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Reflecting on the report of the Consultative Group on the Past

*Reflecting on the report of the
Consultative Group on the Past*

Seminar Report
14th & 15th May, 2009

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Foreword

The report of the Consultative Group on the Past represented an important moment in Northern Ireland's long transition out of conflict. It was a recognition that there is unfinished business that has to be dealt with and it made proposals that many will recognise internationally as fitting into the now customary transitional arrangements for societies emerging from conflict.

The sponsors of the conference – of which this report is an outcome – wished to allow for discussion and debate on the important recommendations of the Consultative Group on the Past. The Group's report was published in late January 2009 and the Group promptly dissolved itself. There was a highly politicised controversy at (and immediately following) the launch, focused mainly on the recognition payment recommendation. Thereafter, a vacuum developed which had the danger of consigning the report, the other important issues with which it wrestled and the other recommendations that it made to a high shelf in the Northern Ireland Office.

It was against this background that the Transitional Justice Institute of the University of Ulster, the Human Rights Centre at the Law School of Queen's University, British Irish RIGHTS WATCH and the Committee on the Administration of Justice decided to convene a gathering for interested individuals and groups. Initially conceived as a small meeting for a day, the interest and enthusiasm of the many participants who eventually attended meant that the conference extended to two days. A rich and rewarding exchange of views took place. And it was clear that a larger and more thoughtful pool of interest existed than was apparent during the public debate in February 2009.

This conference report will, it is hoped, stimulate continuing discussion and decision-making on the issues at the heart of the debate around dealing with the past. We at CAJ will continue to remind both the Irish and the UK governments that they have responsibility – as joint guarantors of the peace process – to create an opportunity for genuine accountability concerning their own role, as well as others', during the conflict. If this is done properly, important lessons for a future founded on human rights and equality can be learnt.

Mike Ritchie,
Director, Committee on the Administration of Justice

Day 1 -14th May 2009 University of Ulster, York Street, Belfast

Michael Hamilton,
Transitional Justice Institute, University of Ulster

Michael Hamilton welcomed those present and stated that the purpose of this event was to reflect on the report of the Consultative Group on the Past (hereafter referred to as the 'Group') and to provoke an inclusive discussion on the report. He recognised the immense task that the Group faced and the seriousness, integrity and degree of reflection that the Group brought to its work; the result of which was a significant and informed report about how best to deal with the legacy of Northern Ireland. Mr Hamilton postulated that the structures which the Group had proposed confront some of the criticisms which have been levelled at previous fragmented and piecemeal attempts to deal with the past, and constituted an attempt to better coordinate and build upon the work that has gone before. The report acknowledges many of the real challenges that lie ahead, including those relating to scarce resources. The report repeatedly referred to the difficulty of building consensus against a backdrop of differing moral assessments, which inevitably shape understandings of the causes and consequences of the conflict. One goal of the report is to deal with the past in a way that does not add to experiences of hurt and isolation.

Mr Hamilton noted that although much attention focused on the important issue of the recognition payment, it was nonetheless only a small section of the report and he hoped that the panel sessions at this event would be able to have a detailed and frank discussion regarding the other recommendations of the report. Mr Hamilton also thanked the British Irish RIGHTS WATCH and the Committee on the Administration of Justice (CAJ) for taking this important initiative which TJI and the Human Rights Centre at Queen's University are committed to supporting, with a view to ensuring and facilitating focused discussion on the issues raised. He suggested that since it was the Group's ambition that the Legacy Commission would be fully up and running by late 2010, such an opportunity to discuss this report, as afforded by this event, was not premature. Mr Hamilton concluded his welcome address by expressing that it is the TJI's hope that by listening to each other's comments, contributions and concerns, this event would represent another step towards building background consensus on how do deal with the past, with an eye on the future.

Panel 1

Presentation of the findings of the report

Chair - Mike Ritchie,
Director of the Committee on the Administration of Justice

Lord Robin Eames, Co-Chair, Consultative Group on the Past

Lord Robin Eames, Co-Chair of the Consultative Group on the Past, informally presented the panel with some background on the eighteen months that the Consultative Group spent working together. He mentioned some of the issues that conflicted and confronted them in their work, including the timing of the formation of the Group i.e. whether it was too soon after the ceasefire, what lessons had been learned from other countries in the post-conflict situation and how could they be applied to Northern Ireland, and whether the recommendations would withstand conflicting pressures from the local political scene.

Lord Eames acknowledged the controversy surrounding the appointment of the Group members and an initial reluctance on his part to accept his appointment. However, he felt a moral imperative to do what he could to contribute to moving this society forward. He described the eighteen months as a journey and expressed his wish that society could make the same journey, as he felt that in that intensity of work, many of the problems on a wider sphere that conflict in society arose with a personal element, and the way in which the members of the Group argued their points of view and reached some degree of consensus could act as a blueprint for society.

Lord Eames believed that the Group knew in advance that some of their proposals would be a shock to sections of the community and yet in reaching a consensus as a Group, they were able to see where a future of some hope might lie. The key word to all of their work was 'reconciliation' - reconciliation of those who over the years of the conflict have suffered so much, those who had been in families of bereavement and those who found themselves totally aghast at things that were happening over which they had no control. Another recurring word from their consultations was 'frustration.' People were frustrated by a society in which they felt that they could not influence future events, let alone reflect on the past. Regarding the related area of victimhood, Lord Eames said that the overriding theme emanating from the Consultative Group's talks with those from the victim sector was that 'storytelling' - i.e. a chance for the victims to talk and for people to listen to their story - was of utmost importance to them, which is why the Group included this point under the question of a Legacy Commission in its recommendations.

Lord Eames said that above all, this was an experience of a personal nature. The Group was inundated with a myriad of views from recommendations, reports and personal interviews, and they undertook to listen to each and every representation. Some of the recommendations that appear in the final report were a direct result of earnest requests from people from a wide cross section of society. This brought Lord Eames to the controversial proposal that came from a recommendation on recognition, recognition of hurt, and recognition that some people have not received the notice of society that they felt they deserved. According to Lord Eames, the inclusion of the recommendation of recognition was also advocated by some politicians.

One issue under the recommendation of recognition that the Group were faced with was the question of how one defines a victim. Under the 2006 Victims and Survivors Order in Northern Ireland, there was no recognition of any particular dimension to victimhood; it was across the board, irrespective of who was a victim. Lord Eames supposed that the Group could be criticised by society for not questioning the 2006 Order or not saying in the final report that it needed to be examined or that it was going to be divisive. The Group took the 2006 Order as it was as the law at the present time, which meant there would be no recognition of a hierarchy of victims, as people often talk about.

According to Lord Eames, the question of the £12,000 recognition payment was based on the fact that the equivalent in Euros had been already decided upon by the government of the Republic. After a very heated period of debates, the Group knew that this particular recommendation ran two risks: firstly, it would dim reflection on all the other proposals; and secondly, it would be very hurtful within the victim sector, for those who felt that there was an equivocation in relation to the perpetrator and the victim.

This provoked a certain amount of controversy. The Secretary of State made it clear that he did not see a consensus on this particular aspect of the report at present. Lord Eames welcomed his statement as it allowed people to realise that there was more to the report than merely this one issue, and he hoped that this seminar would help concentrate people's minds on the other items that the Group recommended in the report, including the Legacy Commission.

Lord Eames recognised that it has been a difficult period for the Group, particularly when people want to 'shoot the messenger' rather than understand the message, as he feels has happened here. He was, however, convinced on the whole issue and thrust of this report - that

the Group has put their heads above the parapet and have run the risk of misunderstanding, but that they have also, he hoped, made some small contribution to asking the hard questions that society must ask if Northern Ireland is going to move forward.

When it was beginning its work, people urged the Group to look at South Africa and at a lot of the other solutions that societies had developed to address their post-conflict situation. The Group examined the South African Truth & Reconciliation Commission in great detail, together with many other countries which have made a similar effort. He noted that the group did not want to impose on Northern Ireland a system that had maybe worked, or had not worked elsewhere. The Group wanted to produce a Northern Ireland solution to a Northern Ireland problem, which is why this report centred more on the events of Northern Ireland's past rather than taking a wider reflection from elsewhere.

Denis Bradley, Co-Chair, Consultative Group on the Past

Denis Bradley, Co-Chair of the Consultative Group on the Past, began by explaining how, in the formative stages of its work, the Group faced much cynicism from people who felt that it was either too early, too expensive, too dangerous or too impossible to deal with the past. This was happening in a context in which the biggest 'dealing of the past' had happened within the Anglo Irish situation in four hundred years, because political structures had been created to move into the future.

Mr Bradley noted that dealing with the past is as common as political muck because the people of Northern Ireland are dealing with it all the time. Outside the political sphere, when this report was being proposed, Northern Ireland was dealing with its past on a daily basis, with some significant expense, through its large volume of tribunals and court cases. Mr Bradley invoked the analogy of Daniel entering the Lion's Den to illustrate a common belief that if you move beyond the political imperative, you would be eaten by the lions. But he argued that this is the den in which the people of Northern Ireland live, *"we are eating each other and will continue to eat each other, but it is kind of normal and we're finding ways through it and we're finding mechanisms to proceed with this, both politically, judicially and so forth."*

With regards to the Group's remit and what they brought to the table, Mr Bradley believed that the Group brought an interpretation of how to take

the best items already in existence and put them in a coordinated fashion, which then provided a possibility to do things better, quicker and less expensively, but still within the context that a fair amount of reconciliation had been achieved politically. He also stated that Chapter 2 is the centre of the report and encapsulates their input. The groups and individuals who spoke to the CGP who were working for reconciliation, acknowledged that while the recorded facts of the past cannot be changed, the opposing moral assessment of what was done and suffered by each side can be revisited, and in doing so can prove to be the beginning of the road to reconciliation, as experienced by many. Chapter 2 of the report is the foundation stone on which all else is based, including information recovery, justice and storytelling.

Mr Bradley mentioned an experiment that he saw on television where people were asked to knowingly electrocute people in an adjacent room in the name of science. The result was that nine out of twelve people killed the person in the room because they were convinced that what they were doing was 'good for science.' The purpose of the experiment was to prove that when a person is tied to an ideology, anything is possible.

Reconciliation is about realising that there are many ideologies, some of which will contain many good things, some of which will contain bad things. Mr Bradley dismissed as nonsense the claim that this report flattens out morality. He countered that it does the exact opposite; it says that all human beings are capable of killing the person in the next room and in fact the history of humankind proves that we have killed the person in the next room. But if we got to know that person in the next room and came to a political agreement, we may not push the button so quickly.

Discussion

In response to a question asking him to explain the journey or process that the Consultative Group underwent, Lord Eames replied that this was one of the most important issues behind the report i.e. the three stages of how they reached the point of making recommendations.

1. He talked about the journey regarding the opening and evolution of dialogue among the Group. Together with Mr Bradley, Lord Eames examined to what extent and at what level there could be communication among the Group. The feelings within the Group were so strong about their interpretation of the history of the Troubles that they wondered at one stage if they would manage to get consensus on even how to go forward.

2. The suspicion of each other's motivations finally evaporated through the understanding that there were some things they would never agree on as a Group, but there were some things they could at least look at, which led to the third and vital stage in the journey.
3. This was the most significant stage in the dialogue, where the Group reached a crossroads and recognised that they could go back into the bitterness of the past and recommend things from a purely sectional standpoint which would do nothing to bring society forward, or they could work in a structure which would at least allow the Group to reflect on the wider issue of what they said to society. As such, the Group did not set out to rewrite or reinterpret history. The journey that they embarked on brought them to a point where they thought this is a possible way of bringing everybody to a level of understanding in which progress can be made.

In response to a question regarding the politics of the situation and the role of the two governments in resolving the issue of whether the past can be moved on from, Mr Bradley agreed that in the immediate future, the onus is on the governments. The reaction that the Group received from both governments regarding the report was generally positive, as he believed it very difficult to criticise this report on any kind of objective level because it is well written, informative and conclusive. The report is attractive to government as it gives options (unlike tribunals and inquiries) and a construct in which this can be done and achieved, and a budget. Mr Bradley argued that the real danger to the report is the issue of devolution, based on budgeting issues and some suspected political reluctance to deal with the issue.

One speaker voiced his disappointments and criticisms of the report, questioning where the report mentions the accountability of anyone within the Irish government. He also criticised the Group's working definition of a victim, claiming that nowhere else in the world uses the same definition of a victim. Mr Bradley highlighted that there is in fact a mechanism to hold the Irish government to account, regarding collusion, etc.

One contributor reflected that the key thing about the report is that it recognised that there was an issue to be addressed, a transition that needed to be engaged with and that this transition was complex. He suggested that implicit in this was the recognition that there were systematic violations that needed to be engaged with; that it was not simply a "rotten apple" situation. He proposed that this is at odds with the narrative of the

conflict in which violations were simply thought of as "rotten apples." He suggested that the first hurdle that has to be overcome at government level is an acceptance and recognition of systematic violations. Once this is achieved, a mechanism can be devised (as in this report) whereby state and non-state violations can be engaged with.

Mr Bradley referred once again to the politics of the situation, stating that he is optimistic that the government will do more than people think because there is some recognition and knowledge within the government that leakage will continue indefinitely *'if there is no grasping of these nettles.'*

Panel 2

What is required to make the Legacy Commission compliant with human rights obligations?

