Transitional Justice*, 2009:3/3, 321-40; P. Lundy, "Paradoxes and Challenges of Transitional Justice at the 'Local' Level: Historical Enquiries in Northern Ireland." *Contemporary Social Science*, 2011: 6/1, 89-105.

280 Testimony available <http://www.psnipolice.uk/historical-enquiries-team>

sectarian attack on their home suggests that the HET report has brought comfort to him and his family: "I think now my mother is happy. She really wouldn't want to hear any more at this stage. She is happy enough that they [the HET] have said that they were innocent victims of a senseless murder campaign".²⁸¹ In other instances, the findings of a HET report when coupled with other actions (e.g. an official apology) have appeared to bring a degree of closure to the families involved.²⁸²

It is worth examining a number of specific cases by way of illustration of some of the issues.

Kingsmills

There are a range of families have clearly not achieved any such closure. One such example are the families of ten Protestant civilians killed by the IRA at Kingsmills on 5 January 1976. The HET published its report in June 2011 and found that despite the murders being claimed by a group calling itself the Catholic Defence Force, the IRA was, in fact, responsible for the atrocity and that the victims were targeted because of their religion.²⁸³ The report also lists flaws by the original RUC team that investigated the killings, detailing how they failed to trace and investigate a number of potential witnesses. In light of this evidence, the families involved have called for the names of those responsible to be revealed and, as noted above, for the establishment of a public inquiry to establish the full facts around the events. Karen Armstrong, whose brother John McConville was among the deceased, reported that far from answering their questions, the HET report highlighted "a degree of either incompetence and lack of direction and motivation or, more alarmingly, a deliberate attempt to suppress evidence for whatever purpose".²⁸⁴ The relatives met with the then Secretary of State Owen Paterson but he refused to call on the PSNI to reopen the inquiry.²⁸⁵

In September 2012, the families met with Taoiseach Enda Kenny in Dublin with the hope that the Irish Prime Minister would apologise "not on his own behalf, but on behalf of previous governments and on behalf of the Irish state".²⁸⁶ The families believe that as the IRA gang had operated from the Irish Republic, and that "there was a failure on behalf of the Irish authorities, both the political authorities and the security authorities, to deal effectively with what was going on there".²⁸⁷ However, Kenny told the relatives that he was unable to apologise for something done by the IRA, although he assured the relatives that the "IRA was the common enemy of all of the people of Ireland...and that their campaign of violence was strongly resisted by successive Irish governments".²⁸⁸ An inquest into the killings was set up in August 2013 by the Attorney General John Larkin, discussed further below.²⁸⁹

La Mon

In a similar vein, families affected by the IRA bombing of the La Mon Hotel in 1978 were highly critical of the 2012 HET report into that event in which 12 people died and many more were left with severe burns and other injuries. The report revealed that crucial police documents, including original transcripts with IRA members who were interviewed about the bombing are missing.²⁹⁰ Some of the affected families, represented by "Ulster Human Rights Watch", argued that "key documents were removed from the files with the view to protecting IRA members who today, may be involved in the peace process at the highest level".²⁹¹

281 HET, "Historical Enquiries Team: Policing the Past," available at <http://www.youtube.com/watch?v=yULzfFtIB48>.

282 In 2008, a HET report found that with regard to the death of Aiden McAnespie (who unarmed and shot in the back as he crossed a border checkpoint to attend a football match) that the soldier's account that he had accidentally discharged a series of random shots "was so remote in the circumstances that they could be virtually disregarded." The family welcomed the initial HET and a subsequent expression of regret by then Secretary of State Sean Woodward. McAnespie's niece said: "Given the findings of the HET report we find it highly significant and positive that the Minister of Defence has co-signed this public statement along with the Northern Ireland Secretary. For years we have fought for truth and acknowledgement. The HET report, in our view, represents the closest that we as a family have got to the truth of what occurred that day. The meeting with Shaun Woodward is the acknowledgement at official level that was missing." See "Family Welcome Findings of HET Focussed Investigation", available at <http://www.patfinucanecentre.org/cases/anespie2.html>. See also "Regret Over Checkpoint Shooting", *BBC News*, 27 July 2009. http://news.bbc.co.uk/1/hi/northern_ireland/8170508.stm

283 "Kingsmills was 'Sectarian Savagery'", *News Letter*, 17 June 2011.

284 "Kingsmills Families Want Killers Named", *News Letter*, 22 June 2011; "IRA blamed for 'sectarian slaughter' of 10 at Kingsmills", *Irish Times*, 22 June 2011; "Kingsmills: HET Report", Northern Ireland Assembly debates, 27 June 2011.

285 "Paterson refuses to back inquiry into Kingsmills massacre", *Irish Times*, 19 July 2011.

286 "Families of Kingsmills Victims Seek Government Apology", *BBC News*, 13 September 2012.

287 Ibid.

288 "Kingsmills victims' relatives unhappy with Taoiseach meeting", *BBC News*, 13 September 2012.

289 "New inquest into Kingsmill murders", *BBC News*, 7 August 2013.

290 "La Mon bomb victims want public inquiry after HET report", *BBC News*, 16 February 2012.

291 "Relatives criticize loss of files in IRA bomb investigation", *Irish Times*, 17 February 2012; "La Mon bomb massacre files 'lost' to protect IRA say relatives", *Belfast Telegraph*, 16 February 2012.

In a statement released after the report's publication, the family criticized the HET, stating that "[t]his case, in common with other major investigations, appears to show that the will to uncover the truth has been curtailed for fear of destabilising the current political process".²⁹² Traditional Unionist Voice leader Jim Allister, who was called in by the families involved to offer legal advice, was highly critical of the HET review, calling it "sloppy" and stating that "[t]his report, I had hoped, would have given more succour and comfort to the families who have suffered so much, than it has".²⁹³ These families also called upon the then Secretary of State Owen Paterson to establish a public inquiry.²⁹⁴ The HET replied that they had tried to answer as many of the families' questions as possible and that "[f]amilies will always be able to seek further clarification of any issue or concern they may have".²⁹⁵

In August 2013, victims of the La Mon bombing met up with Secretary of State Theresa Villiers, expressing their discontent with the inquiries conducted by the HET and demanding a De Silva-style inquiry similar to the one granted to the relatives of Pat Finucane. Villiers said that she would review the HET investigations.²⁹⁶

Loughgall

Nationalist and Republican families have also been critical of the conduct of some high profile HET investigations. For example, the HET's report into the killing of eight IRA men during an attack on a police station at Loughgall on 8 May 1987 was prematurely leaked to the media on 2 December 2011, causing upset to the families of the victims and sparking accusations of propaganda stunts.²⁹⁷ The report found that the SAS was within its rights to open fire on the men, as the IRA unit had fired first.²⁹⁸ The families of those killed have always maintained that the men were intentionally gunned down as part of a shoot-to-kill policy without any warning or attempt to effect arrests.²⁹⁹ The HET's findings were rejected by the victims' families. Commenting on the leaked details, Sinn Féin's Barry McElduff whose brother-in-law Patrick Kelly was amongst the dead claimed:

[t]he men killed at Loughgall were victims of a British government policy of shoot-to-kill. Nobody believes that the British Army unit were sent to Loughgall that evening to arrest anybody. They were sent there to kill the IRA unit and that is what they did. If the HET try and put forward a different theory, it will say more about that group's credibility than anything else. The families of those killed at Loughgall deserve the truth. They do not deserve continuing cover-up and concealment by the British government or by the HET.³⁰⁰

He highlighted the fact that the report was leaked in advance as saying "much about the intent of the HET with regards to this investigation".³⁰¹

In August 2013, the high court in Belfast told the Ministry of Defence (MoD) to hand over all documents relating to the killings as three of the families are set to pursue civil action against MoD.³⁰²

Conclusion

What is interesting about the sample of high profile cases referred to above, which either expose flaws in the original police investigation, or indeed critiques of the work of the HET itself, is that they appear to provoke a fresh round of controversy including calls for prosecutions, further inquiries or indeed state apologies. In effect, for these families and their supporters at least, the experience of HET investigations would suggest that such reports alone will not bring a "resolution" for such individuals and groups. In fairness to the HET staff and managers, this is something they freely acknowledge in both public and private discussion.³⁰³

292 "Police La Mon documents 'lost'", *UTV News*, 16 February 2012.

293 "La Mon bombing report criticised", *Belfast Telegraph*, 15 February 2012.

294 "IRA La Mon bombing must have public inquiry, say relatives", *The Guardian*, 16 February 2012.

295 "Police La Mon documents 'lost'", *UTV News*, 16 February 2012.

296 "Villiers 'considers' La Mon inquiry", *News Letter*, 14 August 2013.

297 "Press Release: Human rights groups concerned at apparent propaganda stunt over Loughgall report", Committee on the Administration of Justice, available at <http://www.caj.org.uk/contents/1049>.

298 "Report says IRA opened fire first in 1987 Loughgall attack", *BBC News*, 2 December 2011.

299 "New cold case report concludes 8 man IRA gang opened fire first and SAS team that killed them had a right to shoot back", *Belfast Telegraph*, 2 December 2011.

300 "Loughgall comments criticized", *Irish Times*, 2 December 2011; "Loughgall inquiry finds IRA fired first", *Irish Times*, 3 December 2011.

301 "Loughgall was Shoot-to-Kill", *Sinn Féin*, 2 December 2011, available at <http://www.sinnféin.ie/contents/22113>.

302 "MoD ordered to disclose documents", *UTV News*, 20 August 2013.

303 See e.g. HET Policing the Past Video – op cit.

HET, Independence and “Article 2 Compliance”

Apart from criticism concerning the quality of some of the reports produced by the HET, the most critical commentary on the work of the HET has focused in particular on the question of independence and its relationship with the PSNI. As discussed further below, the issue of independence is not simply a political or a moral responsibility, it is a legal requirement under the European Convention of Human Rights in cases which involve state actors either directly or where there is an allegation of collusion. Between 4th August 2001 and 1st October 2003 the European Court of Human Rights (ECHR) issued a series of judgments collectively known as the McKerr group of cases, in which they found that there had been a violation of Article 2 of the ECHR in respect of a range of failings in investigating deaths involving state actors in Northern Ireland.³⁰⁴ Those judgements spell out various requirements which are required in order for the investigations of such deaths to be compliant with Article 2 of the ECHR including independence, thoroughness, promptness and accessibility. For example, in all of these cases, concerns were expressed that there was a lack of independence in the investigations between the investigating and implicated officers and soldiers, which resulted in the overall impartiality of the investigation being undermined.³⁰⁵

Following these judgements, the Committee of Ministers, who are the enforcement mechanism for the European Convention on Human Rights, passed an interim resolution on 23 February 2005, in which they requested that the United Kingdom take steps to comply with these judgments and keep the Committee of Ministers informed. In 2007, the Committee of Ministers issued another resolution, noting with interest the creation of the HET and inviting the UK to keep the Ministers informed of its results and progress. In 2008 the PSNI Chief Constable and the Director of the HET gave a presentation to the Secretariat of the Committee of Ministers of the Council of Europe on the work of the HET. As a result of this presentation in November 2008, the Secretariat reported in a memorandum:

The HET seems to have adopted a well-structured organisational scheme. This allows its different teams to concentrate on different aspects of a case depending on its complexity and the engagement of the family concerned... It is noted that the HET meets with the families, informs them of their findings and provides a copy of the Summary Report. The Secretariat welcomes that, after receiving the Summary Report, the families can seek further clarifications of any outstanding issues.... [Additionally the Secretariat noted]...The Secretariat takes note of the structural arrangements/organisation of the HET and acknowledges that the organisation is independent.³⁰⁶

In 2009, the Committee of Ministers recalled the establishment of the HET and noted that although the HET process was taking longer than originally anticipated as a result of a high caseload, it could bring “a measure of resolution” to affected persons; that the HET structure consisted of different teams and was staffed by retired and serving police officers including those from outside Northern Ireland, and that the HET had transferred a total of 87 cases to the Police Ombudsman. The Ministers therefore closed their examination on the grounds that the HET had “the structure and capacities to allow it to finalise its work”. In sum, it appeared at that juncture that the ECHR mechanisms were broadly content that the investigations of the HET satisfied the level of independence required under the Convention.

However, in 2012 a number of important NGOs - the Committee on the Administration of Justice (CAJ), Relatives for Justice and the Pat Finucane Centre - all made submissions to the Committee of Ministers, arguing that the closing of the examination was premature and outlining concerns relating to the HET’s independence and effectiveness, drawing particular attention to the organisations structural relationship with the PSNI and its staffing policies.³⁰⁷ For example, the decision to remove the HET from the investigation of Operation Ballast (subsequently renamed Operation Stafford) and to pass this to the C2 section of the PSNI has been a source of much criticism, particularly given the finding by OPONI of collusion between both RUC and PSNI officers with

³⁰⁴ See *Jordan v UK* [2003] 37 EHRR 2; *Kelly v UK* (Appl No. 30054/96, May 4, 2001); *McKerr v UK* [2002] 34 EHRR 20; and *Shanaghan v UK* (Appl No. 37715/97, May 4, 2001). And see also, e.g., *McShane v UK* [2002]

35 EHRR 23 and *Finucane v UK* [2003] 37 EHRR 29.

³⁰⁵ *Jordan*, paras [118]-[121]; *Kelly*, para. [114] (re: RUC officers investigating the actions of SAS soldiers who had liaised with the RUC prior to the actions); *McKerr*, paras [128]-[129] & [138]-[141], *Shanaghan*, paras [104]-[105].

³⁰⁶ See Freedom of Information Request F 2011 – 0234, available at http://www.psni.police.uk/historical_enquiries_team-3.pdf.