Chair - Professor Colin Harvey, Head of the Law School at Queen's University, Belfast

Caroline Parkes, British Irish RIGHTS WATCH (BIRW)

Ms Parkes began by apologising on behalf of Jane Winter who was unable to attend the event. Ms Parkes proceeded to read out Ms Winter's speech on her behalf. Ms Parkes thanked the members of the Consultative Group on the Past for its report which BIRW viewed as a '*deeply thoughtful and thought provoking genuine attempt to grapple with the vexed question of how Northern Ireland begins to come to terms with its past.*' However, she added that before one addresses the question of what is required to make the Legacy Commission human rights compliant, one needs to ask whether what is being proposed is in fact human rights compliant, which is where BIRW has its doubts. Despite the inclusion of human rights compliance in the Working Principles, there is very little reference to human rights themselves in the report, nor to the role of human rights NGOs. This is a significant omission because the conflict was fuelled by a lack of respect for human rights as well as repressive measures taken in the name of combating terrorism. These created a human rights deficit in Northern Ireland which remains to be fully addressed. It also impedes the potential for learning the lessons of Northern Ireland for other conflicts.

BIRW is critical of the model that the Group has come up with as they feel that it lacks transparency, with too much happening behind closed doors. BIRW has two principal concerns; the first being that the Group is proposing an end to public inquiries in Northern Ireland; the second is that the Legacy Commission model may not improve on the investigations currently on offer from the Police Ombudsman and Historical Enquiries Team (hereafter referred to as HET). If the proposed Legacy Commission delivers less than the HET, then the delivery of justice to the bereaved will become an unfair and discriminatory '*chronological lottery.*' There will be an imbalance of justice for the bereaved i.e. those who received an HET investigation and those who did not.

Ms Parkes explained that BIRW feel that the proposal to separate investigation from information is not an improvement on the approach developed by the HET, which has been holistic and has sought to answer all of a family's questions in one report. She expressed BIRW's annoyance at the fact that the Group appears to have confused information which is in the possession of the state with that in the possession of non-state actors, such as paramilitaries. Paramilitaries are obviously not going to

come forward with information about their activities without guarantees of anonymity and immunity from prosecution. State officials, on the other hand, hold information in trust on behalf of the public. They must clearly have regard to the right to life and the right to privacy, but when someone has been killed, the public interest and the interests of the bereaved must be weighed against those concerns and a balance struck. BIRW advocates that the bereaved have the right to know the truth, however uncomfortable disclosure may be for the authorities. Equally important, where a state actor has acted outside the law, impunity should not be available to them, according to all international human rights standards.

Ms Parkes quoted a passage from the report which states that '*the Group does not see the outcome of the information recovery process as blaming or naming individuals.*' Ms Parkes suggested that this reference to '*not naming or blaming*' equates to an amnesty by any other name. She also expressed concern about public and family access to the information, and quoted a section of the report which implies that the needs of families come at the end of a long list of caveats, which includes the interests of national security and the objective of promoting reconciliation. BIRW particularly objects to the proposition that the Legacy Commission could suppress information in the interests of reconciliation, as this, they argued, is an abuse of power and is lacking in transparency, which would be counter-productive and unacceptable.

Firm, unequivocal government and Northern Ireland Assembly backing, adequate resources and enough time to complete its task are fundamental requirements to ensure that the Legacy Commission is human rights compliant. The benchmarks to enable compliance with human rights are set out comprehensively in the United Nations Basic Principles on Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

The European Court in *Jordan v UK*¹ has set out a template for what constitutes an effective investigation as follows:

- Deprivations of life must be subjected to the most careful scrutiny, taking into consideration all the surrounding circumstances;
- The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident;

¹ *Jordan v. United Kingdom*, App. No.24746/94 (2001)

- There must be an effective official investigation when individuals have been killed as a result of the use of force;
- The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and in those cases involving state agents, to ensure their accountability for deaths occurring under their responsibility;
- A prompt response is essential;
- The authorities must act of their own motion once the matter has come to their attention; they cannot leave it to the initiative of the next-of-kin;
- The burden of proof rests on the authorities to find a satisfactory and convincing explanation where they have exclusive knowledge about a death;
- The persons responsible for and carrying out the investigation must be independent from those implicated in the events;
- The investigation must be capable of leading to a determination of whether the force used was or was not justified and to the identification and punishment of those responsible;
- There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory; and
- The next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

Ms Parkes argued that, with the exception of promptness, there is no reason why a Legacy Commission cannot be established in such a way that it could meet all of these tests. The key words are transparency, independence, accountability and the involvement of the next-of-kin. If the Legacy Commission was to adopt these principles, both in relation to individual cases and to the thematic investigations, it will be in a position to lay the past to rest and to enable the people of Northern Ireland to move forward together into a future free from conflict and the long shadow of the past.

Professor Monica McWilliams, Chief Commissioner of the Northern Ireland Human Rights Commission

Professor McWilliams linked the question with the wider current debate around human rights and the Bill of Rights. In order to put the report of the Group in context, Professor McWilliams referred to the Good Friday Agreement, which was primarily a forward-looking document. However, it did contain certain sections on reconciliation and effective policing which talked about the past, indicating that one is not starting from scratch on this topic.

Professor McWilliams noted that the victims section in the Good Friday Agreement was small and there were some concerns during the negotiations at the time that this would lead to an unbalanced document. The material that made its way into the Good Friday Agreement on victims was more concerned with support for victims rather than dealing with the past. Professor McWilliams suggested that perhaps the reason why dealing with the past was set for an independent body at some future stage to deal with it (like the Commission was given the job of the Bill of Rights), was because it was such a difficult task and the parties to the Good Friday Agreement might still have been at the negotiating table today, trying to resolve all of these very difficult, complex issues.

Professor McWilliams juxtaposed the approach that the Northern Ireland Human Rights Commission took when drafting its advice on the Bill of Rights, with the morality approach the Consultative Group took in their report. The Human Rights Commission was very driven by international human rights standards and the European Convention on Human Rights, which was part of its mandate. Professor McWilliams admitted that the Human Rights Commission was surprised to see how few human rights standards were referred to in the final report of the Group and the manner in which they were referred to, but she attributed this to the fact that Group came from a different direction. The Human Rights Commission came from the direction that “we’re all equal before and under the law”, which it found was a better standpoint than the morality approach.

Professor McWilliams stressed that one needs to ensure that if there is going to be due process, it must have human rights standards underpinning it. She also mentioned that the Commission has some questions and concerns that need to be answered, including the issue of protected statements and some issues around the separation of powers between investigative functions and oversight functions. She insists that the European Convention and human rights standards need to be

built upon as they are incredibly important - they were long fought for and they have a long history, compared with truth commissions which are still very much in their infancy. She concluded by saying that both governments and non-state actors need to be held to account. Professor McWilliams acknowledged the work of the Group and pledged the support of the Northern Ireland Human Rights Commission in terms of asking the questions and addressing how to resolve them. She also stated that during their discussion about the right to life in the Bill of Rights, the Commission spoke of dealing with the conflict and the past in the Bill of Rights document. She culminated her presentation by suggesting that, *'perhaps this is a moment now where we can look at the of advice to the government on the Bill of Rights and how that equally meets those standards of dealing with the past in a document such as this.'*

Francesca Pizzutelli, Amnesty International

Ms Pizzutelli's presentation discussed the international aspects of the human rights framework in which the Legacy Commission will be established. She stated that there are two sides of the human rights framework with respect to the Legacy Commission:

1. The internal functioning of the Legacy Commission i.e. standards with respect to fairness, due process and effective inquiry.
2. Standards about accountability i.e. how the Legacy Commission is supposed to work if it is to comply with the right of the victim of serious rights violations, as perpetrated by state and non-state actors, to remedy and to truth and justice.

Ms Pizzutelli focused on the second set of standards in her presentation. Amnesty International is of the belief that the question of amnesty is of fundamental importance when talking about the right of victims to remedy. She explained that Amnesty International is concerned by a paragraph in the Consultative Group's report which leaves a 'door open' to a future amnesty for serious human rights violations, because these types of amnesties are not allowed under international law. Ms Pizzutelli postulated that together with blanket or non-conditional amnesties, the international community has also moved away from granting 'conditional' amnesties for serious human rights violations i.e. amnesties that are linked to something that the alleged perpetrator is supposed to do or give in exchange. She mentioned the example of the South African Truth and Reconciliation

Commission which was an investigative commission mostly, as the Legacy Commission would be, and it also had a process by which perpetrators of serious human rights violations would be granted amnesty in exchange for full and public disclosure of what they knew about the human rights violations that they had committed.

Ms Pizzutelli acknowledged that the South African Truth Commission is an exception to the general rule regarding truth commissions and amnesties, based on Amnesty International's research. Their research into thirty-eight truth commissions found that no other Commission had a similar process to South Africa i.e. thirty-seven truth commissions gave no amnesty and in fact, many truth commissions actually sent evidence they had found about human rights violations to prosecution authorities. There have also been doubts for many years about whether or not the amnesty process that went on in South Africa was actually lawful or not in terms of human rights standards. It is still debatable whether or not it was lawful at the time, but it is definitely unlawful today, ergo a repetition or an attempt to repeat the experience in South Africa would be illegal from the point of view of international law.

Ms Pizzutelli then proceeded to discuss 'protected statements,' which are confidential statements given when prosecutions are unlikely due to the lack of evidence, by alleged perpetrators or other people informed of the facts, who are assured that their statement would not be used against them, either in criminal or civil cases. Ms Pizzutelli argued that these 'protected statements' are actually a form of amnesty in disguise. There is a risk that perpetrators or people involved would simply wait for time to pass so that the case is declared not prosecutable anymore and then go to the Commission and give their 'protected statements,' thereby protecting themselves from prosecution. This is especially true of 'historic cases.' What de facto would happen is that the Commission would trade justice for truth or information, but the problem is that this trade cannot legally be done under international human rights law. There is no trade between truth and justice and there is consistent jurisprudence by human rights bodies on that point, including the Inter-American Court of Human Rights.

Ms Pizzutelli concluded that there is a practical problem in terms of prosecuting historic cases and there is also probably a sense of fatigue with respect to inquiries and trials that are very long and do not really go anywhere. This practical problem, however, cannot be solved by bending or ignoring a legal principle and the legal principle is that perpetrators of human rights violation must be brought to justice.

**Professor Fionnuala Ní Aoláin, Transitional Justice Institute,
University of Ulster**

Professor Ní Aoláin's presentation focused on the supposition that there is a very serious deficit in terms of our understanding of the implacable international law that applies to any process of dealing with the past. Her comments referred to both a methodology of law that applies to the framework of the Legacy Commission and to some substantive questions which are subsequently raised, namely what the relevant legal universe for a society undergoing a transition from conflict is and what that society utilises as a legal point of reference in its reflection on how to gauge the past in order to go forward. The most pertinent question is what the legal framework that ought to guide a Legacy Commission should be. Professor Ní Aoláin argued that there is a host of national and international bodies and numerous states that have experienced a similar transition to the one that is being engaged in Northern Ireland which have a lot to offer in terms of examples of legal parameters for dealing with the past.

Professor Ní Aoláin suggested that while there is much to be welcomed in the report of the Group, there are significant deficits in the way in which it frames and understands the relevant international legal universe that applies to the set of questions it has set itself. Professor Ní Aoláin proposed that under the universe of law that applies to dealing with the past, there are three bodies of law which are broadly relevant. The first is international human rights law, which Professor Ní Aoláin indicated the Consultative Group had acknowledged, but only in a limited way. She illustrated this point by referring to chapter two of the report which contains the provision about recommendations being human rights compliant. The wording of this section suggests a particular primacy to the European Convention on Human Rights; however Professor Ní Aoláin advised that in this instance, the European Convention is one, but not necessarily the primary body of law which the Legacy Commission or the Consultative Group ought to consult. This is because the European Convention has limited experience in dealing with the set of questions that are before a Legacy Commission. Professor Ní Aoláin proposed that the relevant universe of human rights norms are both customary law, international customary law and international treaty law, including the jurisprudence of the Human Rights Committee and the International Covenant on Civil and Political Rights. In order to be human rights compliant, the Legacy Commission must take account of the overlapping set of human rights norms and jurisprudence that emerges from multiple bodies of international human rights law, i.e. there is not one body or treaty that is applicable here. Professor Ní Aoláin

critiqued the report of the Consultative Group for having failed to do that in a substantive and legally consistent way. She also hypothesised that one would find a much heavier body of law applicable to the questions of how a Legacy Commission would be compliant if one were to examine what the international courts, bodies and treaties to which both the United Kingdom and Irish government are signatories have to say about questions of amnesty and accountability.

The second set of norms or bodies of law which Professor Ní Aoláin thought a Legacy Commission should take account of is international humanitarian law, including the Geneva Conventions. Professor Ní Aoláin understood the reluctance of the Group to debate the applicability of these Conventions or their disinclination to engage with the questions of terminology of conflict and war. However, she believed that in order to deal with the difficult legal questions regarding amnesty and accountability, it is implicit that one must engage with the laws of war; one cannot avoid the legal universe. Therefore, Professor Ní Aoláin believed it was regrettable that the Consultative Group gave no legal guidance or sought no legal guidance in relation to this. Based on the experiences of other jurisdictions in dealing with the past, these are not a set of legal parameters that a Legacy Commission can avoid.

The third relevant body of law is international criminal law. This provides a broad frame of reference, including the Nuremberg Principles of Accountability, the statutes of the International Criminal Tribunals for Yugoslavia and Rwanda and in particular what the Statute of the International Criminal Court says about the question of accountability and the types of crimes which are covered by the statute. Principles of state responsibility, questions of universal jurisdiction and the UN principles on impunity are also relevant for this type of body. To say that the relevant legal universe for the purposes of a Legacy Commission is only ECHR compliance is in fact to ignore an entire universe of legal obligation which is absolutely relevant and binding on a state which engages in dealing with questions of the past. This broader frame of reference is important for three reasons:

1. They address the fundamental importance, conditions and ways in which accountability can be legally enforced.
2. They create a set of overlapping and enforcing bodies of norms which states themselves, including the United Kingdom and the Republic of Ireland, have agreed to be bound by, so it is not a body of law which is inapplicable to these states.

3. These overlapping norms, treaties and customs address directly - but not necessarily any one of them in composite - issues of impunity, state accountability, non-state actor accountability, redress, compensation and methods and means of enforcement.

To conclude, Professor Ní Aoláin warned that if the Consultative Group missed the opportunity to firmly ground a discussion of dealing with the past in the applicable and relevant international law, then a human rights compliant Legacy Commission needs to avoid the same pothole. The Commission must ensure that it does not miss the opportunity to utilise the growing international jurisprudence on many of the issues that it needs to address, and it needs to avoid the problem of creating a false sense that there are no guidelines, no comparable reference points and no rules for which all actors to the conflict in Northern Ireland are bound, because that is as much of a problem as no accountability at all. Professor Ní Aoláin also warned that the Legacy Commission needs to be wary of an overriding tendency to ground the legal frame of reference exclusively in European Convention of Human Rights standards. It is important that the frame of reference for the past is not narrowed to that particular set of norms, but that we have an extensive understanding of the broadest set of international norms to which the state is bound and to which it will be held.

Discussion

Professor McWilliams was asked whether the establishment of a formalised truth commission was a prevalent issue during the negotiations of the Good Friday Agreement. Although Professor McWilliams admitted that the issues of dealing with the past and truth commissions appeared in people's statements, including her own, she does not recall such issues ever being on the table in the discussions. She then proceeded to describe the evolution of the negotiations in relation to the inclusion of victims, which culminated in the insertion of a section about support and services for victims.

A "philosophical" question was put to the panel, asking them how human rights activists stand up to the challenge of dealing with the past, with particular emphasis on the role of amnesties. Professor Ní Aoláin argued that the answer on amnesty is more complicated than to say that there is no room for amnesty; there are rules about how you do amnesty. These rules are flexible enough and one ought to utilise that flexibility. She supported the notion that blanket amnesties are not acceptable and

that there are some crimes for which you cannot provide an amnesty e.g. genocide, torture. She suggested that the challenge to the human rights activist is to work within the flexibility of the law and to use the law as a tool that both addresses the needs of victims and defends the value of the rule of law. When states and non-state actors break the rules then they need to be held accountable. Ms Pizzutelli also responded to the question by saying that she believed it is a matter of personal choice i.e. every human rights activist decides where he or she stands on these kinds of issues in line with one's own personal moral considerations. She employed the example of the 'ticking bomb dilemma' to illustrate her point.

The panel was asked how a human rights compliant Legacy Commission which focuses on individual state and non-state actors, takes account of the nature and the context of the conflict and holds to account organisations and institutions that encouraged, created or perpetuated the conditions in which the violence took place. Professor Ní Aoláin postulated that utilising the full range of legal norms that are available helps to get at the causes and nature of the conflict. There is no perfect solution - accountability in post-conflict societies is deeply messy, but one must find a solution that is good enough and that allows us to move forward. Professor McWilliams contributed to this issue by saying that she felt the report refers to how society as a whole gets reparation as opposed to just individuals. As with the work carried out in relation to the issue of domestic violence, it is easy to introduce new laws, but attitudes must also be changed to avoid double victimisation of the victim within a system that has not taken on board what has created the problem in the first place.

Comment was made on how the focus of the Legacy Commission seems to be entirely on Article 2, in that it focuses on deaths. This was criticised because although a killing is obviously going to involve an Article 2 dimension, a whole host of other issues may be also involved e.g. the person may have been injured, abducted, tortured or may have left a family behind who subsequently may have suffered socioeconomic loss as a result of the death. In terms of measuring human rights violations therefore it is not sufficient to look at Article 2 alone. Professor Ní Aoláin endorsed this 'bundle of rights' approach in dealing with the past. She argued that there is a particularly gendered dimension to this, i.e. women are often missed out if the full range of human rights violations is not accounted for. If one only deals with very narrowly defined rights such as torture and extra-judicial execution, socioeconomic rights, gender issues, children etc can be overlooked. She remarked that one of the biggest failings of the South African Truth and Reconciliation Commission was that

it fundamentally failed to deal with the single largest harm of apartheid, which was the economic harm of apartheid. So one must think in a wide range of rights.

It was remarked that in reality, for families, there is often a tension between what is possible and what human rights standards are. For many families, especially those affected in the early 70s by state violence, all they have met is consistent cover-up and a lack of disclosure and transparency, and all the families are interested in now is the truth. There is a tension there as families need something from the process now, yet they have been the most affected and have the largest vested interest in ensuring human rights standards are met. Ms Parkes agreed that this tension exists between what families want and need and the human rights standards and how the two interact. In order to combat a 'human rights deficit', we need to increase the respect and protection of human rights and one way of doing this is building faith in institutions and in the rule of law. Ms Parkes added that a truth recovery process is one way of both finding the truth for families and preventing the deficit from getting any worse. It is important to look at the three aspects of this debate; the rights and needs of victims, the rights of others who are involved, and the need for reconciliation.

It was suggested that victims in Northern Ireland were led to believe that the Bill of Rights was to look at the particular circumstances of Northern Ireland and that there would be something of a new dispensation around the protection of their rights. It was argued that there are two particular circumstances that are unique to Northern Ireland:

1. The predominance of non-state abuses, which are responsible for the majority of human rights abuses through the past decades;
2. The involvement of those who have either been actively involved themselves, or certainly the political representatives of those non-state actors in government, in framing the current processes.

The panel was asked how these processes may be insulated from those whose past involvement and continuing apology for human rights abuses may now render them somewhat prejudiced in seeing the full application of international standards in these two particular circumstances. Professor Ní Aoláin disagreed that Northern Ireland is a unique situation based on the aforementioned markers of the source of violations and representation. She believed that the situation in Northern Ireland is comparable to a host of post-conflict societies from whom an enormous amount can be

learned. She argued that this mindset, which views Northern Ireland as an insular place that is totally unique, must be overcome in order to recognise that there are multiple other societies which have dealt with this range of issues and from whom lessons can be learned. Professor McWilliams commented on how difficult it is to get a consensus on a definition of the particular circumstances of Northern Ireland as everybody has a different notion of what is particular for them.

Professor Colin Harvey concluded this session by asking a question, *'if human rights lawyers, activists, commissions and NGOs do not speak up for human rights standards in these processes, who will?'*

Panel 3

What powers will the Thematic Examination Unit; the Information Recovery Unit; and the Review and Investigative Unit need in order to get to the heart of the issues?

Chair - Professor Monica McWilliams, Chief Commissioner,
Northern Ireland Human Rights Commission

Dr Patricia Lundy, University of Ulster

1. What are the issues?

Dr Lundy suggested that truth recovery or information recovery processes are primarily tasked with looking at micro level information i.e. answering families' questions. However, she argued that any such process should also deal with macro level issues, i.e. the bigger picture issues around the causes, consequences and context of a conflict. She believed the mechanisms which are currently in place do not adequately address the bigger picture.

2. Powers

Dr Lundy discussed what powers have been suggested for the Commission. Firstly, she referred to the power of subpoena, and although she acknowledged that it is an important tool to have, she also mentioned its limitations. For example, a person may be summoned to the Commission; however, they may 'decide not to remember' certain details or incidents. To seize documents is a second significant power which is unfortunately also subject to certain limitations. The third power is the use of a protected statement. Dr Lundy advocated the use of a protected statement or some immunity protection in order to obtain vital information from individuals who may not come forward without some promise of immunity. It is a crucial cog of the recovery process. Dr Lundy also recognised that informal processes hold a great deal of potential.

3. What are the Sources?

- Official documents: for example from the police, Ministry of Defence, the coroner's office, the Public Prosecution Service.
- Unofficial records: this is the extensive work carried out by the NGOs and human rights organisations which can quite often be ignored. Dr Lundy explained how this work has been given great significance in

some truth recovery processes internationally, in terms of providing answers or at least helping to fill in the bigger pictures.

- Exhibits and forensic: Dr Lundy suggested there may be a question mark over the integrity of some of the exhibits and forensics.
- People: this is a huge source of information e.g. testimony of victims, of eyewitnesses, of state agencies or institutions, of individuals within these institutions, and within the republican and loyalist movements. Most truth commissions or truth recovery processes rely very heavily on victims' testimony as a primary source of data.
- 4. What are the Constraints?
 - Passage of time: this is particularly pertinent for anyone carrying out cold case reviews. This issue of time is immense as people are dying with information and victims are dying without answers.
 - Integrity of some sources: the constraints around the integrity of some of the sources, especially the integrity of exhibits and the existence of 'empty files.'
 - Obstruction: it has been recognised in most truth recovery processes that have taken place internationally that there will be obstruction or a lack of co-operation from certain quarters.
 - Amnesia: people simply may not remember, but there is also selective amnesia, where people choose not to remember and this undermines the effectiveness of the subpoena.
 - Legal constraints: there will be limitations on disclosure based on legal constraints.
 - Remit: Dr Lundy believed that the remit/mandate is extremely important because if the remit is limited, then that will limit what can actually be looked at e.g. the Historical Enquiries Team's remit is to look at individual cases and therefore it cannot look at the big picture as it is not within its remit.

5. Power is in the Process:

Dr Lundy believed that the power is in the process. She acknowledged that while legal powers are crucial, the process itself is equally important. The issue of independence is fundamental: if people are to engage with the Commission, it must be acceptable to all sections of the community. Most truth commissions are independent and international. Dr Lundy advocated multi-disciplinary teams which is the case in most truth commissions, consisting of social scientists, lawyers, police, and human rights professionals. She also suggested that there is a huge role for NGOs, particularly in providing support to victims, in giving feedback and making changes. Dr Lundy favoured a multi-disciplinary team approach as it brings different perspectives to the questions and helps to get to the heart of the issues.

Dr Lundy supported the supposition that advice and support is crucial for victims and families participating in the process and without that advice and support, they should never enter into the process as it affects the quality of the information that the Commissions receive. NGOs play a huge role in supporting and giving advice to families that go through these processes and often the work they do is not sufficiently acknowledged.

As mentioned previously, Dr Lundy believed that there is great potential with informal processes. It is necessary to set up lines of communication or conduits in some instances in order to get to the people who have the information. She recommended that an oversight role could be added to informal processes to give them validity and credibility; preferably the role would be occupied by an international person. As the Commission is inquisitorial in nature i.e. it is a process where the Commissioners do the *'drilling down and asking of questions,'* it is therefore of the utmost importance that the Commission is independent if people are to engage and trust the information.

Dr Lundy believed that there should be an equality of treatment and there should be no hierarchy of cases - everyone should be treated equally. Dr Lundy suggested that there should also be an assessment of delivery at regular periods and this should be built into any information recovery process that takes place.

6. Core Principles:

- Trust is paramount to the integrity of the process and is related to the issue of independence.
- Honesty is linked with the notion of transparency; one has to be transparent about the limitations and difficulties encountered during the process to ensure that it is credible and valid.
- Victim-centred: the key is that the process should be empowering, not disempowering for victims or families who seek to engage in the process; so as not to re-traumatise people.

7. Examples of Truth Recovery Processes:

The Guatemalan example had very limited time to carry out its work, very few resources, extremely limited remit and yet it is acknowledged that it produced a very successful report that got to the structural issues.

The South African example was the opposite of this. It had plenty of resources, plenty of powers, a longer time to carry out its work, yet there is empirical evidence to confirm that it did not deliver on the micro or macro level.

Dr Lundy concluded by voicing her support for the Group's report. She believed that it has potential and that it is breaking new ground by linking the macro - the bigger picture, with the micro - answering families' questions.

Jeremy Hill, Legal Advisor to the Consultative Group:

Mr Hill began by explaining how the Group had to go into a certain amount of detail in drafting the legal aspects of the report in response to the various detailed questions that were put to it. He stressed that he was not implying that the detail is as definitive as the concepts and that, like any design, the views of experts and others are essential in refining the model. He also emphasised that he was speaking in a personal capacity, and that although he vowed to attempt to speak in a way which was consistent with the Group's thinking and the report, he could not speak on behalf of the Group.

Mr Hill discussed the procedures of the Legacy Commission, particularly the legal justice processes, where he agreed with Dr Lundy's analysis that there is an attempt to combine a micro process and a macro process with a fully fledged process of investigation. There are three different strands of the judicial or justice type process:

1. Review and Investigation Unit: this is similar to police investigations and would be primarily responsible for criminal justice. The aim of the Investigation Strand is to review and investigate cases with a view to prosecuting people and bringing them to justice.
2. Information Recovery Unit/Information Strand: this unit deals more with individual questions and its primary purpose is to obtain information of importance to relatives.
3. Thematic Examination Unit: this unit deals with structural issues and its primary purpose is to obtain information of importance to society as a whole.