³⁰⁷ 1136th DH meeting (March 2012) – Communication from a NGO (Relatives for Justice) in the McKerr group of cases against United Kingdom [Application No. 28883/95] – Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements; 1144th DH meeting (June 2012) Communication from NGOs (Committee on the Administration of Justice (CAJ) and the Pat Finucane Centre (PFC) (with appendices) in the McKerr group of cases against the United Kingdom [Application No. 28883/96] and reply of the government.

members of the UVF in North Belfast.³⁰⁸ According to sources interviewed by Lundy,³⁰⁹ the explanation given for the transfer of the case from the HET to C2 (the section of the PSNI which assumed responsibility for counter-terrorism previously undertaken by the RUC Special Branch) was that a series of complex cases (i.e. Operation Ballast) required further resources, the HET did not have the skills required and that such complex investigations would be better placed within C2. This was but one high profile example of the practice since 2009 of the HET referring cases back to the Serious Crime branch of the Crimes Operations Department.

Lundy, an independent researcher from the University of Ulster, also raised a number of additional arguments about the independence of the organisation, which were in turn picked up by the NGOs in 2012 who then raised their concerns with the Council of Ministers. For example, Lundy has argued that each phase of the HET process included the involvement of former long-serving RUC officers, including ex-Special Branch officers.³¹⁰ She also points out that, at least at the time of her research (from August 2005 – December 2007), the Intelligence Unit of the HET was staffed by eighteen former RUC and Special branch officers and there was a lack of transparency surrounding the work of the Intelligence Manager, whose role involves both advising on intelligence issues and reviewing every review summary report produced.³¹¹

In April 2012, Lundy published a further paper questioning the independence of the office and in particular highlighting apparent inequalities of treatment by the HET in cases where state agencies are involved compared to cases involving non-state actors.³¹² Lundy examined the HET's review processes and procedures in Royal Military Police (RMP) investigation cases involving the fatal shooting of over 150 civilians by the British Army between 1970 and September 1973. By November 2011, the HET had completed 36 RMP case reports on these cases, and Lundy analysed 24 HET reports, relating to 17 individual RMP cases.³¹³ Her report brought to light several issues of concern, including the HET's use of "the pragmatic approach" when interviews with soldiers were conducted informally and not under caution; possible unequal treatment arising from an apparent willingness by the HET to supply soldiers with a wider range of pre-interview disclosure documents compared to those given to non-Army suspects; and the criticism that HET interviews "appear to lack robustness and inconsistencies are frequently not adequately challenged". She also noted that HET interviews with soldiers as contained in the unit's completed reports are edited summaries; that questions put to the suspect are not given in the HET report; that, in some instances, the interview summary amounts to one-and-a-half pages within the HET report and that "the process and procedures are not transparent".³¹⁴

In the wake of Lundy's report, the Chief Constable of the PSNI and the Policing Board for Northern Ireland asked Her Majesty's Inspectorate of Constabulary (HMIC) to conduct a review of HET, acknowledging "the public concerns and the need to reassure families and take an independent look at this".³¹⁵ The HMIC review was tasked with determining "whether the conduct of all aspects of the HET investigation of RMP cases meet current policing standards and the requirement to provide an independent, effective, prompt and sufficiently transparent investigation of these cases under Article 2 of the ECHR".³¹⁶

In July 2013, the HMIC released its report which vindicated Lundy's concerns.³¹⁷ The HMIC report expressed concerns that the lack of any "public reporting mechanism or accountability structure" other than reporting to the Chief Constable meant that there was "a real danger that the HET might be inadequate to meet Article 2 standards of transparency and accountability."³¹⁸ The report also expressed concerns on the way intelligence is processed both to and within the HET and recommended an independent procedure for guaranteeing that all relevant intelligence in every case is transmitted for the purposes of review, to ensure compliance with the

308 As solicitor Kevin Winters (who represents some of the families involved) has argued, this move caused a "high degree of anxiety and concern on the part of the families who had already been through a significant and trying ordeal over a number of years in terms of trying to get information, the background to the killing of their loved ones...the central tenet running through the Operation Ballast report rested on allegations of collusion involving members of the security forces so there was a certain perception on one view that it didn't add up or it didn't square at all with many families to find that essentially the police were investigating the police." In "The State and Northern Ireland's Past", *The Detail*, December 19, 2011, available at <http://www.thedetail.tv/issues/54/the-state-and-northern-ireland>.

309 Lundy [2011] op cit.

310 P. Lundy "Can the Past be Policed?", 109-171

311 Lundy 2010 [op cit]

312 P. Lundy, *Research Brief: Assessment of HET Review Processes and Procedures in Royal Military Police Investigation Cases*, 2012, available at <http://www.socsci.ulst.ac.uk/sociology/profiles/p.lundy/research.phtml>.

313 Ibid.

314 Ibid.

315 "PSNI's Historical Enquiries Team faces review", *Belfast Telegraph*, 5 April 2012.

316 "Historical Enquiries Team Review – terms of reference", November 2012, available at <http://www.hmic.gov.uk/publication/historical-enquiries-team-terms-of-reference/>.

317 HMIC, *Inspection of the Police Service of Northern Ireland Historical Enquiries Team*, London: Her Majesty's Inspectorate of Constabulary, 2013.

318 Ibid., p. 26.

Article 2 standard.³¹⁹ In addition, the report found that the HET had not maintained its Article 2 required independence because it failed to ensure that former RUC members now working for the HET were not involved in “state involvement” cases.³²⁰ The HMIC report also concluded that cases involving state actors appeared to be treated less rigorously in a number of ways including: how interviews under caution are conducted; the nature and extent of pre-interview disclosure and the way claims made by state agents about suspects being unfit for interview under caution were verified.³²¹ The HMIC surmised that “in cases of state involvement, the HET acts as investigator and prosecutorial decision-taker”.³²² Accordingly this undermines the effectiveness of the HET’s investigatory capacity in light of Article 2 ECHR and impacts upon the likelihoods of prosecutions.

Overall the HMIC report concluded:

Taken together, our conclusions lead us to consider that the HET’s approach to state involvement cases is inconsistent with the UK’s obligations under Article 2 ECHR. The inconsistency in the way that state involvement and non-state involvement cases are dealt with undermines the effectiveness of the review process in Article 2 terms. In addition, the deployment of former RUC and PSNI officers in state involvement cases easily gives rise to the view that the process lacks independence.³²³

Following the HMIC’s highly critical report, the Policing Board declared that it had no confidence in the leadership of the HET.³²⁴ The Policing Board established a working group on the HET tasked with ensuring that the recommendation of the HMIC would be implemented under the chairmanship of Brice Dickson. In September 2013, Dave Cox, the Director of the Historical Enquiries Team, stood down from his post, which he had held since the formation of the HET in 2005.³²⁵ There has also been a strong reaction to the HMIC within civil society in Northern Ireland. CAJ has called upon the Committee of Ministers to reopen the scrutiny of the HET on its ability to carry out independent and effective investigations.³²⁶ Relatives for Justice staged a protest at the subsequent Policing Board meeting, and called for the dissolution of the HET and replaced by “a proper independent investigative process aimed at getting to the truth and in providing accountability”.³²⁷ When Cox was replaced at the end of September 2013 by PSNI Detective Chief Superintendent Tina Barnett (who has no previous experience in the RUC),³²⁸ this move was strongly criticised as failing to deliver on the required level of independence discussed in the HMIC Report.³²⁹

The PSNI also announced that it was going to “review” 13 British Army killings discussed in the HMIC report “to assess if any evidential opportunities have been lost and to inform deliberations as to the future directions of the HET”.³³⁰ In the absence of any new accountability or independence structures as envisaged by the HMIC, this announcement has also been severely criticised.³³¹

319 “... the HET’s intelligence unit is staffed largely by former employees of either the RUC or the PSNI. Staff in the PSNI intelligence branch, some of whom are former RUC special branch officers, are the gatekeepers for intelligence being passed to the HET. Given the sensitivity of intelligence matters in the context of Northern Ireland the HET needs to do everything it can to make sure its independence is safeguarded.” *Ibid.*, p. 23.

320 “We are aware of one instance in which a former RUC officer led the HET’s enquiry into a state involvement case, in breach of: the HET’s policy; undertakings given to GOs and solicitors; and an express wish of the family in question. In addition, we understand that the officer in question actually knew the SIO [Senior Investigating Officer] originally in charge of the case.... the HET adopted a ‘self-declaration’ process. HET staff are required to declare their previous involvement or prior knowledge in cases. We did not find any evidence that these declarations were subject to any formal checks and validation. We consider that, without a policy that requires the thorough vetting of the HET staff involved in each case, this situation could be repeated.

This is of grave concern. We consider that the independence necessary to satisfy Article 2 can only be guaranteed if former RUC officers are not involved in investigating state involvement cases, and if processes designed to ensure this are, in fact, effective. In order to ensure ECHR compliance, the HET must be in a position to guarantee that its systems are capable of preventing such situations in future.” HMIC Report, p. 92.

321 *Ibid.*, p. 28.

322 *Ibid.*, p. 87.

323 *Ibid.*, p. 28.

324 “Policing Board ‘no confidence’ in HET”, UTV News, 4 July 2013.

325 “Historical Enquiries Team head Dave Cox to step down”, BBC News, 12 September 2013.

326 Further criticisms of the HET are made by Relatives for Justice in their February 2012 submission, “Communication from a NGO (Relatives for Justice) in the McKerr group of cases against United Kingdom (Application No. 28883/95) - Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements”, DH-DD(2012) 244E.

327 “Relatives for Justice call for Historical Enquiries Team to be replaced”, An Phoblacht, 5 September 2013.

328 “Police team appointed to lead HET”, UTV News, 1 October 2013.

329 *Ibid.*

330 “PSNI to review 13 military killings in Northern Ireland”, BBC News, 13 September 2013.

331 See e.g. B. Feeney, “Trying to Pre-empt Haass ? Why is the PSNI now fit to Review Army Killings,” Irish News, 24 September 2013.

Conclusion

To recap, the HET represents a unique experiment in transitional justice – an effort to use contemporary policing techniques to review all deaths in Northern Ireland that were conflict-related in a way which is designed (as much as possible) to bring some measure of resolution to the relevant families. As discussed above, notwithstanding the methodological concerns on the surveys completed, some affected families have apparently taken significant comfort from the work of the HET. Others, however, have been less positive and have either been critical of the work of the HET themselves, or have viewed the information uncovered as a basis for further mobilisation and campaigning, whether for prosecutions, further information or truth, apologies or a combination thereof.

Two overlapping tensions have become apparent in the work of the HET. The first is whether it is possible to do past-related investigations which are designed to bring closure to the families while leaving open the possibility of criminal prosecutions. The second is how to balance harnessing investigative skills which are arguably unique to police officers, maintain necessary relations with the PSNI and still carry out investigations into allegations of state malfeasance while maintaining the required level of independence required under Article 2.

On the issue of prosecutions, as previously stressed by former PSNI Chief Constable Hugh Orde, the HET has not led to large numbers of successful indictments. As of October 2013, only two individuals have been convicted for conflict-related offences as a result of HET investigations.³³² While other cases are pending, the original circumspection about not over-promising prosecutions would appear to be well-placed. On the issue of independence and the related requirements of Article 2, following the well-founded criticisms of Lundy and the HMIC and the no-confidence motion from the Policing Board in the HET leadership, it is obviously an organisation in crisis. It remains to be seen whether the HET can continue despite the serious blows to the public's confidence in its ability to independently investigate the past.

332 HMIC Report, op cit p. 82.

THE CRIMINAL CASES REVIEW COMMISSION

The Criminal Cases Review Commission owes its origins to the conflict in and about Northern Ireland. It was the crisis of confidence in criminal justice in the wake of the Birmingham Six and Guildford Four miscarriages of justice (which involved people wrongfully convicted for IRA bombings in England) that prompted the establishment of a Royal Commission on Criminal Justice.³³³ As a result, the Royal Commission recommended the establishment of the Criminal Cases Review Commission (CCRC), which was the first fully state-funded body in the world whose sole purpose of which was to investigate suspected miscarriages of justice.³³⁴ This recommendation was accepted by the Government and the CCRC was created by the Criminal Appeal Act 1995, beginning its work on 1 April 1997. The CCRC, an independent body, replaced the role previously played by the Home Office in investigating alleged miscarriages of justice and also that of the Home Secretary in referring cases back to the Court of Appeal.

While the Home Secretary had the power to refer a case back to the Court of Appeal “if he sees fit”, the powers of the CCRC are more restrictive. Under the Criminal Appeal Act, there must be a “real possibility” that the conviction or sentence would not be upheld and that “real possibility” must arise from an argument or evidence that was not raised during the trial or at appeal, or from “exceptional circumstances”. The latter are defined on a case by case basis.³³⁵ Based in Birmingham, the Commission is a large organisation with about 90 staff, including 50 caseworkers. It has significant legal powers including the power to access and review police notes or other documents held by public bodies as well as commission reports from outside experts. As the CCRC website makes clear, the test that they apply is not whether or not a person is “innocent” but rather “... to review the cases of those that feel they have been wrongly convicted of criminal offences, or unfairly sentenced. We consider whether there is new evidence or argument that may cast doubt on the safety of an original decision”.³³⁶ Since it began its work in 1997 it has received over 15,000 applications, has had 463 referrals heard by the Court of Appeal, 325 of which resulted in a quashed conviction, and 138 of which were upheld.³³⁷

The CCRC also has the power to refer Northern Ireland-based cases back to the Northern Ireland Court of Appeal. As one academic commentator has demonstrated the Northern Ireland Court of Appeal has developed a distinctive line of reasoning regarding when it will quash a conviction in a number of cases.³³⁸ Broadly, the test applied by the Northern Ireland Court of Appeal on whether to allow an appeal against conviction is that (a) that the conviction is unsafe and (b) shall dismiss such an appeal in any other case.³³⁹ “Unsafety” is, by definition, a broader test than innocence and may mean in effect that the court will quash the conviction of a person even if it believes the individual to be factually guilty but where the methods used to achieve the conviction are flawed.³⁴⁰ In cases where new evidence is raised on appeal, the Northern Ireland Court of Appeal has taken the view that they should not attempt to retry the case but rather ask whether it is certain that the jury or Diplock judge would have convicted had they been aware of the new evidence; if not, it must quash the conviction. Whilst unsafety remains the primary test, “if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal”.³⁴¹ As Quirk notes, the NICA often uses a “sense of unease” in its judgments, almost interchangeably with unsafety.