Mr Hill also explained that only when a case has been properly reviewed and/or investigated by the Review and Investigation Unit, and only if a prosecution was not to be pursued, could a case pass into the process of information recovery or thematic examination.

Mr Hill articulated that the concept was therefore to comply first with the demands of criminal justice to the highest evidential standards, yet also to provide a means subsequently of obtaining information about particular deaths and about the conflict but without confusing the two processes. He acknowledged that there is an advantage in having a process of information recovery like the Historical Enquiries Team (HET) as part of a process of police investigation, but that the information that comes out through the investigation may not actually yield the answers to all the questions or to the particular questions of importance to the families. So the Group looked for a separate process which might help answer individual questions.

Mr Hill suggested that if one looked at the other possible international models, one risk was that of establishing a process of storytelling or providing information or examining themes through a vehicle which at the same time and in the same way purported to deal with criminal justice. This might therefore confuse the evidential standards which should apply and the powers for one process might not be appropriate for the other.

Potential defendants might also be prejudiced if they were not absolutely clear to which process they were subject. Mr Hill added therefore that there is an argument for distinct and sequential processes applying to investigation and to information recovery, with different powers and different procedures but operating under one umbrella to ensure coherence.

Mr Hill referred to the question of powers in relation to the Review and Investigation Unit. He felt this was relatively straightforward as the Unit would in effect conduct a normal police investigation to normal policing standards and should therefore have the equivalent of normal police powers, as is stated in the report. He also mentioned that the new Review and Investigation Unit would have to be supported by relevant police, administrative and police expertise, including expertise which could weigh and consider whether a case should be submitted to prosecution. With regards to the powers of the Information Recovery Unit and the Thematic Examination Unit, Mr Hill explained that a case would only be reviewed by the Information Recovery Unit if the consent of the next-of-kin was obtained. In deciding whether to examine a theme, the Commission would take the views of families into account but would not need to obtain their express agreement. The aim of both information recovery and thematic examination would be to maximise the chances of obtaining information once the investigation process was exhausted. In information recovery, the aim would be to resolve unanswered questions; in thematic examination the aim is to look at overall accountability, not individual accountability, and to identify where and why things went wrong.

Although Mr Hill affirmed that the Group envisaged that the present inquests would proceed, it took the view that in the future, especially regarding thematic examination, less formal procedures taking place in private without formal parties to proceedings would be more likely to lead to frank disclosure of information and acknowledgement of past wrongs. The Group also acknowledged that this informality and privacy needed to be balanced by powers of compulsion. It was proposed that both Units would have the power to compel the production of documents, but only the Thematic Examination Unit would have the power to compel witnesses. The rationale for not having the power to compel witnesses in Information Recovery is that this would be a much more individual process, dealing with concerns of an individual family in which information shared orally was most likely to emerge in a cooperative process. The rationale for bestowing this power on the thematic examination unit which deals with questions of more general concern, was that the process was likely to

have little credibility if key witnesses could refuse to appear, or at least if there was not a threat of applying the law to get them to appear.

Although the process still needs to be cooperative, if the Commission were to have no powers of compulsion in either Unit, it would have no guarantee that it could deliver on its mandate, nor could it exert pressure where necessary to get at all the documents relevant to its work. Mr Hill postulated that the aim should be to provide a safe and secure environment to reveal the truth, which at times might be uncomfortable, rather than a comfortable environment in which truth would simply be kept safe and secure. In practice, protocols for the provision of information would be agreed with the most sensitive government agencies for the most sensitive documents, as proposed by the report.

Mr Hill also explained that as there would be no formal parties to proceedings and no public hearings, there would be no examination of witnesses in the thematic examination except by the Commission and no public examination of witnesses at all. The position of witnesses would be protected; the Commission would have the power and the duty to test evidence given to it. Witnesses would be able to see documents relevant to them and they would have an opportunity to explain themselves before any conclusions were drawn, but the privilege against self-incrimination would remain. The Group had also proposed that statements made under these procedures should not be admissible in criminal or civil proceedings against the person making them, i.e. be treated as protected statements, to encourage free and frank disclosure of information relevant to a particular case. This extends a concept of non-admissibility in criminal proceedings which has already applied to some public inquiries.

Mr Hill listed the advantages of the non-adversarial, non-public approach proposed by the Group in the case of information recovery and thematic examination, as opposed to the more public, more adversarial route, like a public inquiry or litigation, as follows:

- It provides more flexibility: it allows the Commission to determine its own focus and to keep this focus on central rather than peripheral issues.
- It allows the Commission to focus more on substance than procedure. In consultations, the Group heard that a huge amount of time in public inquiries is spent editing and circulating documents.

- It provides an environment in which people can be encouraged to make full and frank disclosure and it would encourage an outcome of acknowledgement and apology rather than recrimination.

Mr Hill concluded by saying that the powers of compulsion would provide the necessary backing without turning the process into an ever expanding public inquiry. He added that it has more chance of containing costs. The risk otherwise is that a lot of testimony, particularly oral testimony, which could both shed light on the conflict and promote reconciliation, would not find a trusted or effective way of coming out.

Peter Madden, Madden & Finucane

Mr Madden began by referring to the recurring themes of the report: reconciliation, truth and forgiveness. He believed that they go to the heart of the solution. He accepted that they can be examined separately but argued that they must be linked together to make any real sense of a solution to the problem of dealing with the past. He would have preferred to see this report as a discussion document rather than a final report because it has raised some complex issues which he suggested need further examination and further discussion. Mr Madden also noted that if there are any weaknesses in the essential links of reconciliation, truth and forgiveness, this will make societal reconstruction very difficult.

Mr Madden advocated the belief that no examination of the conflict can be undertaken without having truth as the objective. He viewed the way in which the report and the authors of the report treat truth as a weakness of the report. He questioned how one gets to the truth or heart of the issues and whether the proposed Legacy Commission and its Units would do this properly. Mr Madden stated that he has been involved in truth or information recovery in one shape or another for over thirty years and he set out what he thinks is necessary to get to the heart of the issues. In his opinion, truth is fundamental to the whole process of dealing with the past and reconciliation is impossible unless one knows exactly what happened. Mr Madden believed that it was unfortunate that the authors of this report did not think it possible to get to the heart of the issues with the current legal processes. He was concerned that they have dispensed with the only current available truth recovery mechanisms which actually work. He was not referring to public inquiries in this instance, but to the legal system generally.

Mr Madden interpreted the report as implying that it is possible to conduct a legal process without legally trained judges or without lawyers for interested parties (as there are no interested parties, therefore there would be no need for lawyers). He was confused as to how complex issues, disclosure of documents or public interest immunity can be adjudicated upon without judicial intervention or judicial decision making. He queried whether it is proposed that the new non-judicial Commissioners will be provided with a legal team, and if that is the case, why not have judicial Commissioners in the first place?

Mr Madden noted that although the report provides that witnesses will be legally represented in a very limited way as far as their own evidence is concerned, there will be no lawyers in the legal process to represent the people most devastated by the conflict. In contrast, he presumed that both governments will have their lawyers working on all the issues to protect those governments from criticism, and they will already be preparing for any issues to be dealt with by a Legacy Commission. He also expressed his surprise that not one of the members of the Group itself was a lawyer, since legal processes were clearly identified from the start as being relevant to the Group's exercise.

Mr Madden viewed this report as an attempt to discard the traditional methods of seeking truth and substitute something which he believed would not work or get to the truth. He suggested that this proposed non-judicial, private Commission would result in cover-up and dishonesty. There will be no opportunity for families bereaved in the conflict to hire lawyers to represent them and to examine material relating to their loved one's death. He postulated that if these issues are not examined in public, then there is no accountability. Judiciaries everywhere, not just in Northern Ireland, are concerned with ensuring that justice is public and seen to be public, because in private, people can hide things and be misleading without anyone knowing. He acknowledged that there is a place for private hearings for particular purposes and it is usually tightly controlled, restricted and used as a last resort. But he interpreted the report as proposing that all the Legacy Commission hearings would be in private. Mr Madden quoted from page 27 of the report which contained the pessimistic comment by the authors that 'complete truth might be unobtainable.' He believed this is justifiable if these proposals are introduced. He claimed that *'There will be no chance of obtaining complete truth, or any truth, because one man's truth is another man's challenge to that truth. If you're not able to use the tools of the trade, the lawyer's trade, to seek truth and to challenge*

versions of events, then why pretend that the Legacy Commission is a proper information recovery process, because it isn't.'

The report's proposal that there would be no examination or cross-examination by others was particularly disturbing to Mr Madden. Cross-examination is an adversarial tool which has been excluded from use in the Legacy Commission and the Units by anybody but the Commissioners. Mr Madden quoted a famous New York lawyer and academic, Francis L Wellman, who states that cross-examination has always been deemed the surest test of truth and a better security for truth than the Oath. He was perplexed by the proposal that although witnesses should be challenged, the only people who will challenge will be the Commissioners. He argued that if the purpose is to get information or truth recovery, there has to be an opportunity for any family or party with an interest in the issues to put their case to witnesses and challenge witnesses, not from a Commissioner's perspective, but from the interested party's own perspective.

Mr Madden referred to another legal principle that would seem to have been jettisoned, that is the principle of equality of arms, i.e. in any legal process, all the parties must have the same legal representation to ensure a level playing field. He suspected that it would be proposed that the Commissioners will have access to a legal team if they are non-judicial, as would all the government, political and military people involved. So what about the families of the bereaved, or the republicans and loyalists or other armed groups?

Mr Madden concluded by voicing his disappointment at the authors' comments on the death of Pat Finucane, that is that the proposed Commission can deliver an inquiry into Pat's death. Mr Madden and Mr Finucane's family members had met the Group twice and appealed to them not to interfere with the issue as there were ongoing discussions with the government about how the inquiry would operate. He was disappointed that they ignored these pleas. He did not believe that this proposed Legacy Commission could adequately deliver an independent public inquiry into Mr Finucane's murder. He felt that the whole process will not work; it will not uncover the truth and the process as envisaged will be, in his view, more of a truth burial commission than a truth commission.

Discussion

Discussion was commenced with a request for clarity on the report's position on a public inquiry into Pat Finucane's death. Mr Hill quoted pages 154 and 155 of the report, where the Group recommends that the proposed new Commission be considered seriously, as an efficient mechanism capable of *'delivering an independent, internationally led investigation into the death of Patrick Finucane, as well as an examination of allegations of collusion as a theme in a broader context.'* However, he also added that this argument would fall away if the Commission was not established and the case for a public inquiry compliant with the recommendations of Judge Cory would then receive the Group's full support.

The report was criticised for failing to take account of the fact that, unlike the nationalist/republican community which has had human rights knowledge for over thirty years, the unionist/loyalist community is coming to this report from a background where they had little support in dealing with human rights issues. It was argued that the HET is the only structure that the majority of victims in this community are coming close to trusting and engaging with, so the panel was asked the why the Group wrote a report which is basically going to incorporate the HET into another organisation, instead of giving them the resources they need to make them into a better organisation? Mr Hill responded by saying that the Group paid warm tribute to the great work of the HET, but it was felt that there were some issues where a new Legacy Commission could build on and improve the work e.g. the structure of the Legacy Commission is to separate the process of gathering admissible evidence from the process of information recovery in order to reduce the risk of mixing these up. Also, if the HET detects patterns or links between cases, it can only look at those from an investigative point of view. It cannot look at these in terms of learning lessons from the conflict or promoting reconciliation, as that is not its job, which is where the Thematic Examination Unit comes in.

Mr Hill was asked to elaborate on the reference in the report in relation to inquests, which states that the Commission will monitor the burden on the Coroner system and, if necessary, make recommendations on how to reduce the burden. Mr Hill recalled that this sentence was not meant to affect the inquests that were already committed, underway or promised, but simply to acknowledge the possibility that some inquests could be reopened, or in the course of further examination, there may be further requests for inquests to be reopened which would impose an extra burden on the Coroner's system. The idea was to encourage the Commission

to keep an eye on that possible increase in the burden of work on the Coroner's systems.

There was an observation that the role of victims' testimony in the proposed Legacy Commission does not seem to be written into the document clearly. It was proposed that the notion of storytelling needs to be linked in through victims' testimony in the Commission in a way that victims themselves can name the investigative issues that need to be followed up; something which does not seem to be provided for in the current report. Dr Lundy added that the role of testimony is central to truth recovery processes/truth commissions in other countries and agreed that it does not appear to be written into this document. In her opinion, testimony plays a role in establishing patterns and trends and she lamented the fact that it appears that the testimony of victims is being siphoned off into the Victims Commission. Dr Lundy viewed the Thematic Unit as problematic, describing it as 'putting the cart before the horse' by 'selecting' the cases. The norm for truth commissions is that cases emerge because of the testimony and because patterns materialise from this. She considered the absence of victims' testimony to be a missed opportunity because it runs the risk that a whole range of issues around social, economic and gender issues will not be tapped into without it. Mr Hill responded to this comment by stating his belief that the one advantage of this Commission is that, unlike other truth commissions which have tried to combine storytelling, evidence gathering for the purposes of criminal prosecution and victims' testimony, it gives prominence to each of these strands. He offered that the intention is not to deny any of those strands, but to try and get them within the proper legal context and proper legal procedures applying to each.