Between 1998 and 2011, 33 cases were referred from the CCRC to the Northern Ireland Court of Appeal, 30 of which were conflict-related. Following on from these referrals, 26 convictions were quashed, a “success” rate of 92% compared to 70% in England and Wales. 20 of those cases where convictions were quashed referred to “problematic” confessional evidence including allegations of police torture of abuses, where juveniles or vulnerable persons had been denied access to their lawyers, or where ESDA testing of police notes suggested that evidence had been tampered with. In eight related cases materials had been wrongfully withheld from the

333 E. Stockdale and S. Casale, *Criminal Justice Under Stress* London: Blackstone, 1992; C. Walker and K. Starmer, (eds.), *Justice in Error*, London: Blackstones, 1993; M. McConville, and L. Bridges, *Criminal Justice in Crisis*, Aldershot: Edward Elgar, 1994.

334 The Royal Commission on Criminal Justice, *Report*, Cm 2263 (1993).

335 S. Roberts and L. Weathered, “Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission”, *Oxford Journal of Legal Studies*, 2009:29/ 1, 43–70.

336 http://webarchive.nationalarchives.gov.uk/20110215111039/http://www.ccr.gov.uk/about/about_27.htm.

337 <http://www.justice.gov.uk/about/criminal-cases-review-commission>.

338 H. Quirk, “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*, 2013:76/ 6, 949–980. The details regarding the Northern Ireland cases considered by the CCRC were also kindly made available by Quirk.

339 s2(1) Criminal Appeal Act 1968 and s2 Criminal Appeal (Northern Ireland) Act 1980, (as amended by the Criminal Appeal Act 1995).

340 *R v Mullen* [1999] 2 Cr App R 143; *R v Mason* [1988] 86 Cr App R 349.

341 *R v Pollock* [2004] NICA 34.

defence, and one case involved insufficient reasoning given by a judge. Other issues raised in quashing convictions have included where new expert evidence has called into question the safety of a conviction or where questions were raised as to the reliability of eyewitness evidence or other prosecution evidence which was relied upon in order to secure a conviction. With regard to the suggestions of torture, in one notorious case referred to the CCRC in 2012 and unopposed by the PPS, the allegations include that an individual was subject to “waterboarding” by British Army interrogations before confessing to involvement in a murder.³⁴²

Conclusion

At the time of writing, over 30 cases are pending before the Criminal Cases Review Commission. However, as noted by the CGP (2009:119), there are potentially hundreds of applications which could be brought to the CCRC by individuals, most of whom were convicted under the Diplock system. In 2012, an organisation was established specifically to help co-ordinate applications from former prisoners who allege a miscarriage of justice.³⁴³ Again as is well documented, the Diplock system relied heavily on confessional evidence for successful prosecutions,³⁴⁴ and there is a huge array of documentary evidence that torture, inhuman and degrading treatment were frequently used by interrogators to secure convictions at different periods during the conflict in and about Northern Ireland.³⁴⁵ As the number of convictions quashed when referred back to the Court of Appeal by the CCRC would suggest, cases which make it through the CCRC’s own filtering processes have a high chance of success. Given that the UK Supreme Court has confirmed that individuals who had their convictions quashed are potentially entitled to very large compensation claims (linked to the length of the prison sentence and other factors) including in cases where an individual’s actual membership of paramilitary organisations is not disputed,³⁴⁶ the concerns raised by the CGP that such historical cases place very considerable pressures on the human and financial resources of the CCRC remain highly germane.

342 “British Army Waterboarded Suspected in the 1970s”, *The Guardian*, 21 December 2009. “Man Granted Soldier Murder Appeal Following Waterboarding Evidence”, *The Guardian*, 4 May 2012. For a more detailed discussion see I. Cobain, *Cruel Britannia : A Secret History of Torture*. London: Portobello Books, 2012.

343 The Irish Centre for Wrongful Convictions. See <http://www.ic-wc.org/>

344 See J. Jackson and S. Doran, *Judge Without Jury. Diplock Trials in the Adversary System*. Oxford : Oxford University Press, 1995.

345 See for example, Amnesty International, *Report of a Mission to Northern Ireland*, London : Amnesty International, 1978; J. Bennett, *Report of the Committee of Enquiry into Police Interrogation Procedures in Northern Ireland*, London: HMSO, 1979; B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland – esp Ch. 7*. Oxford: Oxford University Press, 2010. See also “An RUC Interrogator Speaks: Northern Ireland’s Forced Confessions Revealed.” *The Guardian*, 11 October 2010. Available at <http://www.guardian.co.uk/uk/video/2010/oct/11/northern-ireland-police-torture>.

346 *R (Adams) v Secretary of State for Justice* [2011] UKSC18. In this case, one of the applicants who had his conviction quashed and who was deemed entitled to compensation was Raymond McCartney. McCartney, now a Sinn Féin MLA, was previously the Officer Commanding of IRA prisoners in the Maze/Long Kesh prison.

INQUESTS

The operation of the Coroner's System in Northern Ireland was the focus of much critical commentary throughout the conflict.³⁴⁷ Coroners in Northern Ireland, as in England and Wales, are required to hold inquests into deaths in order to identify the deceased and to ascertain "how, when and where the deceased came to his death".³⁴⁸

Prior to the Human Rights Act 1998, much of the critical discussions on Coroners' Courts centred on the lack of breadth of investigation and the findings that were possible at inquests, in particular given that coroners and juries were prohibited from expressing any opinion "on questions of criminal or civil liability".³⁴⁹ The Coroners' legislation had previously been interpreted to mean that the function of an inquest was to consider "by what means" death had occurred rather than "by what means and in what broad circumstances".³⁵⁰ Ultimately the operation of the Coroners' Courts in Northern Ireland came under scrutiny as part of the Article 2-related challenges (discussed above) before the ECHR namely *Jordan, Kelly, McKerr, and Shanaghan v. UK*.³⁵¹ In a damning series of judgements, the ECHR criticised a number of aspects of the Coroners' System in Northern Ireland including this narrow formulation regarding the purpose of a Coroner's Inquest,³⁵² the rule of procedure whereby coroners could not compel individuals who had been involved in the use of force to give evidence at an inquest;³⁵³ the delay in holding inquiries in the various cases;³⁵⁴ the absence of legal aid for some of the families of the deceased;³⁵⁵ the use of public interest immunity certificates to suppress evidence on key issues;³⁵⁶ and the non-disclosure of witness statements to families prior to the inquiry.³⁵⁷ Similar criticisms were raised by the ECHR in the *Finucane* case wherein the inquest was criticised for being "concerned only with the immediate circumstances of the shooting" and for thereby being unable "to address serious and legitimate concerns of the family and the public ... [it could not] be regarded as providing an effective investigation into the incident".³⁵⁸

As a result of domestic legal challenges, the Article 2 related cases heard at Strasbourg and other political pressures, the British government instigated a major review of the Coroners' System headed by Tom Luce.³⁵⁹ Following that review, the government amended the coronial rules to compel a person suspected or charged with causing the death of the deceased person to appear before an inquest as a witness, although the person can decline to answer any question in order to prevent incriminating himself or his spouse.³⁶⁰ Additionally, the government introduced legal aid for relatives of those killed to be represented in inquests.³⁶¹ In addition, there is now also pre-inquest disclosure to the next-of-kin of individuals who die in police custody or a result of police action.³⁶² Finally a general restructuring of the Coronial system in the light of the Luce Review has been carried out for purposes of, among others, avoiding inquest delays.³⁶³

347 See e.g. CAJ, *Inquests and Disputed Killings in Northern Ireland*. Belfast: CAJ, 1992; F. Ni Aolainn, *The Politics of Force : Conflict Management and State Violence in Northern Ireland*, Belfast : Blackstaff, 2000.

348 Coroners Act (Northern Ireland) 1959, s.31(1); and Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 (SI 1963/199) [as amended], r.15.

349 M. Requa and G. Antony, "Coroners, Controversial Deaths, and Northern Ireland's Past Conflict", *Public Law*, 2008:62, 443-451.

350 *Re Ministry of Defence* [1994] NI 279, following *R v HM Coroner for North Humberside and Scunthorpe, ex p Jamieson* [1995] QB 1.

351 See *Jordan v UK* [2003] 37 EHRR 2; *Kelly v UK* [Appl No. 30054/96, May 4, 2001]; *McKerr v UK* [2002] 34 EHRR 20; and *Shanaghan v UK* [Appl No. 37715/97, May 4, 2001]. And see also, e.g., *McShane v UK* [2002] 35 EHRR 23 and *Finucane v UK* [2003] 37 EHRR 29.

352 *Jordan*, paras [128]-[130]; *Kelly*, paras [123]-[124], *McKerr*, para. [145], *Shanaghan*, paras [109]-[113].

353 *Jordan*, para. [127]; *Kelly*, para. [121], *McKerr*, para. [144]. Rule 9(2) of the Coroners (Practice and Procedure) Rules (NI) 1963 at that time read: "Where a person is suspected of causing the death, or has been charged or is likely to be charged with an offence relating to the death, he shall not be compelled to give evidence at the inquest".

354 *Jordan*, paras [136]-[140], *Kelly*, paras [130]-[134], *McKerr*, paras [152]-[155], *Shanaghan*, paras [119]-[120].

355 *Jordan*, para. [132].

356 *McKerr*, paras [149]-[151].

357 *Jordan*, para. [134]; *Kelly*, paras [126]-[128]; *McKerr*, paras [147]-[148]; *Shanaghan*, paras [116]-[117]. On the position in NI law before the judgments see, e.g., *R v HM Coroner at Hammersmith ex parte Peach* [1980] 2 All ER 7; *In Re Mailey* [1980] NI 102; *In re Devine and Breslin's Application* [1988] 14 NIJB 10.

358 *Finucane v UK* [2003] 37 E.H.R.R. 29 at [78].

359 T. Luce et al [2003] *Death Certification and Investigation in England, Wales and Northern Ireland – The Report of a Fundamental Review* (Cm 5831) and *Death Certification and the Investigation of Deaths by Coroners – Third Report of the Shipman Inquiry*, 2003 (Cm 5854).

360 Coroners (Practice and Procedure) (Amendment) Rules (Northern Ireland) 2002.

361 Funding of Advice, Assistance and Representation under Article 12(8). of the Access to Justice (Northern Ireland) Order 2003.

362 This position changed not as a result of Article 2 ECHR *per se*, but of the 1999 MacPherson report into the murder of Stephen Lawrence. A Home Office Circular issued after the report – see http://www.homeoffice.gov.uk/docs/hoc31_2002.pdf – provided that pre-inquest disclosure should be given and this position has since been adopted and implemented by the Chief Constable of the PSNI.

363 Anthony and Mageean, *op cit*.

As has been much discussed, a number of important conflict-related inquests some of which relate to events which happened in the early days of the conflict remain unresolved. For example, when the CGP published their report in 2009, they suggested that 39 such conflict-related cases were “pending” (i.e. live) in the Coroners’ Courts. In some instances, cases were suspended by the Coroner pending resolution of a range of legal issues. In addition, as is discussed further below, the Attorney General of Northern Ireland John Larkin QC has exercised his powers under the Coroner’s Act to refer a number of conflict-related cases (as well as other non-conflict cases) back to the Coroners’ Courts for inquest.

Retrospectivity, Article 2 Compliance and the Inquest System

Following on from the Article 2 cases heard at Strasbourg, some complex case-law has been considered by the UK courts to determine, amongst other things, whether Article 2 requirements could and should be applied retrospectively with regard to cases which occurred before the enactment of the Human Rights Act in 2000 – the Act which fully incorporated the European Convention on Human Rights in UK domestic law.³⁶⁴ While some of the details of the legal argumentation involved is beyond the scope of this report, a number of key points should be addressed.

Following on from the ECHR judgement, in *Re McKerr* the son of the deceased brought a judicial review to compel the Secretary of State to order an Article 2 ECHR compliant investigation into his father’s death in 1982. The application was first dismissed by the High Court in Northern Ireland, but the Northern Ireland Court of Appeal disagreed, and made a declaration that the applicant had a continuing right to an investigation.³⁶⁵ The then Secretary of State for Northern Ireland appealed to the House of Lords, where the central question became whether the Human Rights Act 1998 could have retrospective effect regarding a death that had occurred 18 years previously. The House of Lords, however, disagreed and ruled in favour of the Secretary of State, declaring that the Human Rights Act did not have retrospective effect.

Confusingly, however, the House of Lords also delivered judgements in the same day on two non-Northern Ireland cases – *Sacker and Middleton*³⁶⁶ – where it appeared to take a different view. These cases concerned pre-October 2000 deaths in prison, which were the subject of Coroners’ inquiries after the date of the coming into force of the Human Rights Act 1998. In these cases the House of Lords did afford the Human Rights Act a retrospective effect, a decision that was apparently inconsistent with the finding in *Re McKerr*. As Queens University academics Anthony and Mageean have argued,³⁶⁷ the inconsistency between *McKerr* and *Sacker/Middleton* generated an inevitable uncertainty in the Northern Ireland courts, where it was initially thought that there were the two options of either distinguishing *McKerr* or following it.

The case which has apparently brought some degree of clarity concerning the question of whether or not Article 2 has retrospective effect is the decision by the Supreme Court³⁶⁸ in 2011 in the House of Lords in the *Re McCaughey* case. The *McCaughy* case arose out of a 2009 inquest into the killing of two IRA men in 1990 by undercover soldiers. From the outset, the Coroner was faced with the question whether Article 2 applied to the investigation or whether House of Lords earlier ruling in *McKerr* should be followed. By a 6-1 majority, the Supreme Court held that Article 2 did in fact apply to an on-going coronial inquest into two deaths caused by the state during the conflict in and about Northern Ireland.

To arrive at that decision, the Supreme Court relied upon a core point of reasoning from within a ECHR (GC) judgment.³⁶⁹ However, in *Šilih*, a case concerning a death in a Slovenian hospital before Slovenia had actually ratified the ECHR, the ECHR recast its understanding of the nature of Article 2. In a crucial passage it said that:

the procedural obligation to carry out an effective investigation under article 2 has evolved into a separate and autonomous duty ... it can be considered to be a detachable obligation arising out of article 2 capable of binding the state even when the death took place before the critical date. [para 159]

The critical date in *McCaughy*, by analogy, was October 2000 when the Human Rights Act came into effect. To arrive at that decision the Supreme Court distinguished *McKerr* and adopted the logic of ECHR’s decision in *Šilih*

364 See. G. Anthony and P. Mageean, “Habits Of Mind And ‘Truth Telling’: Article 2 ECHR In Post Conflict Northern Ireland.” in J. Morison, K. McEvoy and G. Anthony (eds), *Judges, Human Rights and Transition*, Oxford: Oxford University Press, 2007.

365 *Re McKerr’s Application* [2003] NI 117.

366 *R (Sacker) v West Yorkshire Coroner* [2004] 1 WLR 796 and *R (Middleton) v West Somerset Coroner* [2004] 2 WLR 800.

367 *op cit*.

368 The House of Lords was renamed the Supreme Court in 2009.

369 *Šilih V. Slovenia* - 71463/01 [2009] ECHR 571 (9 April 2009).

of what the ECHR termed “detachable obligation”. This detachable obligation was based upon the idea that the Human Rights Act had brought rights home and that, should the ambit of application of the Human Rights Act not match that of the ECHR, individuals would otherwise be required to petition Strasbourg rather than argue their case before the local courts – which was a key rationale for the introduction of the Human Rights Act in the first place. The majority of the Supreme Court took the view that “the procedural obligation to investigate a death under Article 2 of the [ECHR] is not only distinct from the substantive aspect of the article but is autonomous and detachable from it” (Lord Dyson, para 121). The practical consequences of the ruling, as noted in Lord Brown’s judgment, is that:

...there are 16 “legacy inquests” (involving 26 deaths) currently outstanding on the coroner’s books, a further six incidents (involving eight pre-2000 deaths) referred by the Attorney General ... and a further 7 deaths (between 1994 and January 2000) not yet the subject of inquests. (para 102)

This all means that the requirement for Article 2 will apply to that range of unresolved deaths.³⁷⁰

Inquest Directions by the Attorney General

Under section 14 of the Coroners’ Act (Northern Ireland) 1959, the Attorney General can direct a Coroner to either hold an inquest into a death, if none has been held, or to hold a further inquest if one has already been held. The statutory test applied by the Attorney General whether to so direct a Coroner to hold an inquest is a consideration of whether it is “advisable” to do so.³⁷¹ In deciding upon the advisability of such a direction the criteria utilised by the Attorney General include “...the improper rejection of significant evidence, irregularity or unfairness of proceedings, insufficiency of inquiry or the discovery of significant new evidence”.³⁷² In 2010/11, he directed the Coroner to hold an inquest in 14 cases, deciding against in two other instances. During 2011/12 the Attorney General received 18 requests to direct an inquest, deciding yes in two cases, against in four others. While, of course, not of all of these requests are related to the conflict, it is the decision by the Attorney General to direct inquests in such conflict-related cases that has provoked the most public attention.

Over the past three years the Attorney General has now directed over 30 inquests into conflict-related deaths,³⁷³ including the deaths of ten people who were killed by the 1st Battalion, Parachute Regiment in Ballymurphy between 9-11 August 1971 as part of Operation Demetrius (internment), and, more recently, into Kingsmills in 1976.³⁷⁴ Relatives of those killed in Ballymurphy have welcomed the announcement of these inquests but consider them only “another strand” and continue to demand an “an international, independent investigation”.³⁷⁵ In another case, that of teenager Francis Rowntree who was killed by a British soldier’s plastic bullet, a solicitor for the family described the Attorney General’s request for an inquest into his death as a “significant step forward for the family’s quest for truth”.³⁷⁶ While nationalists and Republicans have been generally supportive of the Attorney General’s directions,³⁷⁷ Unionists have expressed concerns over the risk of leaking the security services procedures into the public domain, the cost of inquests and the fact that these inquests were focused on people killed by the security forces rather than the victims of IRA violence.³⁷⁸ Further controversy occurred in November 2012 at the beginning of the Attorney General’s requested inquests into contentious deaths involving the security forces, when Senior Coroner John Leckey halted proceedings. Leckey expressed concerns that Larkin had exceeded his powers by ordering inquests into material which touches on national security.³⁷⁹ This announcement by Leckey caused anger and frustration amongst victims who had not been notified beforehand and some of whom were in court awaiting the inquest to begin.³⁸⁰ One lawyer for a number of victims’ families stated it was a setback which “puts the issue of truth recovery in serious

370 G. Anthony, “Article 2 ECHR, controversial deaths, and the ‘mirror principle’”, 2011. Available at <http://ukconstitutionallaw.org/2011/06/06/gordon-anthony-article-2-echr-controversial-deaths-and-the-mirror-principle>. See also M. Requa, “Keeping Up With Strasbourg: Article 2 Obligations And Northern Ireland’s Pending Inquests”, Public Law, Autumn 2012, 610-619.

371 Attorney General, *First Annual Report of the Attorney General of Northern Ireland*, Belfast : AGNI, 2011 at p. 13.

372 Attorney General, *Second Annual Report of the Attorney General of Northern Ireland*, Belfast : AGNI, 2012 at p. 14. \

373 Attorney General Annual Reports, 2010-2013.

374 “Ballymurphy Families Welcome John Larkin Decision”, *BBC News*, 15 November 2011; “New inquests ordered into Kingsmills”, *UTV News*, 7 August 2013.

375 “Victims’ Families Welcome New Inquest Into Army Shootings”, *Belfast Telegraph*, 15 November 2011; and “Ballymurphy Massacre Families Welcome Reopening Of Inquests”, *Irish News*, 16 November 2011.

376 “Inquiry Into Killing Of First Child By Rubber Bullet To Be Reopened”, *Irish News*, 26 June 2012.

377 Ibid., McCrory.

378 “Ex-UUP Leader In Row Over Troubles Victims Remarks”, *Irish News*, 9 August 2012.

379 “Fury As Inquests Into Killings Are Suspended”, *News Letter*, 16 November 2012.

380 “Forty Years, And Still No Justice For My Brother,” *Irish News*, 16 November 2012.

unsolved conflict killings back 20 years”.³⁸¹ The High Court allowed the victims to seek a judicial review of the coroner’s decision, with a hearing to take place in February 2013.³⁸² However, in February 2013 before court proceedings began, the Senior Coroner Leckey abandoned his decision to suspend the conflict-related inquests after the Advocate General for England and Wales, Dominic Grieve, affirmed that the Attorney General for Northern Ireland, John Larkin, did have the authority to order the inquests.³⁸³

Conclusion

“...Inquests by themselves cannot provide a comprehensive solution to the troubled past of Northern Ireland. Inquests are undoubtedly valuable – and in some cases are clearly required by Article 2 ECHR – but they cannot, it seems to me, deliver satisfactory outcomes for families whose primary wish is to see successful prosecutions, nor can they offer an effective vehicle for the exploration of broader themes and factors that have shaped our recent past”.³⁸⁴

The decisions before the ECHR and the House of Lords have developed the potential of inquests in Northern Ireland to more effectively investigate contentious deaths that involve state agents. Of course, as has been noted, the most controversial inquests usually only occur when state actors are involved in the killing and, notwithstanding issues related to collusion, such events were a smaller proportion of those killed during the conflict.³⁸⁵ Procedural and security issues remain and obviously, with the passage of time, the ability of a judicial mechanism, such as an inquest, to effectively investigate and discover the truth about a death diminishes. As the ECHR found in the *Finucane v UK*:

The lapse of time and its effect on the evidence and the availability of witnesses inevitably render such an investigation unsatisfactory or inconclusive, by failing to establish important facts or put to rest doubts and suspicions.³⁸⁶

The European Court’s dissatisfaction with the continuing delays in the Northern Ireland inquest system was reiterated more recently in July 2013 in the *McCaughey and Grew v United Kingdom*, and *Hemsworth v United Kingdom* cases where the Court found continuing violations of the procedural obligation under Article 2 through failure to provide a prompt investigation into the deaths of McCaughey, Grew and Hemsworth 12 years after the original decisions in *Jordan and others v United Kingdom* which had the same finding.³⁸⁷

While Attorney General Larkin has stated that the inquest system will be an important part of how Northern Ireland deals with the past,³⁸⁸ as noted above, he has generally been very careful not to oversell the truth recovery potential of the inquest system in the absence of other measures. Victims’ expectations of the inquest system as a truth recovery mechanism should therefore be appropriately managed.

381 Michael McHugh, “Families’ Fury As Coroner Halts Inquests After Clash With Attorney General”, *Belfast Telegraph*, 16 November 2012.

382 “Inquest suspensions to be reviewed”, *UTV News*, 19 November 2012.

383 “Grieve bats Troubles inquests back to coroner”, *The Detail*, 10 February 2013.

384 J. Larkin, “Attorney General for Northern Ireland, Annual Report”, 2012, op cit at p. 15.

385 *Lost Lives* reports that all security forces were directly responsible for 367 deaths in Northern Ireland out a total of 3,720, with Republicans being responsible for 2,152 and Loyalists for 1,112. See D. McKittrick, S. Kelters, B. Feeney, C. Thornton and D. McVea, *Lost Lives*, London: Mainstreaming Publishing, 2006.

386 *Finucane v UK*, para. 89.

387 Application no. 43098/09 and Application no. 58559/09 16 July 2013 available at <http://go.qub.ac.uk/NIresources>

388 Gregory Campbell, “Inquiries costing millions every month: DUP MP”, *DUP News*, 26 May 2008; and Jeffrey Donaldson, “Question to NI Secretary of State in the House of Commons”, House of Commons Prayers, 4 July 2012, House of Commons Debate, 4 July 2012, vol 546: col. 907-908. Barry McCaffrey, “inquests will be ‘front and centre’ in dealing with the past – Attorney General”, *The Detail*, 19 June 2011.

389 For a discussion see B. Gormally and K. McEvoy, *Dealing with the Past in Northern Ireland ‘From Below’*. Belfast: Community Foundation of Northern Ireland, 2009. See also P. Lundy and M. McGovern, “Rethinking Transitional Justice from the Bottom Up”, *Journal of Law and Society*, 2008: 35/2, 265-292.

OTHER LEGAL ISSUES RELEVANT TO THE DEBATE

The final section of this report examines a sample of grassroots, civil society or other community-based initiatives which have been geared towards “dealing with the past”. In part, precisely because Northern Ireland has not had an overarching mechanism to deal with the past, community-based and civil society initiatives have arguably shouldered a significant amount of “heavy lifting” in the transition to date.³⁸⁹ Indeed the establishment of some of the “top-down” initiatives discussed above (e.g. the Public Inquiries, ICLVR, etc.) was due in no small part to lobbying efforts by affected families and the civil society groups which campaigned on their behalf.

The issues considered in this section have raised particular legal queries which have wider implications.

LITIGATION

As was noted in the introduction, HTR is very aware of the huge contribution made by a range of organisations and individuals working on reconciliation, commemoration, healing, cross-community relations, truth recovery and other past-related themes. In many instances, HTR has worked directly with such projects, and some of the organisation’s resources have been developed in order to facilitate this work. A number of our previous HTR reports have outlined both the historical importance of some such initiatives but also the potential role of such processes in, for example, truth recovery and acknowledgement.³⁹⁰

This section highlights a number of instances exemplars where individuals and groups have sought to use the courts as a means of redress. The use of litigation in the civil courts to seek redress for past injustice or hurts has long been a feature of the conflict in and about Northern Ireland and the ensuing post-conflict transition.³⁹¹ As is illustrated by the examples below, civil litigation is often lengthy, complex, and expensive and with no guarantees that those litigating will achieve the objectives that they wish.