It was put to Mr Hill that the proposed powers to be bestowed on the Investigative Unit of the Commission in order to leave the prosecution route open will in reality only lead to a miniscule number of prosecutions. In response, Mr Hill reiterated that it is the Group's intention that this should be a bona fide process of review and investigation of historical cases with a view to prosecution with full police powers in the same way as the HET is conducting at present. However, the Group did acknowledge that for various reasons, including lapse in time concerning older cases and reliability of witnesses, in some cases the chances of successful prosecution are reduced. So in reality, the prosecutions may be relatively few, but nevertheless the intention for a legitimate process of prosecution is there.

Panel 4 Socio-economic issues and the absence of the gender dimension

Chair - Michael Hamilton, Transitional Justice Institute,
University of Ulster

Mike Tomlinson, Queen's University, Belfast

Mr Tomlinson began his presentation by proposing to discuss some reflections that have been made on the relationship between conflict and poverty and social exclusion. He noted how difficult it is to bring these two areas of concern together and link them in intellectual and political discourse and argued that one piece of evidence for this is the text that exists in the Consultative Group's Report. In comparison to reflections on other issues in the report, there is really just one paragraph devoted to socio-economic issues which makes a few remarks about the economy only. He explained that this chapter in the report is entitled 'The Conflict and the Impact on Society,' which unfortunately is only a discussion of some of the psychological impacts on individuals, when it should be discussing how conflict is actually imprinted in a systematic way in patterns of behaviour within institutions, within labour markets and opportunities, and within advantage and disadvantage. Mr Tomlinson postulated that the difficulty in linking poverty and conflict is reflected in the tendency to separate and compartmentalise the discussion of the legacies of the conflict, from bigger, wider social issues and in the propensity to discuss the legacies of the conflict in very individualistic and psychological terms. He also argued that this intellectual and political difficulty that exists in linking poverty and conflict is reflected in the practical experience as a researcher and he proceeded to provide the audience with some examples of the difficulties he had experienced in his work.

The first example he discussed was the poverty and exclusion work that he carried out with a group of other people at the beginning of the decade. This was the first population-wide, systematic survey, not just of poverty, income levels, etc, but of patterns of activity, exclusion and inclusion in a whole range of activities, including employment, unemployment, health, etc. He revealed that in framing this piece of work, the group thought it was essential to reflect the lived experience of people in Northern Ireland by asking a very short module on the direct experience that people had had of the conflict, including what they had seen. The Group aspired to measure experience as opposed to attitudes and they wanted to link this experience to the systematic evidence that they were building up about physical and mental health, income statuses and people's ability to participate in society in a whole range of activities. Mr Tomlinson said that there was massive intellectual and political opposition to the group doing

Dr Lundy agreed with one audience member's comment that statistical analysts are also integral members of a multi-disciplinary team as they occupy the crucial role of identifying patterns and trends.

Mr Hill was asked why there is no reference to humanitarian law in the report, when it endeavoured to look at patterns of paramilitary violations. Mr Hill reiterated that the Group did not want to use this forum to deal with the contentious issue of deciding the nature of the conflict, but he advocated the report's supposition that the European Convention is more relevant to the Northern Ireland situation than the Geneva Conventions.

One audience member acknowledged that legal procedure is good at getting at the micro truth, but queried whether it is any good at getting at the macro truth, and asked Mr Madden how one really gets at the macro truth, except through statistical inquiry and examination of patterns. Mr Madden replied by agreeing that the micro truth, which refers to a specific, individual incident, at a specific time, can be examined using the current legal tools. He did not think that legal tools could be used to get at the overall nature of the conflict or the macro truth.

The earlier discussion regarding the challenges that truth recovery and dealing with the past presents for human right activists was raised again. It was suggested that there is a parallel set of challenges for lawyers as to how lawyers respond to these kind of processes and meet some of the challenges that transitional justice requires. It was stated that while Mr Madden made a very compelling case for the need for legal representation at different stages in the process, the political reality is that the politics of cost in terms of dealing with the past so far through the various inquiries have left the public and politicians with a negative attitude towards lawyers. Mr Madden postulated that it all boils down to the principle of equality of arms. He admitted that there is a lot of cost involved in these processes but he argued that one has to look at the objective, at the overall picture, what is involved, what is the extent of the exercise, and then cost it. One must ask if the objective is needed and if it warrants the cost of the process.

this, as people questioned what these things have to do with each other. He argued that this is what life is, what people have experienced and it is important to gather evidence around it. The group was successful in getting these questions through, and he advised that this allowed them to present the first systematic, population wide evidence on this relationship.

In the second example, Mr Tomlinson and a group of others were asked to look at what international literature says about the link between poverty and conflict, as well as drawing together all of the evidence that there is about these matters in terms of impact, both in Northern Ireland and across the border. The product of this work was the book, 'Poverty and Conflict in Ireland: an International Perspective.' Mr Tomlinson found it interesting that any attempt to frame and understand the link between poverty and conflict, and to draw on evidence and apply that to the context of Ireland historically, was seen as inappropriate. He suggested that history was exorcised from the project so that they just had to deal with a statement about legacy, which obviously limited the extent to which one went into deeper levels of historical explanation.

The third example related to the issue of suicide. As part of his work in this area, Mr Tomlinson had questioned some of the data sources and some of the judgements that have been made about the registration of particular kinds of deaths, i.e. whether a particular event is an accident or a suicide. There are at least two interesting connections to the conflict here. One is how the Registrar General has classified people that killed themselves in the course of planting bombs, etc. Is it appropriate to regard these deaths as suicides? There is an attribution of intent there, even if the intent is technically unknown. He suggested that the controversy over the hunger strikes was probably the most extreme example of people coming up with different definitions for these deaths, i.e. murder or suicide. Mr Tomlinson put a footnote in the first draft of his report saying in fact that the Registrar General classified these deaths as suicides, which he read in the annual report. This footnote generated numerous objections instantly; with many people claiming this was a dangerous assertion and should be removed. He concluded that these sensibilities about the connections between social marginalisation of all kinds and conflict are alive in contemporary political practice.

Mr Tomlinson deduced that the core argument that can be made from analysing international political, economic and statistical evidence is that when poverty is combined with ethnic, religious or unresolved national divisions, armed conflicts are much more likely.

Mr Tomlinson finished by discussing the Group's conclusion that 'The primary challenge is to tackle poverty and social exclusion in the communities most affected by decades of armed conflict', and that this means '*mainstreaming peace building and conflict resolution*' with anti-poverty strategies and those international programmes ostensibly concerned with reconstruction. In response to the criticism that this, in effect, rewards terrorism, Mr Tomlinson replied, '*the evidence however is that if poverty and continuing conflict are not addressed they may act as incubators of further cycles of violent actions, whether disordered, reactive or part of organised movements.*'

Margaret Ward, Women's Resource and Development Agency

Ms Ward introduced the aim of her presentation as to approach the issue of women's exclusion from the report through some examples of what happens when gender is not considered an issue in terms of conflict resolution. Based on her experience in this area, Ms Ward advocated the supposition that women leaders '*are operating in a parallel universe in the informal sector, such as civil society and informal women's networks.*' She lamented the fact that in reality, those involved in different institutions and initiatives concerned with helping society to move away from conflict are largely men, despite the existence of the United National Security Council Resolution 1325 on Women, Peace and Security which calls for gender parity in all institutions concerned with conflict resolution and peace building. She believed that the Northern Ireland Office is guilty of non-compliance with Resolution 1325 when it convened the Consultative Group, as women were so underrepresented in the Group.

In this presentation, Ms Ward proposed to briefly consider issues concerned with gender parity, the consequences of gender neutrality, and some concrete issues related to women in Northern Ireland that should be of concern to any initiative on how we deal with the past. She described how women in Northern Ireland have been active at political and strategic levels, working within communities and keeping a semblance of normality in a society throughout decades of conflict. She criticised the report as it only refers to 'people' sustaining services that helped with normality. She then juxtaposed this with a quote from the Irish government in 2003 when it was briefing the Council of Europe on the role of women in Northern Ireland, where it said, '*The benefits of involving women in conflict resolution were clearly evident. In Northern Ireland, women played and continue to play a pivotal role in building peace and are essential contributors to the*

ongoing process of fostering reconciliation.' Ms Wards advocated that this perspective and recognition need to be included in the report.

Ms Ward quoted Donald Steinberg, Deputy President of the International Crisis Group, on the issue of a gender neutral approach. As a member of the Peace Commission implementing the Angolan Peace Accord, he realised that a peace agreement that is gender neutral is by definition discriminatory against women. He found this approach did not require the participation of women; women's voices were not heard, their issues ignored by the men around the table, issues including sexual violence, abuses by security forces, girls' education, etc. This Peace Accord was based on amnesties that forgave parties for atrocities committed during the conflict. As rape was used as a weapon of that war, this Accord meant that *'men with guns forgave other men with guns for crimes committed against women.'* The end of the civil war, in effect, unleashed a new era of violence against women, as male ex-combatants returned to villages that had learned to live without them during the decades of conflict. These men were not adequately prepared for this and their frustration exploded into an epidemic of alcoholism, divorce, rape and domestic violence. Steinberg conveyed how women's absence leads inexorably to the ignoring of their issues and the building of a new gender order in a dispensation that is utterly discriminatory against women.

Cynthia Coburn has remarked how civil society rebuilt after war or tyranny seldom reflects women's visions or rewards their energies. Effort may be put into healing enmity by reshaping ethnic and national relations, but gender and class relations are usually allowed to revert to the status quo ante, and Ms Ward believed that is the situation that one is faced with in this report. The very real contribution that could be made by women is ignored. She argued that gender has to be at the forefront of reconstruction and it has to include consideration of very difficult issues in terms of the relationship between women and men. Theorists talk about a warrior-type masculinity existing when a society emerges from conflict and Ms Ward questioned how that would impact on the lives of women in Northern Ireland, the levels of violence they might experience and whether it is accidental that such societies experience increased levels of gender based violence. There is one reference, on page 87 of the report, to people experiencing domestic abuse; Ms Ward argued that without any gender deconstruction of this, it is unclear who are the perpetrators or the victims and what the needs arising out of such situations might be. In fact, the majority of victims of domestic crimes are female and the number of incidents of domestic abuse increased by sixty per cent here between 1998 and 2006. The

Women's Aid Federation has said while there were more recorded crimes with a domestic motivation in 2007/8 than the combined total of nearly all other crimes, domestic violence remains under-reported and judicial procedures expensive and difficult, and none of that is recognised within this report.

Women have also been participants and combatants in conflict. One in twenty of those imprisoned in Northern Ireland for politically related offences were women and Ms Ward stated that nowhere in the report is there any acknowledgement that female ex-prisoners have specific needs, e.g. in terms of adoption rights for women who have missed out on opportunities for motherhood because of long-term imprisonment. Ninety-one per cent of those killed in the conflict were men, but the majority of members of victims groups are thought to be women. They are left to deal with the fallout from the conflict, but if their existence is not acknowledged, what kind of voice will they have in terms of how the past is dealt with? The long-term consequences of violence has probably been felt most by women, especially in terms of long-term injuries, bereavement and separation, yet the report talks only about 'carers' without any sense that these carers are predominantly female.

Ms Ward then discussed the South African Truth and Reconciliation Commission which has been criticised for gender blindness. This was an all male group and that determined its terms of reference and agenda e.g. it encouraged the notion that the harm suffered by women was the same as that suffered by male victims and perpetrators. In response to charges of gender insensitivity, the Commission did convene three special hearings for women which were relatively effective.

Ms Ward concluded by appealing that we learn from the shortcomings of other Commissions and look at where they fell down, how that happened and what the consequences were. Because without the incorporation of gender, and to quote the Good Friday Agreement, 'the full and equal involvement of women', we can never come to terms with our past or construct an inclusive and equal future.

Catherine O'Rourke, Transitional Justice Institute,
University of Ulster

Ms O'Rourke began by saying that while the report from the Group is very substantive and in many ways impressive, it did not make the contribution that many had hoped for in terms of recognising either a gender dimension to the past debate or recognising women as actually being stakeholders in that debate. She expanded the popular quote regarding transitional justice that *'the past is a foreign country'* by saying that it would appear from the Consultative Group conclusions that *'not only is it a foreign country but no women live there.'* Her aim in this presentation was to propose some practical and symbolic ways that the structures that do ultimately emerge to deal with the past might redress the gendered shortcomings she has noted.

Ms O'Rourke discussed the absence of women and gender in the report. There is a physical absence of women from the report and there is little evidence of any real engagement with the substantial women's sector that exists in developing the proposals. This, as already noted, is contrary to the spirit of the Good Friday Agreement. The second notable absence of women is in the account of the past and the conflict; the fact that no specific acknowledgement was made of women's organisations or the role that those organisations played in sustaining communities. The third evident absence of women is in the recommendations for the Legacy Commission, particularly in the storytelling provisions. There is no requirement that this process be inclusive of women and international experience implies that in the absence of this sort of commitment, gender and women are ignored.

Ms O'Rourke described how the report acknowledges the particular impact of conflict on young people, people in rural and urban areas and the impact of different socio-economic circumstances; however, gender is not regarded as a meaningful category of analysis of examination and is notable by its absence. She recognised that this report will be an agenda-setting document and that absences at this point can be critical and can be very difficult to repair or redress. Ms O'Rourke also noted that there was no acknowledgement of the gender specific impact of the Troubles and she suggested that even the presentation of the socio-economic impact of the conflict appears to be oddly business-oriented and masculine by discussing damages to business and deterring tourism. It fails to describe the poverty as experienced not just by women but by communities most directly affected by the conflict. Ms O'Rourke hoped that this sort of reflection would lead to an improvement, in the future, in the guidance offered for actually recognising the gendered way in

which the conflict was experienced, such as recognition of the additional vulnerability to particular types of harm, including economic violence, sexual violence and strip searching, which one has not seen to date. Ms O'Rourke also appealed for a more comprehensive understanding of what exactly the 'violence of the past' was, which was experienced in a host of very complicated gendered interrelated ways, and which is really given no footing at all in the report.