Omagh Bombing

Following the failure to successfully criminally prosecute a range of individuals suspected of involvement in the Omagh bombing,³⁹² a number of the affected families began preparations to bring a civil action against those suspects in 2000. After a number of delays, the civil action finally commenced in 2008 and in July 2009, the High Court in Belfast found that Real IRA leader Michael McKevitt, as well as Liam Campbell, Colum Murphy and Seamus Daly were responsible for the Omagh bombing of August 1998 and resulted in £1.6m in damages being awarded to the 12 named relatives.³⁹³ While the defendants lacked the capacity to make any kind of large-scale payment, the families insisted that financial reparations was not their main goal, but rather to use the civil action as a vehicle for putting as much information as possible into the public domain about the bombing and those involved,³⁹⁴ stating “[i]t was never about money. We can stand and say that these guys are responsible for Omagh, that’s what we wanted”.³⁹⁵

389 For a discussion see B. Gormally and K. McEvoy, *Dealing with the Past in Northern Ireland ‘From Below’*. Belfast: Community Foundation of Northern Ireland, 2009. See also P. Lundy and M. McGovern, “Rethinking Transitional Justice from the Bottom Up”, *Journal of Law and Society*, 2008: 35/2, 265-292.

390 See e.g. Healing Through Remembering, *Conversational Guide on Dealing With the Past*, Belfast: Healing Through Remembering, 2009; Healing Through Remembering, *Ethical Principles for Story-Telling and Narrative Work*, Belfast: Healing Through Remembering, 2009; Healing Through Remembering, *Making Peace with the Past: Options for Truth Recovery in and About Northern Ireland*, Belfast: Healing Through Remembering, 2006; Healing Through Remembering – see range of Healing Through Remembering Annual Reports. All publications are available at <http://www.healingthroughremembering.org/resources/reports/>

391 See e.g. K. McEvoy, “Law, Struggle, and Political Transformation in Northern Ireland,” *Journal of Law and Society*, 2000:27/4, 542-571; C. Bell and J. Keenan, “Lost on the Way Home?: The Right to Life in Northern Ireland,” *Journal of Law and Society*, 2005:32/1, 68-89; B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland*, Oxford: Oxford University Press, 2010; K. McEvoy, “What did the Lawyers Do During the War?: Neutrality, Conflict and the Culture of Quietism”, *Modern Law Review*, 2012:74/ 3, 350-384.

392 The only person convicted in a criminal court for involvement in the bombing was Colum Murphy by the Special Court in Dublin in 2002. Murphy’s conviction was overturned in 2005 and following a retrial, he was acquitted in 2010. See “Omagh Bomb Plot Man Is Sentenced To 14 Years’ Jail”, *The Independent*, 26 January 2002; “Omagh Bomb Accused Cleared After Retrial”, BBC News, 24 February 2010. Mr Murphy’s nephew, Sean Hoey, was also tried and acquitted of involvement in the bombing in 2007. See “Man Not Guilty Of Omagh Murders”, *BBC News*, 20 December 2007.

393 “Omagh bombing judgment: relatives win landmark civil case”, *The Telegraph*, 8 June 2009.

394 “Real IRA founder loses Omagh civil case appeal”, *The Guardian*, 7 July 2011.

395 “Omagh bomb families win multi-million pound legal case”, *Belfast Telegraph*, 8 June 2009.

However, appeals were heard against the civil ruling by the four accused in 2011, as their case rests on the credibility of the intelligence reports used against them.³⁹⁶ In July 2011, the NI Court of Appeal ruled against McKevitt and Campbell's appeal.³⁹⁷ It did, however, direct a civil retrial of the claims made against Colm Murphy and Seamus Daly's appeal was allowed.³⁹⁸ It had subsequently been decided that both men are to face civil retrials.³⁹⁹ Both McKevitt and Campbell sought to apply to the Supreme Court to challenge the ruling that they are liable for the Omagh bomb, but were denied authorisation.⁴⁰⁰ In response, the families of bomb victims also sought to appeal to the Supreme Court over the Court of Appeal's rejection of their bid to be awarded exemplary damages and called on the British Government to financially support their cause in future civil proceedings.⁴⁰¹ Their application was also denied.

Both parties are now set to petition the Supreme Court directly to have their arguments heard.⁴⁰² While the Court of Appeal directed that the retrial should focus on the responsibility of Murphy and Daly, it has emerged that the amount of compensation may also be subject to change with victims having to testify again. As one of the victims' representatives stated: "We are very sensitive about re-traumatising the victims who have already given evidence ... It's an experience they wish never to happen again".⁴⁰³

The civil retrials of Murphy and Daly commenced in January 2013 and in March 2013, both were found liable for the bombing.⁴⁰⁴ However, the defendants have been allowed to appeal to the Court Appeal on the re-trial decision, which is to be heard in November 2013. Trial proceedings have been drawn out over the past 12 years, due to various delays and appeals by defence lawyers. If the defendants are unsuccessful in their appeal, the judgment of £1.6 million affirmed in the re-trial will be sought against all four men by the victims.⁴⁰⁵

Libya and compensation for IRA victims

A number of those affected by IRA violence have also sought to litigate before international courts to render liable the Libyan authorities for providing arms and ammunition to Republicans during the 1970s and 1980s.⁴⁰⁶ The previous Libyan regime under Colonel Gaddafi made multi-million pound pay-outs for the families of victims of the Lockerbie Pan Am Flight 103 and other acts of terrorism in which Libya was involved as part of a broader rapprochement with the West.⁴⁰⁷ Despite sporadic agitation by IRA victims and unionist politicians, progress on a similar deal has, until recently, been relatively static.

However, legal action in the US against Gaddafi, led by London-based lawyer Jason McCue with respect to 147 individuals injured by Libyan-supplied explosives and weaponry, has, however, made some progress. In April 2011, McCue brokered a "Statement of Reconciliation to the Victims of Gaddafi Sponsored Terrorism" with Libya's National Transitional Council.⁴⁰⁸ This document contained not only an apology for "the pain suffered by British victims as a consequence of IRA acts of violence that were supported by the Gaddafi regime in contravention of international law", but also discusses the possibility of compensation coupled with an "appropriately resourced humanitarian fund".⁴⁰⁹ While the precise details of this financial package are unclear,

396 "Omagh case appeal centers on MI5 agent's credibility", *The Guardian*, 10 January 2011.

397 "Real IRA founder loses Omagh civil case appeal", *The Guardian*, 7 July 2011.

398 Ibid.

399 "Colm Murphy and Seamus Daly to face Omagh bomb retrials", *BBC News*, 14 October 2011; "Reasons given for Omagh bomb retrial for Seamus Daly", *BBC News*, 22 November 2011.

400 "Men held liable for Omagh bomb denied permission to appeal", *BBC News*, 2 December 2011; "Omagh accused fail in bid to go to appeal", *Irish Times*, 3 December 2011.

401 "Omagh relatives in funding plea to fight civil actions", *Belfast Telegraph*, 8 July 2011.

402 "Omagh bombing civil retrial 'could mean relatives testify again'", *BBC News*, 21 June 2012.

403 Ibid.

404 "Omagh bomb: Retrial of Colum Murphy and Seamus Daly Begins", *BBC News*, 14 January 2013; and "Omagh bomb: Colm Murphy and Seamus Daly found liable at retrial", *BBC News*, 20 March 2013. As discussed above, in addition to these efforts, a number of the Omagh victims' families have continued to campaign for an international cross-border public inquiry. However in September 2013, Secretary of State for Northern Ireland, Theresa Villiers, ruled out an inquiry into the Omagh bombing on the grounds that it would not lead to any new information for the families that they did not already have; the families will challenge this decision in the High Court. "New Omagh bombing inquiry ruled out by government", *The Guardian*, 12 September 2013. The Irish government has not yet ruled out an inquiry into the bombing. See "Gilmore stresses importance of Haass talks to flags, parades issues", *Irish Times*, 23 September 2013.

405 *Breslin and others v Murphy and Daly* [2013] NIQB 35. See also "Republicans Colm Murphy and Seamus Daly to challenge ruling that blamed them for atrocity", *Belfast Telegraph*, 7 June 2013.

406 "A chance for Libya to build better relations with the outside world", *BBC News*, 22 August 2011.

407 "US-Libya Compensation Deal Sealed", *BBC News*, 14 August 2008.

408 "Victims in Line for Libyan dividend", *Sunday Times*, 29 August 2011.

a number of figures and dimensions have been mooted. A threefold structure appeared most likely, incorporating £1.8 million for each of the 147 victims involved in bringing the case; £188 million for projects to benefit victims and the community in Northern Ireland and £1 billion for development projects in Northern Ireland, such as encouraging agricultural and trade exports to Libya.⁴¹⁰

In advance of travelling to Libya to meet the new government, a delegation of victims and politicians, including Co. Armagh victims campaigner Willie Frazer, his colleague Barrie Halliday, London-based victims campaigner Jonathan Genesh who was injured in the 1996 Canary Wharf bomb, DUP's Jeffrey Donaldson and Lord Laird met with senior officials in the Foreign and Commonwealth Office and the specialist Libyan IRA compensation unit in late October 2011 for an update on the case.⁴¹¹ Delegates reported progress on the case to be "very positive".⁴¹² In May 2012, victims of Libyan-sponsored IRA terrorism petitioned Prime Minister David Cameron with over 100 letters for the completion of compensation payments from Libya.⁴¹³

However, in October 2012, it emerged that victims of the Omagh bomb had not been included in the Libya compensation claim.⁴¹⁴ Given the numbers of people who were affected by IRA violence, and the importance of Libyan weaponry to that campaign, the difficulties associated with limiting the claim against the Libyan government to only 147 victims are obvious. In November 2012, Peter Lismore, chairman of the Libyan Irish Business Council, warned that victims of IRA terrorism should not expect direct compensation from the Libyan government.⁴¹⁵ Rather, Lismore suggested that the Libyan government would contribute to a development fund. The other important point to note is that the political situation in Libya remains quite volatile and regardless the efforts in the US courts, or indeed the efforts to reach an accord between the victims of IRA violence and the Libyan authorities, both legal and diplomatic routes require a stable regime in that jurisdiction.

Civil actions taken by ex-combatants

At the time of writing this report, legal action initiated by both Republican and Loyalist ex-combatants, concerning their internment during the early 1970s, are on-going. As has been discussed at length elsewhere, many ex-combatants have also experienced significant past violence, both at the hands of rival paramilitary groups but also at the hands of the state.⁴¹⁶ Ex-prisoners have been encouraged to sue the British government on its internment policy after the UK courts accepted the applications by Kenyan citizens interned during the Mau Mau rebellion in the 1960s for compensation in July 2011.⁴¹⁷ Represented by solicitor Pdraig O Muirigh, six former detainees served writs on the Ministry of Defence, the Northern Ireland Secretary of State and PSNI on the 40th anniversary of internment on 9 August 2011.⁴¹⁸ The former internees are also suing the estate of the late Brian Faulkner, the former Northern Ireland Prime Minister who first ordered internment.⁴¹⁹ The six individuals taking the case are Evelyn Gilroy, Brian Ward, Kevin Donnelly, Geraldine Rogan, Thomas Morgan and Joseph Curley.⁴²⁰

While charges of trespass of the person, wrongful arrest, unlawful detention and conspiracy to injure are being brought against the British state,⁴²¹ the importance of an official acknowledgement of the discriminatory nature of internment and the subsequent trauma of human rights violations suffered by internees underpins this case.⁴²² O Muirigh has drawn on archival documents of Northern Ireland Office meetings which he claims underpin the discriminatory nature of the internment policy.⁴²³

409 Ibid.

410 "Omagh families want share of Libyan payout", *Belfast Telegraph*, 24 October 2011.

411 "Hopes rise for Libyan pay-out", *News Letter*, 20 October 2011.

412 Ibid.

413 "Libya-IRA victims petition Cameron", *News Letter*, 22 May 2012.⁴¹⁴ "Omagh Bomb Victims' Families Want Share Of Libya Payout Deal", *Belfast Telegraph*, 24 October 2011.³⁹⁴ "Libya Unlikely To Pay

415 "Libya unlikely to pay compensation to victims of IRA", *Belfast Telegraph*, 14 November 2012.

416 See P. Shirlow and K. McEvoy, *Beyond the Wire: Ex-prisoners and Conflict Transformation in Northern Ireland*, London: Pluto, 2008.

417 "Mau Mau torture claim Kenyans win right to sue British government", *The Guardian*, 21 July 2011. See also "Kenya move 'boosts internment case'", *Belfast Telegraph*, 5 October 2012 and O Muirigh website:

http://www.omuirighsolicitors.com/our_cases_internment_civil_action_pdraig_omuirigh_solicitors.html.

418 "Republicans 'To Sue Government' Over Northern Ireland Internment", *BBC News*, 9 August 2011.

419 Ibid.

420 "Former detainees bring internment case", *Irish Times*, 10 August 2011.

421 "Legal writ served over interment", *UTV News*, 9 August 2011.

422 "Government paper discovery sparks internment test case", *Irish News*, 9 August 2011.

423 "Republicans 'To Sue Government' Over Northern Ireland Internment", *BBC News*, 9 August 2011.