According to Ms O'Rourke, the second gender gap derives from procedural issues and the absence of guidance for investigating or reporting those gender specific harms. She explained that some processes are more successful than others in eliciting this gendered information: the way in which mandates are drawn and interpreted, the procedures for actually eliciting that information; to whom the processes are directed, etc. These all make a very substantial difference as to how effective structures such as the proposed Legacy Commission are in securing the involvement of women and eliciting meaningful participation. There is a whole host of access issues to these processes that affect women, such as caring responsibilities, reduced access to transportation, and they are not explicitly addressed in this report, which Ms O'Rourke found worrying. With regards to the development of these methodologies and how one might better approach the truth telling process and the past, Ms O'Rourke advocated the use of local examples that have been very effective as a template, particularly the recent work by the Women's Resource and Development Agency, which has been very effective in getting women to talk about their own experiences of conflict and getting over those issues of access.

Ms O'Rourke argued that the third substantive gender gap is about the issue of the harms that have been experienced and in neglecting a gender component to that. There is a reliance on a legal definition of harms, which tends to reinstate all sorts of gendered exclusions that one can identify in domestic and international contexts around harm, a focus on bodily harm and 'direct victims.' She postulated that there is a whole range of socio-economic issues, damage to familial relationships etc that gets obscured in an Article 2 focus. In addition to this, by concentrating on Article 2 violations, and identifying primary victims and implying secondary victims, a gendered hierarchy of victims is created. Ms O'Rourke explained that the forward looking functions that have come out of the Good Friday Agreement are notable by their attention to issues of equality and to creating structures to address inequality and she thinks this is a lesson that might be well taken by the Consultative Group on future structures. She expressed surprise that there appears to be this gap where forward

looking structures can make equality so central, but the past does not seem to recognise those debates or recognises them only very narrowly.

Ms O'Rourke believed that a commitment to gender equality might actually transform this entire process in a very productive way. Processes such as truth telling processes and truth commissions can be used to expose, reveal, and ultimately hopefully address historical inequalities and discriminations. They can highlight neglected abuses which would have a heavy gender component and would be integral to the debate about what the vision for this process really is. There are both local and international examples of this from which lessons can be learned.

Lord Eames' statement, that the Consultative Group Report was about devising *'Northern Irish solutions to Northern Irish problems,'* prompted Ms O'Rourke to ask two questions. The first was, *'given the entrenched patterns of gender discrimination that preceded and that regrettably seems to have survived the conflict, does this mean that we devise our solutions in a way that is differential to those particular gender discriminatory patterns?'* Her second question concerned Lord Eames' clear reluctance to draw excessively on international experience. She recommended examining the evolution of truth commissions in Latin America, where there has been a learning process; gains that were hard won are now resulting in improvements. She asked *'must we now reinvent the wheel in Northern Ireland and insist on replicating the mistakes of earlier Truth Commission models and impose the legacy of those mistakes on future generations?'*

Discussion

In response to a question regarding the link between the themes discussed in this session and the Bill of Rights, Ms Ward agreed that there has to be a link and she spoke of her involvement in the Bill of Rights Forum and how all of those issues, from women's rights to representation, were very hard fought for within the Forum itself.

Some further comments were made about truth processes and what happens to women in processes of truth:

1. One deduction that can be drawn from the significant amount of cross-jurisdictional empirical work carried out by the Transitional Justice Institute on truth commissions is that unless these processes make an effort to include women, the women will not be involved.

2. It is also evident that without considerable thought and energy, it is very difficult in these processes to get women to talk about what happened to them. They are more likely to talk about the harms that their male relatives experienced.
3. Design matters and there is a way to design things that elicit optimum information about what happened. However, most truth commissions are designed to focus on physical bodily harms and certain kinds of physical harms are elevated over others that exclude the experiences of women.
4. There is an organic link between the failure of truth processes to deal with socio-economic violations and their failure to deal with the harms experienced by women. If one is not prepared to deal with socioeconomic violations, it would be impossible to grasp either the scale of those harms or the scale of harms that have been experienced by women. It was strongly suggested, as a recommendation going forward, that the members of the Group on dealing with the past read the 'how to' toolkit that the International Centre for Transitional Justice has developed because it may instruct them on how to create a truth process that would deal with a broad range of issues and would in that way include women and create a better outcome for all in the process.

The question was asked whether a member state of the United Nations who claims to lead on Resolution 1325 internationally, can have any excuse for setting up a design and reporting process seen through to the end and a report put into publication which clearly contravenes 1325. Ms Ward explained how the women's sector, and in particular the Northern Ireland Women's European Platform, has been actively lobbying for a number of years for the implementation of Resolution 1325, but has not made any progress as the British government is resistant to implementing it domestically within Northern Ireland, compared with Iraq, Afghanistan, etc, where it is part of the remit of the Foreign and Commonwealth Office and readily implemented.

Catherine O'Rourke referred to the difficult and divisive issue of 'strip searching' which was a form of state violence against women. If neither civil society nor state nor the Consultative Group are going to talk about it, it will be very difficult to move this conversation on to where one can actually talk about a gendered experience of the conflict and that looks at private and public incidences of violence and finds some way to integrate them.

DAY 2

Panel 5

Perspectives of victims & survivors

Chair - Professor Fionnuala Ní Aoláin, Transitional Justice Institute, University of Ulster

Mark Thompson, Relatives for Justice

Mr Thompson began by discussing the issues from the perspective of those families who have had relatives killed. He noted that the families did not want to tell their stories again or sit yet again in another forum asserting that they wanted recognition, answers and acknowledgement. Mr Thompson highlighted the fact that many of the family members are quite old and do not have a huge amount of time left, and indeed are dying without any sense of official recognition or acknowledged truth. He stated that for the vast majority of people, when one talks about human rights compliance and what happens within the Courts and inquiries and elsewhere, it has minimal impact. Mr Thompson asserted that Relatives for Justice is seeking the truth within a process that is beneficial to families. He stressed the need for a truth recovery process to be independent, international and victim-led.

Mr Thompson explained that the key principles of Relatives for Justice confirm that there can be no line drawn under the past and that an international truth commission must be independent of the policing and criminal justice system. Mr Thompson was dubious about the fact that the CGP report was commissioned by the British government and therefore saw it as not impartial and working in favour of the British government. He stated that the fate of the report is ultimately in the government's hands and that the government is not neutral and has failed to show any sense of goodwill concerning its actions in the past.

Mr Thompson highlighted the United Nations' *Rule of Law Tools for Post-Conflict States: Truth Commissions*² and stated that this is an appropriate reference guide for establishing a process to deal with the past, which he believed marries the human rights obligations with what is required on the ground in practical terms.

He also noted challenges to the truth-recovery process at present, such as issues around adequate legislation, the remit and terms of reference, the number of Commission staff, implementation, resources and support, and in particular the role of NGOs, who have been central to the success of previous truth commissions.

² <http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf>

According to Mr Tomlinson, mass medication has been part of the transition; all the data suggests seriously alarming rates of alcohol and medication abuse comparatively and otherwise, which cannot be explained with reference to ordinary levels of social deprivation. He also noted that at the end of conflicts, research indicates that problems like self-harm and suicide are usually on the increase. He discussed one of the interesting North/South projects that recently took place involving the Western Health and Social Services Board monitoring people attending hospitals who had self-harmed. This year long project showed that the rates of self-harming in the Western Health and Social Services Board per hundred thousand of the population are exactly twice what they are in the South. The relationship with alcohol in the North compared to the South is almost double. He believed that there is good evidence to associate this social crisis with patterns of experience of conflict.

One contributor spoke about the *'impact of a denial and continual denial of an experience'* and argued that since the Good Friday Agreement, there has been a significant absence of an agenda around dealing with the past, including truth recovery, which actually translates into a denial of experience. There was a warning that if *'we do not have processes for dealing with the past or for truth recovery, and all the related ways of dealing with the past, then we're going to be continuing to deal with a denial of an experience which is going to have all of the effects that Mike (Tomlinson) spoke about.'* Mr Tomlinson agreed and said that it reflects what one can identify as a growing body of work which is trying to explore what is referred to as 'psychosocial pathways,' i.e. linking psychotherapeutic views at the individual level with trauma at the social level. Experts are also trying to actually link what happens to people socially and economically to what happens to them psychologically. Richard Wilkinson's book 'The Spirit Level' is the most popular example of this at the moment and the explanation he came up with is simply that it comes down to stress; the stress induced by the domination which is involved in inequality. Inequality of status, money, rewards, etc, leads to patterns of interpersonal behaviour which involves domination, which leads to stress.

Mr Thompson stressed the need for a bi-national, cross-jurisdictional process which involves the Irish government on an equal footing with the British government. He maintained that the political will does exist and used various examples to demonstrate this, including the Sinn Féin, SDLP and Alliance Party truth recovery documents; the various motions put forth by these political parties; and the DUP and UUP rhetoric about truth. He recognised that while there were different perspectives and they all saw truth through different lenses, recognition of the need for truth was the starting point and something that can be built upon.

Mr Thompson hoped that what would emerge out of the CGP report is an opportunity to do the right thing. He believed the report was a template which would be backed up by international support from the UN and the EU, NGOs and academics both here and internationally. He stressed that for families who lost loved ones, the most important outcome is to narrow the permissible amount of lies that exist and misperceptions about what happened. For families, this is important because they live with culpability not being accepted, with misinformation about what happened, character assassination heaped upon the person who has been killed, and all sorts of associated difficulties in the midst of dealing with an awful trauma and grief.

Mr Thompson concluded that in order to create a process where the maximum amount of people have the opportunity to engage, all of society needs to create the process, and the process needs to be independent which, although a challenge, would be the key to its success.

Reatha Hassan, SAVER/NAVER victims group

Mrs Hassan stated that on two occasions, she and widows from the SAVER/NAVER group had met with Lord Eames and Denis Bradley. They were given quite a lot of time to tell their stories. They told how they had suffered in the past and how they had received no compensation. She maintained that the widows had viewed the CGP recommendation of £12,000 acknowledgment payment as a positive thing and affirmed that it was due to meetings such as that with the widows that the recognition payments were present in the report, although she stressed that the recognition dimension of this recommendation is more important than the monetary dimension to the people. She maintained that her group had researched paying the nearest relative approach but discovered difficulties such as changing of family structures since the death.

Mrs Hassan emphasised the need to take into account and address the current and future needs and concerns of victims; she believed that the main issue should be improved healthcare, including services for dealing with trauma, preventing suicide and addressing addictions and mental health. Mrs Hassan stressed the need to focus on the future rather than dwelling too much on the past. In relation to the proposed Legacy Commissioner and a bursary of a hundred million pounds to tackle victims' issues, she had concerns as to whether or not the money would be directly beneficial to victims or wasted on structures, administration and salaries.

Mrs Hassan also voiced concerns that five years could be a short-term tokenistic response to long-term issues. By the time the proposed Legacy Commission is in place, it would be forty years since many of the deaths during the conflict. The people who have answers and the people who need answers may no longer be alive.

Mrs Hassan questioned the need for a new independent unit dealing with historical cases as the present HET team is broadly accepted, and stressed concerns about the high cost of public inquiries, believing that an effective HET would reduce the needs for public inquiries. If matters of concern are dealt with effectively within the existing system in an open and transparent manner, it will be less likely that we would ever get to the stage of a public inquiry.

Mrs Hassan asserted that the 'telling of stories' about the impact of the Troubles can have therapeutic value and help in a healing process; she stressed the value of sharing the stories with young people as part of their education and when framed within the context of experiences of conflict in other parts of the world, this can make a positive impact. She voiced support for the continuation of an Annual Day of Private Reflection on the 21st of June, while acknowledging that is not a priority for some victims who prefer to observe their own personal day connected to the loss of their family member.

In relation to confronting the state about acknowledging wrongdoings, Mrs Hassan stated that one must not take away from the majority of men and women that served in the RUC, PSNI, UDR and RIR who died in the line of duty and suffered appallingly, as have their families.

She maintained that there needs to be further opportunities to discuss and contribute to the CGP report. The feasibility of implementing some of the proposals should be followed up and dealt with. Mrs Hassan concluded

that the conflict should never happen again and that in order for society to move forward, *'it is better to mix than to be all mixed up.'*

Paul O'Connor, Pat Finucane Centre

Paul O'Connor started by stating that since the Bradley/Eames report was published, there had been an almost deafening silence from the political parties, civil society and the media.

Mr O'Connor emphasised the issue of how the conflict has affected the Republic of Ireland - which the seminar did not address - and noted that over a hundred and sixty people died in the South; the Troubles in the North certainly spilled over. He stated that the process of dealing with the past needs to get underway as the clock is ticking and family members are dying. If a Legacy Commission is not created now, there is nothing else on the table; this is the last chance.

Mr O'Connor suggested that the HET does not have widespread support, pointing out the fact that the HET has produced some 'pathetic reports' and cited the Alan Murphy report as one example. He highlighted the issue of tension between the Police Ombudsman and the HET as two investigative bodies and stated that there must be one investigative mechanism. That mechanism does need to be internationally led, but it also needs to be transparent and independent. He explained that the HET is not independent as it is answerable to the Chief Constable and there are problems in relation to Article 2 (ECHR) obligations with that.