As in other litigation related to historical events during the conflict, O Muirigh insists that his clients are motivated by more than the desire for compensation:

...many of the people interned still suffer the traumatic effects of that period yet have never been issued with as much as an apology even though the British government recognised that many of the people arrested were innocent...It's really about acknowledging, officially, that internment was illegal and discriminatory and the actions of the government at the time were unlawful. If there was liability accepted, or a settlement in these cases, it would be an acknowledgement of the wrong done to these people... It's not about money, it's really about acknowledgement, officially, that internment was illegal and discriminatory and the actions of the government at the time were unlawful.⁴²⁴

Those involved in this action regard their cases to be a litmus test on behalf of almost 2,000 people, the majority of whom were Catholic and who were interned without trial between 1971 and 1975.⁴²⁵ Interestingly, 19 Loyalist ex-combatants are also seeking legal redress for their experiences of internment.⁴²⁶ Facilitated by the Ex-Prisoners Interpretive Centre (EPIC) and represented by solicitor Kevin Winters, they are claiming that the decision to intern Loyalists was "political, wrong and unlawful". There are a number of reasons behind Loyalists involvement in this legal bid. As with republican internees, the trauma associated with internment and attendant human rights violations has been a key motivating factor. In addition, their argument is that these Loyalist ex-prisoners were arrested and interned to mask government embarrassment that the internment was directed primarily against the nationalist community:

An often overlooked fact is that a certain body of Loyalists/Protestants were taken off the streets to serve a wider political agenda, and it is that which is at the source and core of this potential litigation.⁴²⁷

Conclusion

This snapshot of legal actions taken by victims, ex-combatants and others speaks directly to the inevitable lure of litigation as a route to compensation, acknowledgement, and/or to uncover or clarify the truth. While civil actions can be an avenue to pursue these objectives, as evidenced above, claimants face a number of barriers including delays in proceedings, statutory limitations, access to legal aid, evidential burdens, and the willingness of other actors, including the state, to disclose information. As is underlined by the experience of the Omagh families, there are no guarantees of success even after years of litigation and the emotional, personal, and financial investment are often considerable. Such barriers are likely to prevent the majority of those affected by violence during the conflict from being able to pursue the objectives of retributive justice, acknowledgement, compensation, or the truth through the courts alone.

⁴²⁴ "Government paper discovery sparks internment test case," *Irish News*, 9 August 2011.

⁴²⁵ "Former detainees bring internment case", *Irish Times*, 10 August 2011.

⁴²⁶ "Kenya move 'boosts internment case'", *Belfast Telegraph*, 5 October 2012.

⁴²⁷ "Interned Loyalists were pawns, says lawyer in legal bid", *Belfast Telegraph*, 16 November 2011.

STORYTELLING, DOCUMENTING AND SHARING PERSONAL NARRATIVES

Over the past two decades, there have been a range of initiatives which have sought to provide individuals with opportunities to tell, share and document their personal experiences of the conflict in and about Northern Ireland. These initiatives have ranged from opportunities for groups of people to come together within facilitated spaces to share and hear from the personal experiences of those affected by the conflict, to large-scale projects which have sought to collect and disseminate personal stories of the conflict, based on particular issues, experiences, events, geographical and temporal boundaries. These are presented in a range of formats, including publications, documentaries, accessible archives and exhibitions. An audit of “personal story, narrative and testimony initiatives” undertaken by HTR in 2005⁴²⁸ identified over 30 projects or initiatives which conformed with the audit definition of:

A project or process which allows reflection, expression, listening and possible collection of personal, communal and institutional stories related to the conflict in and about Northern Ireland.

The majority of these projects were community-based, and ranged in size, scope and funding support. A significant number of projects were undertaken by organisations working with victims/survivors of the conflict and former combatant groups, but also included individual researchers, community-development organisations, reconciliation groups and broadcasters. The 2005 Audit noted a wide range of motivations behind the initiation of such storytelling processes, including advocacy, healing, documentation, acknowledgement, education and as a conduit for other services.

The emphasis on storytelling and personal narrative work was given further prominence with the decision by the European Union’s PEACE III Programme to explicitly indicate their interest in supporting storytelling work through one of three strands of work under the theme of “Acknowledging and Dealing with the Past”.⁴²⁹ The strand of funding entitled “Addressing the Past in Public Memory” aims “to support actions that explore the legacy and memory of the conflict through truth recovery, documentation, story-telling and the recording of complex history and experience”.⁴³⁰ The nature of the EU grant programme meant that the storytelling-focused projects funded under this strand tended to be large-scale, involved the establishment of partnerships between a range of organisations, and leaned much more heavily towards the documentation of individual stories in audio or audio-visual formats or in using creative approaches such as drama. In 2013, the PEACE III-funded “Accounts of the Conflict” Project, based at INCORE in the University of Ulster, conducted a scoping study of storytelling projects⁴³¹, and identified an additional 35 initiatives post-2005. While the majority of these more recent projects have been funded by the PEACE Programme, small-scale projects continue to be initiated by organisations and individuals motivated to document the stories of those impacted by the conflict as a result of their experiences, occupations, geographical bases, or affiliations.

The Boston College Interviews

The “Belfast Project”, hosted by Boston College, ran between 2001 and 2006. It was designed to archive first-hand accounts of former combatants and security force personnel with no public access until after their death. The director of the project was Ed Moloney (journalist and author); the researcher was Anthony McIntyre (writer and former IRA prisoner) with another researcher Wilson McArthur. Interviews were conducted with 40 former members of Republican and Loyalist paramilitary organisations (26 and 14 respectively) as well as a former member of the security forces.

428 Healing Through Remembering, *Storytelling” Audit: An Audit of Personal Story, Narrative and Testimony Initiatives related to the conflict in and about Northern Ireland*, Belfast: Healing Through Remembering, 2005.

429 See SEUPB, “PEACE III: EU Programme for Peace and Reconciliation 2007 – 2013, Northern Ireland and the Border Region of Ireland: Operational Programme”, Belfast: SEUPB, 2008, p. 52-53.

430 See Deloitte, “Theme 2.1 Acknowledging and Dealing with the Past: Review of Implementation Report, 13 September 2010”, Belfast: Deloitte, 2010, p. 79.

431 INCORE (2013) *Accounts of the Conflict: A Scoping Study*. Unpublished.

The archives were deposited at Boston College and as Moloney subsequently confirmed in his affidavit before the High Court in Belfast:

When the research project at Boston College ("BC") began, I as project director, and Anthony McIntyre as researcher, gave interviewees a pledge that nothing of what they said would be revealed until their deaths. I intend to keep that promise.⁴³²

Moloney published a book in 2010 based on interviews conducted as part of this research with the (then deceased) former IRA activist Brendan Hughes and former UVF member and Progressive Unionist Party Leader David Irvine.⁴³³ In that book, citing Hughes, Moloney reported that Sinn Féin President Gerry Adams had ordered the murder of Jean McConville on the basis that the IRA believed that she was an informer. Following press speculation as to the content of other interviews (including that of former IRA activist Delours Price) the British government (on behalf of the PSNI) contacted the US Department of Justice seeking to subpoena all materials relating to the Brendan Hughes and Dolours Price interviews in March 2011. A few months later, following a HET review of the McConville murder, a second subpoena was served for "any and all interviews containing information about the abduction and death of Jean McConville".⁴³⁴ In December 2011, Judge William Young ruled against both Boston College, as well as Moloney and McIntyre and ordered the material to be handed over. Boston College declined to appeal though Moloney and McIntyre filed a Notice of Appeal. Judge Young's decision was upheld by a three judge US Federal Appeal Court in July 2012.

In both the first instance and appeal judgement it is clear that, notwithstanding Moloney's commitment to his interviewees, the Director of the Burns library at Boston College told Moloney that, although he had not yet conferred with counsel on the point, he could not guarantee that Boston College "would be in a position to refuse to turn over documents [from the Project] on a court order without being held in contempt".⁴³⁵

As presiding Chief Justice Lynch notes, the document signed between the interviewees and Moloney and McIntyre does not include the wording "to the extent American law allows" language that is contained in the agreement between Moloney and Boston College.⁴³⁶ The Court of Appeal reiterated the view of the District Court that American law is quite well established on the relevant point, and no "freedom of speech" associated privilege regarding journalistic or academic guarantees of confidentiality will trump a government's legitimate interest in pursuing a criminal investigation – particularly with regard to crimes as serious as murder.⁴³⁷

The fact that Moloney and his researchers had failed to tell his interviewees of this limitation made no difference in terms of whether or not their interviews were protected once the government had requested access to them – they were not. Meanwhile, in October 2012 in Belfast, the project's lead researcher Anthony McIntyre filed for a Judicial Review, claiming that his right to life was being put at risk by the police pursuance of these interviews, which was denied.⁴³⁸ The court found that the PSNI could access the tapes pending the finding of the appeal in the US.⁴³⁹ In April 2013 the US Supreme Court denied the appeal by Moloney and McIntyre to review the constitutionality of the decision to provide the tapes to the PSNI. Following a further decision by the 1st U.S. Circuit Court of Appeals in June 2013 the court reduced the PSNI's access to 11 interviews of seven people, and in July 2013 the PSNI obtained the transcripts of the interviews relating to the death of Jean McConville.⁴⁴⁰

The Boston College affair has had a number of important consequences for past-related initiatives. Obviously for journalists, academics and others who have been involved in interviews with former combatants or former security force personnel, it raised important questions about the limitations of the legal protection which may be afforded to such interviews, even if they were conducted in a context where interviewees were guaranteed anonymity. More broadly, with regard to ex-combatants themselves, it has created an understandable unease.

432 "Statement by Ed Moloney, Former Director", 14 September 2012. Available at <http://thepensivequill.am/2012/09/statement-by-ed-moloney-former-director.html>.

433 E. Moloney, *Voices from the Grave: Two Men's war in Ireland*, London: Faber and Faber, 2010.

434 "Northern Ireland police seek access to Troubles tapes", BBC News, 13 May 2011; "PSNI keen to get hands on Boston College interview tapes", *Belfast Telegraph*, 2 January 2012.

435 See US Federal Court of Appeal of the First Circuit, Case No 11-2511, 6 July 2012, in *Re: Request From The United Kingdom Pursuant To The Treaty Between The Government Of The United States Of America And The Government Of The United Kingdom On Mutual Assistance*, at p. 5.

436 *Ibid.*, at p. 8.

437 *Branzburg*, 408 U.S. at 682 n.21 (quoting 8 Wigmore, Evidence § 2286 McNaughton rev. 1961).

438 "McIntyre loses IRA tapes case", *UTV News*, 2 October 2012.

439 *Ibid.*

440 "PSNI confirm securing Boston College tapes on Jean McConville's murder", *News Letter*, 7 July 2013.

For example, two former members of the Red Hand Commando, William “Plum” Smith and Winston Rea, both of whom took part in the Belfast Project, have requested that their tapes be returned.⁴⁴¹ Perhaps inevitably, this case has also raised a number of questions for on-going and future efforts at truth recovery.⁴⁴² For example, Geoff Knupfer, the senior investigating officer with the Independent Commission for the Location of Victims’ Remains (discussed further below), has suggested that the case is going to cause “enormous problems” with regard to accessing potential sources of information for those seeking to relocate the remains of the Disappeared.⁴⁴³ The question of whether it will deter those actively involved in the conflict from engaging with any future truth process has also been mooted.⁴⁴⁴ As “Plum” Smith summed up; “The damage that [the legal proceedings are] doing to truth recovery, or conflict transformation, is tremendous. People will not talk now.”⁴⁴⁵ In July 2013, concerns were raised over the usefulness of tapes obtained by the PSNI after coded keys identifying the participants were lost.⁴⁴⁶

441 “Loyalist wants Boston College tapes returned”, *Belfast Telegraph*, 3 January 2012; “Dark truths from our past lie silent in Boston College”, *Belfast Telegraph*, 25 January 2012.

442 “Boston researchers fight seizure of IRA interviews”, *The Guardian*, 23 January 2012; “Boston College has undermined all researchers and journalists who rely on confidential sources”, *Belfast Telegraph*, 25 January 2012.

443 “Concerns raised over case of Boston papers”, *Irish Times*, 17 February 2012.

444 “Boston researchers fight seizure of IRA interviews”, *The Guardian*, 23rd January 2012; “PSNI legal bid for Boston College IRA tapes ‘not way to truth’”, *BBC News*, 15 January 2012.

445 “U.S. and U.K. Entangled in Legal Battle to Release Former IRA Militants’ Stories”, *Public Broadcast System (PBS)*, aired 23 August 2012.

446 “Boston Tapes gaffe – Confessions may be useless after identity codes lost”, *Belfast Telegraph*, 29 July 2013.

CONCLUSION: THE PANEL OF THE PARTIES NEGOTIATIONS AND THE POTENTIAL FOR PROGRESS

As noted above, the debate concerning dealing with the past received significant impetus as a result of political developments in late 2012. A decision by Belfast City Council to restrict the flying of the Union flag over the City Hall led to widespread violence and disorder in the period before Christmas and into the New Year of 2013. In July 2013, the First and Deputy First Ministers announced that the five parties which make up the Northern Ireland Executive (DUP, Sinn Féin, Ulster Unionist, SDLP and Alliance) had agreed to establish all-party negotiations – The Panel of the Parties of the Northern Ireland Executive – under the chairmanship of the US Diplomat Richard Haass and Vice Chair Meghan O’Sullivan. The announcement indicated that “the all-party group will seek to bring forward a set of recommendations by the end of this year on parades and protests, flags, symbols, emblems and related matters stemming from the past in order to make the peace more resilient going forward”.⁴⁴⁷

Preliminary discussions began with Haass in September 2013 when, in addition to meeting with the relevant political parties, he and his team began a series of discussions with interested civil society groups and individuals and have invited submissions from interested parties.⁴⁴⁸ Haass publicly stated from the outset that notwithstanding the concerns raised by the Secretary of State Theresa Villiers (discussed above), the views of the British Government were “one data point” amongst many and that he did not regard himself as restricted by the views of the British Government. Instead he indicated:

“I am an independent chair and will come at this with my own best take on things. At the end of the day the British Government, the Irish Government, the leadership of Northern Ireland itself – individuals and governments are going to have to decide what they are prepared to sign-up to, what they are prepared to support”.⁴⁴⁹

The aim of the talks is to bring forward a set of recommendations by the end of 2013.

At the time of writing it is difficult to assess the prospects for the success of these negotiations. Obviously much will depend upon the political positions adopted by the parties involved and the two governments.