Mr O'Connor asserted that the glass is half full when it comes to Bradley/Eames, believing there to be many imaginative proposals in the report. He also considered the proposal of a £12,000 acknowledgment payment to have been extremely brave because it was a challenge to the community to deal with the issues of equality, innocence and guilt. He took issue with the failure of the report to reiterate support for the Pat Finucane inquiry and felt that the report should not have touched on this.

Mr O'Connor commented on the absence of the PSNI and other government officials at the seminar and the overall debate. He believed that they should be giving panel presentations, answering questions from civil society and engaging in the debate. He also maintained that while the report may not be the perfect human rights compliant structure, it does have to happen now and not in three, four, or five years time.

William Frazer, Families Acting for Innocent Relatives (FAIR)

Mr Frazer began by explaining that he spoke for the people that are connected to FAIR and reiterated that no victim group can speak on behalf of all victims as they have had different experiences.

Mr Frazer recognised that some people in Northern Ireland believe that those individuals who put on a uniform and joined the security forces were a legitimate target. Yet he felt that there is no point in getting into who is right and who is wrong as that is the road to justifying the actions of the 'other side' which will never amount to anything.

Mr Frazer shared his experience of being injured two or three times in different attacks and how his home was destroyed, yet he never made a financial claim for this. He claimed that money still is not an issue within his community and takes umbrage at the thought of financial compensation, although he realises that for many, it is more for the recognition of what people went through. Mr Frazer's community *'we believed in the state for thirty odd years, we believed the state would look after us, that's why we never made claims, we never took things we were entitled to because we thought we had the support of the state.'*

The problem around the issue of recognition is that *'you have to accept one or you do not get the other, and with that I'm saying that we have to accept the whole conflict as a conflict that went on by accident. But it did not go on by accident. People actually sat down and thought out what they were doing. So for people to sit down now and pretend that everything is okay, we're going nowhere.'* He went on to say that while he can sit down and discuss and debate with various individuals, at the end of the day, *'he knows where he stands and I know where I stand... his views haven't changed, my views haven't changed.'*

Mr Frazer gave credit to the nationalist community for embracing human rights and building themselves up using human rights dialogue to their advantage. He recognised the short comings of the unionist community in this regard and the need to bolster resources and continue to build the community structures.

Without wanting to diminish the murder of Pat Finucane or the entitlement of the family to know what happened, Mr Frazer questioned why the Finucane case receives so much more attention than others and why a public inquiry is not warranted in other cases too. He highlighted the issue of the plight of border communities and the imbalance around

the demand for inquiries and accusations of collusion. He believed that the Irish government and An Garda Síochána were involved in collusion and things that should be known to the wider public including training IRA men, supplying weapons, and supplying information and that the Irish government should have to answer for killings they did not prevent, particularly along the border. *'If you want our community to start stepping up to the mark it is going to have to be on a level playing field...we need to get away from the idea that collusion was one-sided.'*

Mr Frazer voiced concerns about his community being pressurised to move on and being forced to move forward in a certain way. *'People keep saying to us "We can't move on." Do you know why we can't move on? Because there are too many people telling us what way to move on.'*

Alan McBride, WAVE Trauma Centre

Alan McBride began by welcoming the report and stressing the importance of people reading the report. He warned against the public making a kneejerk reaction to the report which would close down debate. His personal observations regarding the report were that it is an extremely honest report which comes to terms with some of the complexities of actually trying to address difficult issues, particularly around the notion of hierarchy and definition of a victim.

Mr McBride praised the report for looking beyond victims and survivors to the whole of society by acknowledging the issues around young people and the socio-economic impact of the conflict. He suggested the proposed Legacy Commission could recover the truth for those families that want to know it and acknowledged that there are some families that just do not want to go down that road and that their decision should also be respected.

In relation to the HET, Mr McBride stated that the families he works with have had positive engagement with the HET, believing the issue surrounding the capability of the HET to be around a lack of resources. Mr McBride welcomed the recommendation of a declaration to be signed by all interested parties in Northern Ireland that they will never again kill or injure others on political grounds and he expressed the need for all of society to remember the past.

He spoke of a trade off between truth and justice in post-conflict societies and commented particularly on the issue of amnesty, believing that the report had not totally ruled that out the possibility of an amnesty, which he suggested is an area of concern. He also expressed disappointment that the report did not deal more with the whole notion of memorial and proposed a need for something in legislation to memorialise the conflict in the way that people see fit.

Mr McBride raised concerns pertaining to the British government's ability to cut proposals it did not agree with, as illustrated by the scrapping of the £12,000 recognition payment. He stated that the removal of this recommendation should have been part of the consultation process, where people could have adapted it instead of the decision ultimately resting with the British Secretary of State. He questioned what would happen with other proposals within this document if the British government did not agree with them. He also voiced concerns about the appointment of Commissioners and secretariat staff, which looks rather top-heavy and suggested keeping a watch on this area to ensure that resources go to the victims.

Mr McBride's greatest apprehension with the report was in relation to its lack of support for the injured, whom he movingly asserted, have been neglected and unrecognised for too long.

Discussion

There was a long and lively debate following the presentations about various issues including the definition of a victim, the value of apology and the notion that all people in Northern Ireland carry some degree of culpability for the conflict.

Mr McBride shared his experience of the loss of his wife who had been killed in the Shankill bombings and stated that to put his wife and the Shankill bomber on the same page in terms of their guilt or their innocence would be wrong. However, he went on to say that he respected the fact that Thomas Begley's mother lost her son and her hurt and pain is every bit as much as his hurt and pain. He stated that while it's *'a difficult thing for people to hear... for me the focus should be not on the people that died but on the people that are left behind and we've all lost.'*

The need to analyse the root causes of the conflict and to debate whether there was justification for the conflict was articulated.

Panel 6 Perspectives of former political prisoners, combatants and the PSNI

Several people noted the absence of the British state, including the PSNI, from the seminar and it was argued that the British state needed to step up to the mark and that they were the only party present who had not expressed any accountability for their actions.

Willie Frazer was asked to explain 'what road do you want to go down'? Mr Frazer responded by saying that the road he wants to go down is a road where they get recognition for what they have gone through and what their loved ones went through.

Paul O'Connor expressed the view that there are many other issues which need to be explored and which were not addressed over the two-day seminar, such as the role of the Irish government, the reality for Protestants living along the border, the policy with plastic bullets, the issue of collusion, the policy with agents and the withholding of evidence that allowed civilians to die, for example. He stated that these were the '*macro issues*' that the proposed Legacy Commission could deal with but could never be dealt with by the HET or the Police Ombudsman. He concluded by broadly welcoming the CGP report and stated that he was leaving the conference with more hope than he had when he arrived at the conference.

Mark Thompson reflected that one of the key things about the report was that the issue of the £12,000 recognition payment bravely tackled the issue of hierarchy. He suggested that perhaps it should have been proposed in the form of reparations at the end of a process.

Chair- Kieran McEvoy, Queen's University Belfast

The original intention was to have a panel with representatives from the PSNI as well as republican and loyalist ex-prisoners. Shortly before the day of the event, the PSNI had to withdraw as the individual best suited and most knowledgeable on the issues at hand was not able to participate. In turn, the loyalist and republican panellists together decided that a panel with only their two sides present might suggest that the Troubles was simply two-sided and that it was merely the loyalist and republicans at conflict with each other.

Given that the topic was of great interest and significance, Professor McEvoy was asked to make a presentation based on his knowledge and research on ex-prisoners and ex-combatants both in Ireland and further afield in order to facilitate a conversation about the role of the security and paramilitary forces in the conflict and in the peace process.

Professor McEvoy began by saying that compared to many other post-conflict instances where dealing with the past is '*something that is foisted upon ex-combatants or upon the security forces*' because they are the key players, Northern Ireland speaks to a completely different reality. He pointed out that '*ex-combatants were already leading discussions*' on the issue of truth within their own communities. He gave the examples of the '*Untold Truth*' by the Ardoyne Commemoration Project and the '*Consultation Paper on Truth and Justice*' (the Eolas document) as efforts within the republican/nationalist community to deal with the past and cited '*Truth Recovery: A Contribution from Within Loyalism*' by the Ex-Prisoners Interpretative Centre (EPIC). He also referred to the Historical Enquiries Team as an example of the Security Forces' effort to deal with the past.

Professor McEvoy noted that the international debate in relation to truth recovery mechanisms and ex-combatants often includes a number of key questions:

- **Should prisoners be released early?**

Professor McEvoy contended that this was the most controversial aspect of the peace agreement in Northern Ireland. In his opinion as a criminologist, the early release provision was a highly successful initiative. As evidence,

he put forth the fact that there were four hundred and fifty prisoners released; the normal recidivism rate for ordinary prisoners is about sixty per cent within two years in Northern Ireland, that is to say fifty to sixty per cent of ordinary prisoners will be back in jail within two years. After ten years, approximately thirty prisoners who had been released early have been back in jail, half of them for ordinary offences. This equates to less than ten per cent over ten years.

- **Should state actors and non-state actors be treated differently?**

There are different arguments and discussions around this. Some would argue that state actors have a higher level of responsibility because they are within the state structure.

However, some state actors will talk about the myth of equivalency and of not wanting to be put on the same plane as terrorists or paramilitaries. Professor McEvoy noted a strong sense of exasperation from the police and security force family in relation to the state-centricity of the inquiries that have transpired to date in Northern Ireland. They argue that all of the inquiries are focused on the activities of state and state actors although ninety per cent of deaths directly related to the conflict are attributable to paramilitary organisations. Although there are obvious questions in relation to collusion, they query how it can be argued that truth recovery in Northern Ireland be more or less exclusively on the state.

However, just as security forces fear this '*myth of equivalency*', Professor McEvoy has encountered ex-combatants both here in Northern Ireland and elsewhere that fear that they will be exclusively blamed for the conflict. A concern that is often expressed is that if they do engage in the process, they suddenly become to blame for it all, that the people involved in the actual direct actions of violence are the ones to blame. He noted that ex-combatants tend to acknowledge that they have inflicted harm and damage done to other human beings, although they may try to frame that or to put it in a particular context. '*It was put very nicely to me from someone who was involved in the Truth Commission in Sierra Leone, who said "we end up blaming the eighteen-year-old with an AK47 for our conflict in Sierra Leone. The eighteen-year-old who came forward who had the AK47, who killed people, he gets blamed for our conflict, there's something wrong with that."*' The question that arises is whether the broader structural or political or ideological or sociological causes of conflict get lost when there is blame put upon those who were directly involved in perpetrating

violence? Tied to this debate is the significant fear that victims have about individuals or organisations attempting to justify what happened.

- **Should state and/or non-state actors be given amnesty for politically motivated crimes? Should immunity from prosecution be granted as a 'carrot' for truth recovery? Should the capacity to prosecute be retained as a 'stick' for truth recovery?**

Drawing on the example of South Africa, Professor McEvoy suggested that the ambitions of prosecution - '*the mass prosecutorial fantasy*' - are very often different than what can be accomplished in reality for various reasons.

Referring to the report of the Consultative Group on the Past, Professor McEvoy clarified that the 'protected statements' give immunity in relation to statements but not to persons. It applies to both criminal and civil proceedings and applies to both primary and secondary evidence; in other words, any information provided in the statement itself, or evidence that could be obtained or deduced as a consequence of that statement would not be admissible in criminal or civil proceedings - these are protected statements. The aim obviously is to encourage frank and free discussion, and it can cover serious crimes, including murder.

The CGP recommendations for a Legacy Commission also build in a number of safeguards with regard to the tensions between truth and justice, which aim to ensure that procedure does not prevent a case for which there might be significant evidence from coming to court. The safeguards are as follows:

1. Before a case is subject to the protected statement procedure, it would have to be reviewed or investigated to see if there is a case for prosecution. That process of review and investigation would have been completed before any person could provide information under the rules of information recovery.
2. If evidence emerged (outside of this process) that a person had committed a crime, that person could still be brought before a court. Furthermore, a person could not go from the process of information recovery and give the same information to the press or elsewhere with impunity.
3. The CGP proposed that oral evidence under thematic examination should not be taken until two years after the Commission's establishment.

Following the presentation, the discussion between people present in the audience centred on several issues including:

- **Relevant terminology and applicable law.**

There was the suggestion that the Troubles amounted to war and the subsequent ramifications therefore that humanitarian law, in addition to human rights law, would be a consideration in relation to possible prosecutions. However, it seemed that there is no need to choose between humanitarian law and human rights law as both can be applicable in the same situation and the jurisprudence of the European Court of Human Rights to that effect was noted.

- **Reflection on the test for prosecution.**

The test for prosecution, that is to say the factors which the DPP uses to determine whether to prosecute or not, is in relation to:

1. Whether the existing evidence is likely to secure conviction; and
2. Whether prosecution is in public interest.

The fact that over thirty years has passed since the majority of deaths occurred clearly creates evidential problems and diminishes the probability of prosecutions, much less convictions. Moreover, there is the view held by some within society that the DPP was, and perhaps still is, *'the most unaccountable of all the organisations'* in Northern Ireland over the past 40 years. This led to a debate around who was best placed to decide whether prosecution of certain cases is in the public interest or not.