However, it is the genuine hope of Healing Through Remembering that this document, in conjunction with our previous publications, will provide a useful tool both for those involved in the current political negotiations as well as broader civil society in Northern Ireland.

⁴⁴⁷ Northern Ireland Executive, “Press Release: Dr Richard Haass to Chair All Party Talks,” 9 July 2013.

⁴⁴⁸ “Richard Haass wants Public Input into All-party NI Talks”, *BBC News*, 11 September 2013. See also the NI Panel of the Parties website at <http://panelofpartiesnie.com/>.

⁴⁴⁹ “Haass Promises No Restrictions on Dealing with Northern Ireland’s Legacy”, *The Detail*, 13 September 2013.

APPENDIX ONE: The Healing Through Remembering Options

Introduction

In its 2006 report *Making Peace with Past*, Healing Through Remembering suggested five possible options for dealing with past in Northern Ireland. These options were designed to help give structure to the local political and social debate. The options proposed were seen as heuristic models and readers were encouraged not to view the options as “either/or” but rather to think about what the required components might be for any proposed mechanism or mechanisms to deal with the past relating to the conflict in and about Northern Ireland. If they so wished, readers were therefore encouraged to draw elements from the different options in devising what they regarded as the best way forward. The options were grounded in a comprehensive review of available international local and historical evidence and were presented for public discussion to facilitate the debate on dealing with the past.

The aims of the *Making Peace with the Past* Report were to:

- Broaden and deepen the public debate on the important issue of truth recovery;
- Increase awareness of the different ways people have tried to deal with the past, in a variety of conflict situations, and how their approaches have worked;
- Critique the assumption that a single truth-recovery model must be selected, by describing different approaches which could be used singly or in combination;
- Identify broad principles and values which are likely to frame any process of truth recovery;
- Offer options for truth recovery with regards to the conflict in and about Northern Ireland in a complex, nuanced way, including alternative ways of dealing with a variety of needs;
- Describe practical issues and likely reactions to different options; and
- Offer for public debate and scrutiny five options for truth recovery that hopefully can provide a basis for moving the “dealing with the past” debate forward.

The Report identified five options for dealing with the consequences of the conflict in and about Northern Ireland:

- Option One: “Drawing a Line Under the Past”
- Option Two: Internal Organisational Investigations
- Option Three: Community-Based “Bottom-Up” Truth Recovery
- Option Four: A Truth-Recovery Commission
- Option Five: A Commission of Historical Clarification

Option One; Drawing a Line Under the Past; The “Do Nothing New” Option

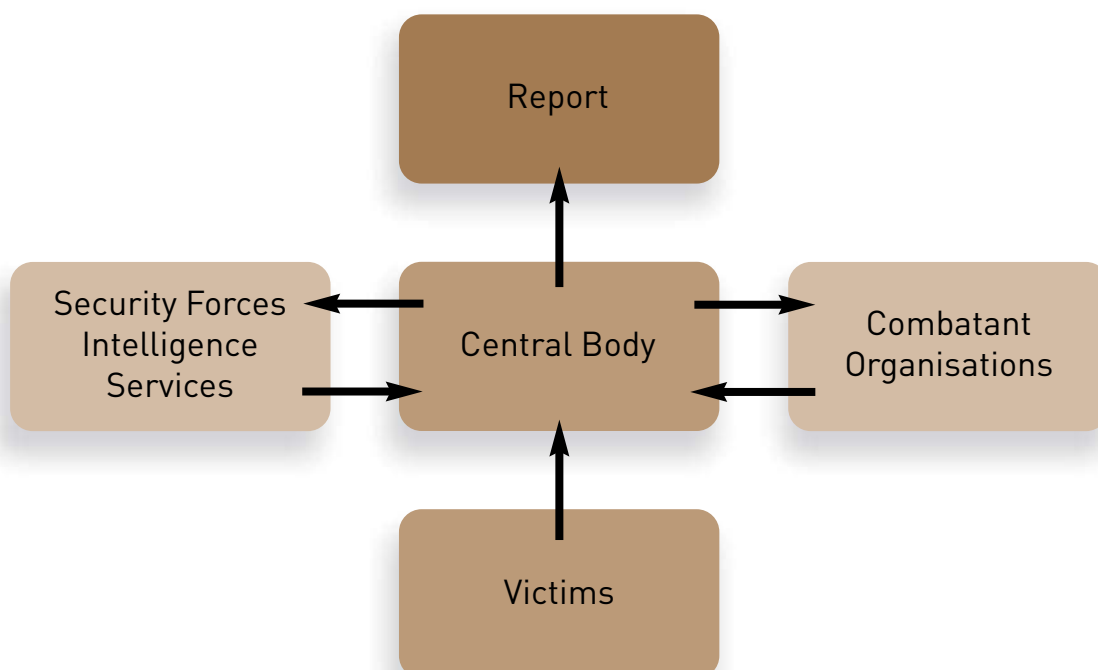
The “drawing a line under the past” or the “do nothing else” option would mean that the on-going patchwork of processes would continue. However, no additional formal steps would be taken towards a process of truth recovery. Those who favour this option believe that any process of truth recovery is not necessary, is not possible at this time, or is likely to have a number of consequences including:

- Opening old wounds without resolving anything;
- Destabilising the already fragile political system; and
- Criminalising those who were actively involved in violence, without changing the systems and structures which gave rise to and encouraged the conflict.

Discussion

The absence of an official process to establish a broader “social truth” would mean that the on-going patchwork of truth recovery (e.g. the various post-Cory inquiries, the work of the Historical Enquiries Team, the work of the Office of the Police Ombudsman, individual cases before the courts, and disclosures from former combatants, security force personnel and others) would continue. The obvious attraction to this option is that it does not require political agreement or consensus since these mechanisms are already in place. The central weaknesses of this option would be that the state-centric nature of the patchwork of initiatives would continue despite the fact that, leaving aside the issue of collusion, the state was only directly responsible for 10% of deaths during the conflict. In addition, the absence of one overarching mechanism to “manage” the past could render the political institutions vulnerable to the politics of the latest revelation – i.e. the constant but unregulated feed of information about events which occurred during the conflict.

Option 2: Internal Organisational Investigations



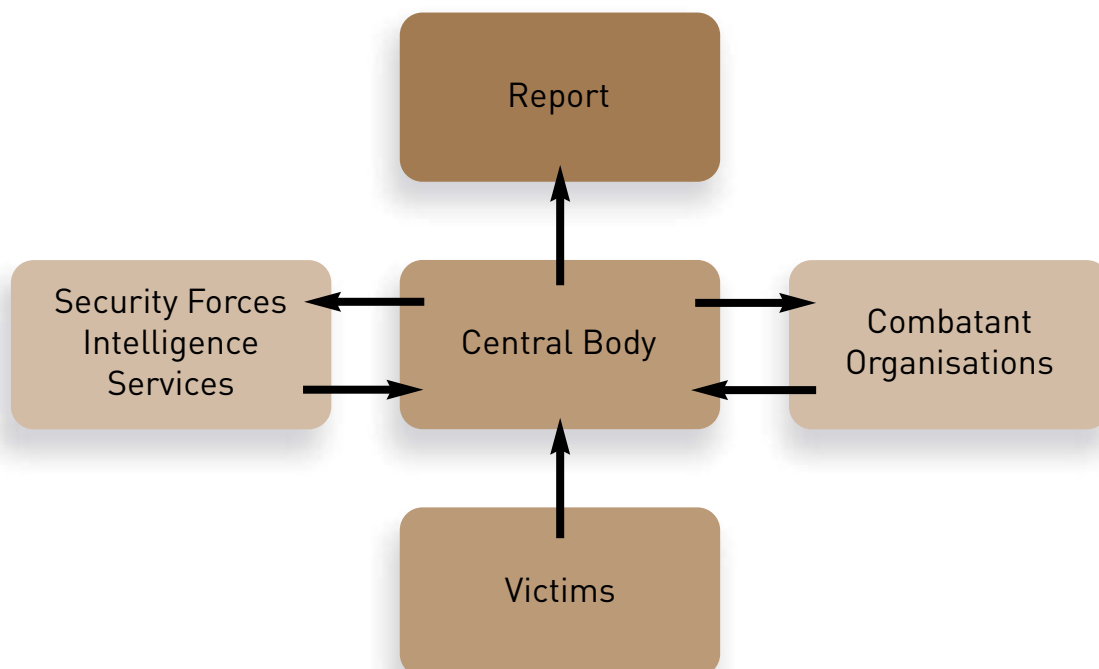
Option Two; The Internal Organisational Investigation Option

Under this option, organisations which have been involved in acts of violence take primary responsibility for assisting as much as possible in providing victims with the truth about what happened to their loved ones. The organisations would become involved voluntarily, in order to meet victims' requests for information, and would build on their experience in conducting internal investigations. A variety of possible formats, including tribunals or investigations by group members at an internal level, could be available.

Discussion

This option could provide ex-combatants and the security forces with the opportunity to make a commitment to healing and reconciliation. Its key strength would be that it might achieve greater "buy-in" from the organisations involved since those involved as interlocutors would themselves be ex-combatants or former security force personnel and therefore much more likely to be trusted by the former colleagues. The obvious weakness, is that there would be obvious credibility challenges with such a mechanism if organisations were investigating incidents in which they themselves had been involved. This option might deliver information about what happened to individuals, if victims and families were prepared to ask for investigations. It would not lead to prosecution or the naming of names, nor would it directly help in transforming institutions or political leadership. However, a willingness to participate in such a process might show some commitment to trying to resolve past grievances. This option would probably require some form of amnesty or guarantee of non-prosecution to secure the cooperation of former combatants or security force personnel. In addition, considerable care would be required in terms of the oversight of the process in order to reach the required threshold of independence, transparency and effectiveness in order for such a mechanism to reach the requirements of Article 2 compliance.

Option 2: Internal Organisational Investigations



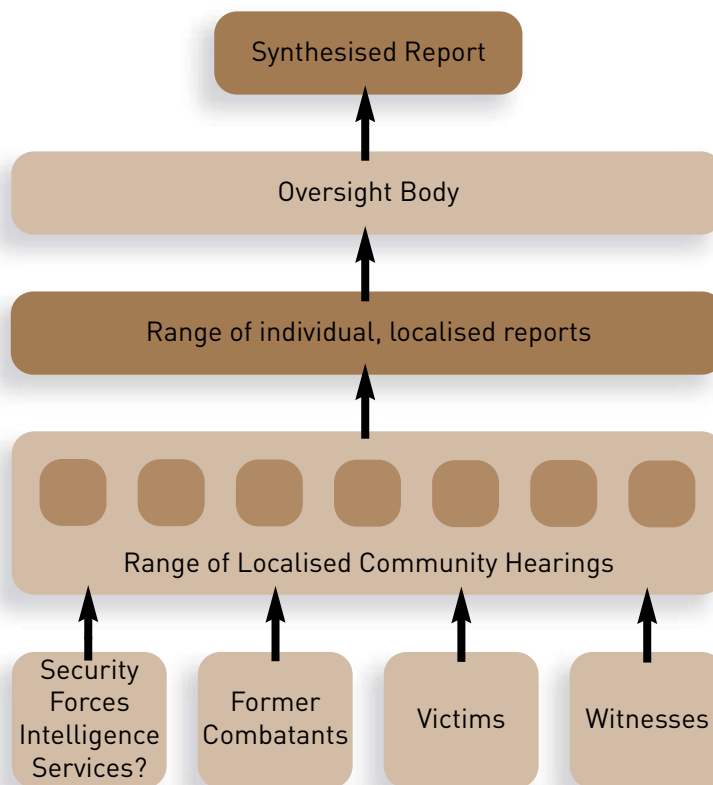
Option Three; “Bottom Up” Community Based Truth Recovery

This option would draw upon existing models wherein communities have devised and carried out their own forms of truth recovery. The involvement of local people in collecting and documenting local truth would take advantage of this skills base, and would itself be a mechanism for communal healing and reconciliation. This model could take into account structural issues, combine with storytelling and local history as well as “top-down” truth recovery, and could vary from one community to another. It could give voice to victims and marginalised communities, record previously untold stories, underline the validity of different experiences between and within communities, and emphasise the importance of individual and grassroots experiences, thus providing an alternative to dominant “macro” narratives.

Discussion:

“Bottom-up” truth recovery could promote community development, open up space for reflection, and resonate with other on-going activities such as storytelling and community testimony. It offers particular possibilities of healing when there are internal communal divisions. Such deliberations could in turn feed into a broader societal process of truth recovery, whether or not there was a formal, state-sponsored mechanism. The obvious weakness for such an approach is that localised mechanisms might risk varying greatly from one community to another, or focusing within single identities, and therefore not holding to account all institutions and protagonists. It would also struggle to take account of differing levels of capacity across different community types in Northern Ireland. This option would not lead to prosecution or the naming of names, but a broad collection of stories and narratives about the past.

Option 3: Community-Based “Bottom-Up” Truth Recovery



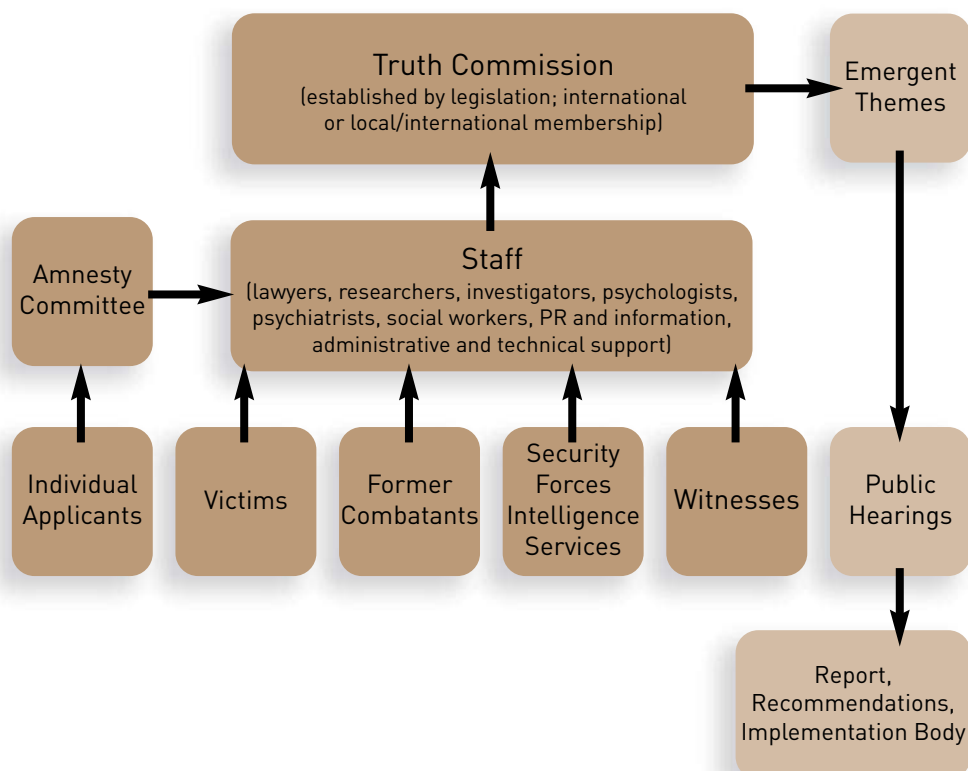
Option Four; A Truth Commission

Such a commission would focus on events of the past over a specified period of time. It would explore the causes, context, and consequences of violence as well as examine specific events and patterns. Set up by legislation by the Irish and British governments (and possibly the Northern Ireland Assembly), with independence from all, it would have the power to compel witnesses, grant amnesty, recommend prosecution, order reparations, and present a report with recommendations. A Truth-recovery Commission could build on the truth-recovery work that has already taken place, but do so in a much more inclusive fashion, which would not only cover a broader range of incidents, but also find, investigate, and document events in a broader framework of the causes, nature, context, and consequences of violence. Such a Commission would collect testimony from victims. It could also try and persuade those that committed acts of violence to reveal information by, for example, offering to expunge criminal records or a guarantee against future prosecutions in exchange for truth telling.

Discussion:

The establishment of such a Commission would be a practical and symbolic expression of the willingness of society to deal with its violent past as part of the transition to becoming a more inclusive society. It offers the possibility to document individual events, as well as organisational and institutional aspects of the conflict. It could have both “carrots” and “sticks” to reach the truth. Such a commission need not be exactly like the South African Truth and Reconciliation Commission, nor exactly like any of the previous inquiries here in Northern Ireland. It would work best if it were independent, included eminent international figures, avoided an overly adversarial and legalistic way of working, and saw itself as part of the wider process of making peace with the past rather than the only vehicle. Whether it could be established, and succeed, would depend greatly on the trust, participation and confidence of victims, ex-combatants, and institutions within society to participate in it. It would also require the engagement of the legal community, specifically the Bar Council and the Law Society, to devise a mechanism to limit legal costs associated with the delivery of the work of the Commission.

Option 4: Truth-Recovery Commission



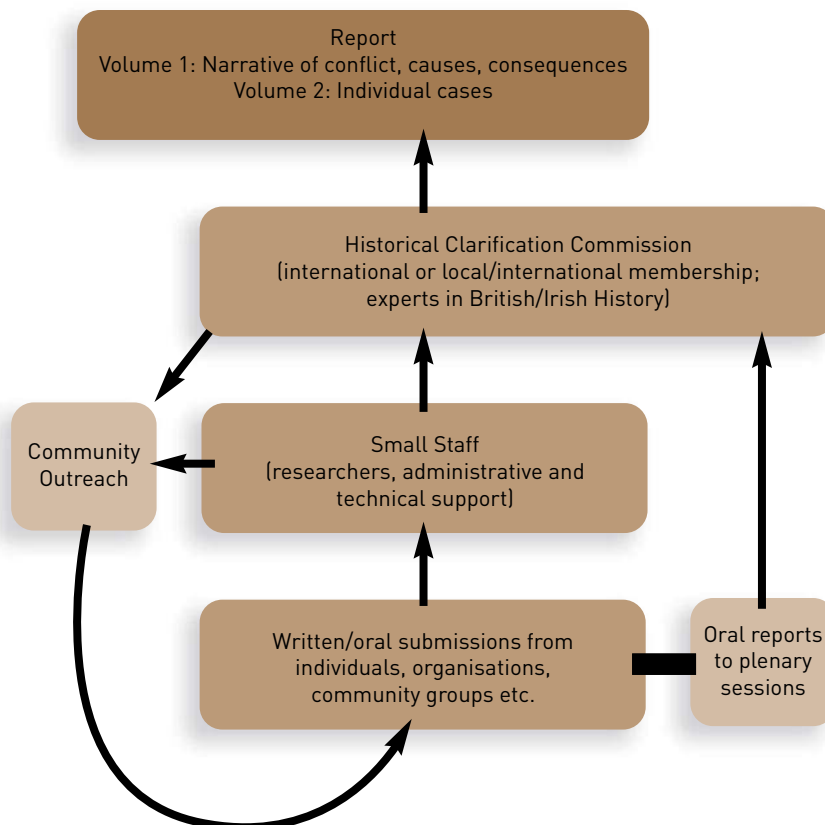
Option Five; A Commission of Historical Clarification

The primary focus of this option is historical rather than legal. It would examine the causes, context and consequences of conflict, but with less emphasis on either victims or those who had been involved in past acts of violence. The focus would be on devising an independent, authoritative, historical narrative about what occurred during the conflict and why, in order to encourage a broader sense of collective (rather than individual) responsibility for what happened. An agreed narrative would limit misperceptions and disagreements about what actually happened, and thus help to prevent future cycles of violence based on grudges and manipulation. This narrative would be developed by an independent body over a period of time.

Discussion:

This option would probably generate less political opposition, be less expensive, and could be the start of a broader public debate on what happened. It would produce a report, and could make recommendations. However, this type of Commission would have no evidentiary powers, no power to compel witnesses, grant amnesty, or prosecute, so it would not enable individuals to discover what happened in particular incidents, nor would it be able to name names or push for prosecution. Also, it would be unlikely to meet the needs of victims, and would risk seeming distant and scholarly, both of which would limit public ownership of its results.

Option 5: Commission of Historical Clarification



APPENDIX TWO: Amnesty International's "Single Overarching Mechanism"

Introduction

In September 2013, Amnesty International published a report Northern Ireland, Time to Deal With the Past in which they advocated a "single overarching mechanism" for dealing with the past in Northern Ireland. Amnesty reviewed the existing piecemeal and multi-mechanism approach to the past in Northern Ireland and identified two key problems. First, they argued that weaknesses and deficiencies in the existing mechanisms have meant that they are too often failing to deliver the effective investigations needed. Second, Amnesty argued that even if all the mechanisms were operating fully in compliance with their mandates, their inherent limitations mean that collectively they are insufficient to address the outstanding violations and abuses in Northern Ireland's past.

Given those deficiencies, Amnesty outlined a range of objectives which it argued should be linked to the establishment of this single mechanism. These included:

- A single overarching mechanism should be established that can promptly, thoroughly, effectively, impartially and independently investigate all outstanding cases of violations and abuses (including cases involving injury and torture and ill-treatment).
- The mechanism should also examine the overall patterns of abuses committed during the conflict, including the policies and practices of state and non-state actors and collusion.
- The mechanism ought to take over the work currently being carried out by the HET;
- It should be able to identify individuals or organizations responsible and, where sufficient evidence exists, lead to criminal prosecutions.
- It should also consider and formulate recommendations for providing full and effective reparation to the victims including revealing the truth, as far as possible.
- Such a mechanism would be an important step towards ending impunity for human rights violations and abuses in Northern Ireland, and allowing for public recognition and understanding about the harm that was inflicted by all sides. It could contribute towards reconciliation and recommend other initiatives that would contribute towards ending division in Northern Ireland.
- While Amnesty International does not endorse all aspects of the Legacy Commission as proposed by the Consultative Group on the Past, it was an idea that could and should have been considered and developed into something that was effective and human rights compliant.
- Any overarching mechanism established to investigate the human rights abuses and violations in Northern Ireland must be able to effectively investigate relevant connections with Ireland.

Amnesty International also detailed a series of "Principles For A New Mechanism". These included:

- The establishment and framework by which any mechanism would function should be the product of extensive and meaningful consultation with all interested parties, in particular victims.
- It should comply with international human rights norms; respond to the needs of victims; and take account of Northern Ireland's social and institutional context.
- The mechanism should be given the mandate, capacity and resources to clarify, as far as possible, the facts about past human rights violations and abuses. This objective normally includes an inquiry into the causes, antecedents, circumstances, contexts, nature, and extent of violations and abuses.

- The mechanism should be able to investigate the range of human rights violations and abuses (including killings, life-threatening attacks resulting in injury, torture and other ill-treatment) committed by all sides involved (including state agents and non-state actors) that occurred during the period under investigation.
- It should identify which persons, authorities, institutions were involved in human rights violations and abuses, including collusion between the authorities and armed groups. It should be able to determine whether those violations and abuses were a result of deliberate planning, policy or authorization on the part of a state or any of its organs, or of any political organization, armed group or other group or individual.
- It should also be authorized to investigate incidents that occurred outside of Northern Ireland and have a protocol on how best to ensure cooperation with third state authorities.
- Arrangements should be put in place to enable information gathered by the mechanism which indicates responsibility for criminal acts [or omissions] to be passed to appropriate bodies for criminal investigation and, where there is sufficient admissible evidence, prosecution in accordance with international fair trial standards.
- The mechanism must have the mandate to formulate effective recommendations for providing full reparation to the victims, including their families. This should also include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
- Guarantees of non-repetition should include measures to address the causes of conflict, the socio-economic legacy of the past, changes needed to law and policy; and to advance reconciliation and promote human rights education and public awareness.
- Any mechanism established must be completely independent of all parties to the conflict including the state. Those working for the mechanism should be selected on the basis of their competence, proven independence and recognized impartiality.
- The mechanism must be mandated with the powers and authority to gather all information it considers relevant, including the power to compel the production of information and the attendance of persons as and when necessary.
- The mechanism should enjoy financial, administrative, and operational autonomy. It should receive sufficient resources, including support from a sufficient number of experienced, trained and skilled staff. It should also have access to impartial, expert legal counsel.
- As a matter of principle, all aspects of the work of the mechanism should be made public. As far as possible, the media and public should be given access to the proceedings and to the information on which the commission bases its findings. However, confidentiality may be required to protect the rights of individual victims, witnesses and others who may be at risk of serious harm.
- Victims should be able to participate effectively in investigations and consulted on key issues where their interests are affected. They should always be treated with respect for their dignity and with humanity and appropriate measures should be taken to protect their safety, physical and psychological well-being, and privacy.
- Victims should not be unfairly discriminated against. No group of victims should be prioritized over others. Measures should be taken to ensure the protection of victims and witnesses who may be at risk as a result of their participation in the process.
- The mechanism's procedures should be fair. In particular, persons suspected of committing human rights violations and abuses should have the right to be represented by legal counsel and allowed a right to reply.

- Throughout its operation, information should be regularly disseminated about the mechanism's work, through a range of media and formats to ensure the information is accessible to all interested sections of the public. The results of investigations and recommendations should be officially proclaimed, published and widely disseminated.
- The government and any other body or bodies to whom its recommendations are addressed should issue a public response within a reasonable time and should state what steps they will take to implement the recommendations made by the mechanism and a proposed timeline for implementation.

Amnesty International also recommended a number of ancillary measures on dealing with the past. These included that the UK government should:

- Establish a Bill of Rights for Northern Ireland that takes into account its particular circumstances and history;
- Provide adequate resources across all of the existing mechanisms to address endemic delay in the investigation and processing of historical cases;
- Provide the Office of the Police Ombudsman for Northern Ireland with powers to compel retired officers to submit to interview; bring civilian staff working with the PSNI under the remit of the OPONI; and amend regulations to ensure there are no restrictions on OPONI investigating deaths where RUC officers were responsible despite the fact that the death might have otherwise been previously investigated.
- Ensure that coroners' inquests in practice allow for effective and thorough investigation of the circumstances of a death;

Ensure that the PSNI provides timely and adequate disclosure to all bodies undertaking historical investigations and that all processes for disclosing and redacting documents are undertaken in an independent manner and subject to effective challenge;

Reform the Inquiries Act 2005 to ensure the independence of future inquiries;

Establish an independent public inquiry into the death of Patrick Finucane;

Establish an independent public inquiry into the Omagh bombing;

Until a single overarching mechanism as described is established, reforms should be made to the HET, including: the establishment of an independent complaints mechanism that is easily accessible to those who might want to complain about any aspect of the HET's work; that proper policies and procedures are put in place in the HET to ensure thoroughness of reviews across all cases; provide the HET with powers to compel witnesses and material; as well as the implementation of other recommendations put forward by HMIC. With respect to cases involving the state, it is imperative that these cases are investigated in an impartial manner and by a suitably independent body; a threshold that at present the HET does not meet.

Finally Amnesty International recommended that the Irish government should :

- Support the establishment of a single comprehensive mechanism to address the past in Northern Ireland and provide it with full cooperation



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