Jeremy Hill, legal advisor to the CGP, noted that in respect to the issues relating to decisions of whether or not to prosecute as based on public interest, the CGP had discussed whether it was possible to create a prosecuting authority separate from the DPP to determine these historical cases, but in the end decided that it would be very difficult to do so without undermining the integrity of the criminal justice system as a whole in Northern Ireland. To compensate for this, the CGP felt that when the Legacy Commission forwards a case to the DPP to consider for prosecution, it should include a recommendation or guidance as to whether a prosecution would be in the public interest as defined in the established criteria. It was thought that regardless of who makes the decision whether to prosecute or not (DPP or another body) the decision

whether to prosecute or not could simply be taken on evidential grounds and therefore controversial cases would be hidden in there, meaning that the public interest issue maybe is not as salient as many seem to think it to be.

- **Mediation and dialogue.**

A positive and frank exchange between several individuals from victims' groups and ex-paramilitary prisoners also transpired, which suggested that although views will clearly remain different about the past, almost everyone wants a better future free of political and sectarian violence. It demonstrated that fostering dialogue between communities, victims and perpetrators is perhaps a way of humanising those who hold different views and a mechanism for creating empathy between those with opposing views.

- **Discrimination against political ex-prisoners.**

It was also noted that despite the intentions of the Good Friday Agreement to *'reintegrate ex-prisoners back into the communities fully and wholly... the ex-prisoner community is the only group that can still be legally discriminated against'* given that ex-prisoners cannot, for example, foster or adopt children or acquire house insurance, for example. The report of the Consultative Group on the Past clearly states that the barriers facing ex-combatants need to be addressed and calls for legislative guidance for employing people with criminal offences relating to the conflict.

- **Lack of state participation and engagement.**

Finally, disappointment was voiced that the British and Irish states and the security forces were not involved in the discussions. Professor McEvoy mentioned that he has had very interesting and mature conversations with senior police officers about dealing with the past and their input would have *'contributed significantly to this conversation.'* Furthermore, all processes of truth recovery require input from all those involved in past violence.

Panel 7 The political perspective

Chair - Aideen Gilmore, Deputy director, Committee on the Administration of Justice

Stephen Farry, Alliance Party

Stephen Farry from the Alliance Party began by stating that from the Alliance perspective the *'piecemeal approach over the past few years really is unsustainable and isn't really going anywhere in terms of trying to provide healing for society as a whole.'* In terms of individual victims, the different demands of over three thousand families across Northern Ireland, and indeed some people outside of Northern Ireland have not been met. Also, the broader issues of societal reconciliation have not been addressed and the Alliance Party view this as very important. Mr Farry stated that *'the route of individual inquiries looking at cases on an individual basis'* had the potential to bankrupt society and that there was the need to *'be very cold and rational'* when making decisions in relation to these issues. He said, *'we have a choice about how we spend our money and we have to find a balance, especially in the context of the current economic downturn.'*

In response to the Consultative Group on the Past, the Alliance Party *'welcomed'* its creation and considers the report as positive. *'Particularly we like the emphasis upon tackling sectarianism within the report, and promoting reconciliation.'*

Mr Farry suggested that *'the Legacy Commission, to me, is probably the best we're going to get'* although he questioned the willingness of the various paramilitary organisations to come forward and given information. He stated that the CGP did not sufficiently tease out the issue of incentive and of how to encourage those with information to share it.

Stephen McIlveen, DUP

Mr McIlveen stated that, in relation to the DUP's attitude to the Eames/Bradley proposals, probably the matter that stands out most is the suggestion of the twelve thousand pounds recognition payment, and the DUP came out very strongly against that initially and the public was quite upset regarding that particular proposal.

He stated that while there are things in the report that the DUP wouldn't agree with, there are things that are very positive and that they wouldn't

have any difficulty with. In particular, they find it very important that there is storytelling as part of the healing process, as well as a suggestion of how we might move on.

In relation to the issue of definition of victims, the DUP are working towards proposing a new definition of victims, as it is important for the wider community that there is a definition of victims that they can be happy with. He suggested that it would be very difficult for anyone to accept a process where there is no distinction between those who perpetrated crimes and innocent victims.

One of the points in the document that the DUP would agree with is the idea of not having any further public inquiries. Citing the example of the Bloody Sunday Inquiry, he questioned the benefit that inquiries give to victims as they get bogged down in the legal process. He stated that there has to be a huge question mark over whether the cost constitutes an adequate spending of public resources and whether that money could be used in a different way to benefit victims in general. While the DUP recognise that certain things happened that perhaps should not have happened, they feel that spending hundreds of millions of pounds in each particular case is not the right way to go about dealing with it.

There are certain questions the DUP has regarding the establishment of a Legacy Commission, the work it would do, and particularly duplication of work that's already taking place and perhaps undermining that kind of work. He concluded that there are good things in the document, and that it provides a framework for discussion and for opening up the debate.

Dolores Kelly, SDLP

The SDLP gave a broad but not unqualified welcome to the Eames/Bradley report. While they recognised it was one of the most difficult tasks faced by any Commission, they believed there are clear failings of the report, particularly in relation to the lack of human rights and legal detail.

In relation to inquiries, the SDLP still feels very strongly that the inquiry promised to the family of Pat Finucane is an outstanding debt which the British government has yet to honour. Whilst acknowledging comments in relation to costs, they felt it important to point out that the inquiries would not have cost so much money had the authorities actually worked with the

tribunal teams rather than seeking to either destroy or prevent disclosure which would have meant a less costly and lengthy process.

Ms Kelly stated that the SDLP were not confident that either the British government or the terrorist organisations are actually going to step up to the mark in engaging in a truth recovery process. They also felt that the report could have been much more challenging to the government and to the paramilitary organisations for their role in the past.

In relation to the twelve thousand pounds recognition payment, she stated that it was not something they felt comfortable with; however, they did not underestimate the need and the continued hardship faced by many families, particularly where the breadwinner was lost. So the issue of compensation - while set aside for the moment - is something that may have to be faced again in the future.

In relation to the five year mandate, the SDLP is concerned that this is an arbitrary timeline and could be used as a cover for an amnesty for anything that is not dealt with in that period.

Francie Molloy, Sinn Féin

Mr Molloy stated that Sinn Féin had not developed a detailed response to the CGP report beyond their initial comments highlighting their concerns that the CGP itself was *'set up by the British government and as such was reporting to the British government and could be stood down by the British government.'*

As a case in point, Mr Molloy noted that the recommendation of a twelve thousand pounds recognition payment was ruled out by the British government although there clearly was support for the recommendation within some sectors of society. He felt that this demonstrated that the CGP did not have real independence and raised questions as to the ability of the government to pick and choose which recommendations it would implement without public consultation.

Mr Molloy said that while there are benefits within the CGP report *'it doesn't move us into a situation to ensure the safety of stopping it happening again.'* He felt that the CGP washed over the need to deal with the causes of the conflict and instead focused on getting people to move on and on closing down inquiries. But, he questioned, *'how do we close down*

people looking for the truth? How do we get people just simply to say that's all in the past, we have to move on?' He also stated that there must be recognition of the role of the state.

Dawn Purvis, PUP

The PUP welcomed the publication of the report because it recognised that we need to deal with our conflicted past. Ms Purvis said, *'I think that Eames and Bradley and the report of the Consultative Group really offers an honest assessment of what they saw and they heard during their journey of eighteen months.'* The recommendations that they made reflect their assessment of how to best address the broad range of needs of victims and survivors and also the needs of wider society. In relation to the specifics of the CGP report, she speculated that the time frame of five years is probably a bit too restrictive.

She noted that society needs to decide how to approach the past and individuals must ask themselves whether they think it is best to deal with the past by attributing blame to one side or the other and defining who was right and who was wrong, or whether there are other ways to deal with the past which help define the future and create a better society to live in and a better Northern Ireland. She said, *'in conflict, everything's black and white, right or wrong, you're to blame, you're not, you're right, you're wrong. But in building peace, it's shades of grey.'*

She also reiterated what had been said earlier about apartheid - *'we live in a benign apartheid and people are comfortable with that. It's like a comfortable segregation.'* She also reflected on the need for political leaders and the Assembly to set a positive example in relation to dealing with the past, noting that the *'Executive parties can't even agree on a strategy for cohesion, sharing and integration. So if it is not going to come from the Assembly, where is it going to come from?'*

Discussion

The subsequent discussion primarily revolved around three central issues: the role that politicians and political parties can play as part of a truth recovery process; the issue of acknowledgment; and the definition of victims. At times these three issues melded together.

Ms Purvis spoke of the impact that personal journeys have: *'I wish that all the political parties in the Assembly could have gone through a process*

that Eames/Bradley have gone through, or through a process that Healing Through Remembering have gone through. And then we might see not so much of the tribal tennis match that passes for political debate, but a maturing of discussions.’ Ms Purvis reflected that defining a victim is ‘a very emotive issue and it will be very politicised, and it will not have the potential for reconciliation.’

There was a great deal of discussion around the term “victim” as defined in the Victims and Survivors (Northern Ireland) Order 2006. Ms Dolores Kelly stated that the SDLP ‘accept the 2006 definition of a victim; however, I do also recognise that there are other definitions in other post-conflict situations which are more subtly defined’ and suggested that it might be worthwhile to examine those, particularly in light of the anticipated proposal by the DUP to amend the legislation outlining the accepted definition.

Mr Farry was pragmatic about the issue and felt that the definition used ‘is going to be as good as it gets’ and... ‘We shouldn’t go back and reopen that discussion. [Moreover] in practical terms the Assembly will not be in a position to redefine that because this will have to be a cross-community decision and I suspect that the two nationalist parties will not countenance any change in terms of the 2006 definition.’ Ms Purvis did not believe that there was a need to change the current definition of a victim.

He also noted that the window of opportunity for dealing with the past was narrow and questioned the implications of a potential future British government being linked to the UUP. He pondered how the government could be impartial in terms of trying to find a way forward: ‘I think that is a major issue that the Conservative Party have to address and haven’t even contemplated just yet.’ He stated that they have not examined their own past or looked at their own involvement in the conflict over the last forty years.

It was observed that one of the issues which has come out fairly regularly in the consultations which Healing Through Remembering has carried out is around the issue of acknowledgement, particularly the need for those in political power to acknowledge their role in the past as a key to moving the process forward. It was speculated whether the parties and the British and Irish government had specific responsibilities ‘either by omission or commission in relation to the past’ which they would like to acknowledge?

Significantly, in relation to the role that politicians can have, Mr Farry stated that ‘the role of a politician is to act in terms of the common good and we

all have a very clear code of conduct in the Assembly that we don’t just act for our own supporters, we act on behalf of our own constituency in terms of everybody who lives there, and indeed I think we have a responsibility to Northern Ireland as a whole as well.’ He also stated that he felt that there are different levels of responsibility across different political parties.

Ms Kelly stated that the SDLP is most concerned about whether the British government and the ex-paramilitary organisations are really prepared to acknowledge what happened in the past. She questioned if ‘we’ll ever really get to the truth of our past in order to build...a reconciliation to our future.’

Panel 8 Engaging the unengaged

Chair - Professor Colm Campbell, Transitional Justice Institute, University of Ulster

Kirk Simpson, Transitional Justice Institute, University of Ulster

Dr Simpson explained that this concept of 'Engaging the Unengaged' is a difficult epistemological question in terms of what it actually means and who the unengaged actually are. He advocated the supposition that there are myriad truths about the past, as opposed to just one single truth and he suggested that the truth of the unengaged is one of these.

Dr Simpson then discussed generation Y; this generation of young people who are viewed as being more interested in Twittering or Facebook than any of the issues that are being debated at this seminar. He carried out some research on this topic amongst unionists of middle-class origin, aged between eighteen and twenty-one and was astonished by the results. He was surprised at the vibrancy of these young people's discourse and interchange about the past because he thought they were apathetic or ambivalent and only concerned with pop culture and all the various technological advances that have taken place. But he was quite wrong. What he actually discovered was a group of people who for various reasons are certainly unengaged in the wider debate. They are not factored into the greater equation as they are children, post-ceasefire children some of them, with very little living memory of the conflict. They are often derided by older unionists, who claim that they do not care about or understand what happened. But it is not that they do not care about past atrocities; it is that they do not know, and when they find out, there is a moral idealism - or one could call it naivety, if one were an opponent of it - that something should be done.

With regards to politicians, Dr Simpson quoted the famous phrase from Hollywood screenwriter William Goldman's 'Adventures in the Screen Trade,' which is, 'Nobody knows anything.' He did not mean to offend anyone from any of the panels, because there has been a plethora of expertise, but in one sense, he suggested that nobody does know anything. Dr Simpson argued that there are large pockets of people in the population who have never been consulted about these issues but may have very strong feelings about them.

With regards to the notion of moving on, it was asserted on an earlier panel that the general consensus among the electorate was that moving on/

forward is a good thing. However, Dr Simpson relayed that the prevailing consensus from the people he had spoken to is that they cannot move on unless they have an apology and that they cannot move on if there is to be an amnesty or an implicit or explicit moral equivalence, and for that reason, he argued, they remain unengaged.

Dr Simpson avowed that unionists are not unengaged based on the empirical evidence. He conceded that they might be silent but they are not unengaged; they are just in a parallel universe. He did not mean this pejoratively; he suggested that when they see the direction they perceive this to be moving in, e.g. that it originated as a republican initiative and that there would be a master narrative of the past and so on, they get fearful and silent. He reasoned that this is connected with a Calvinist predisposition for silence and stoicism and a reluctance to talk and show weakness, which was demonstrated by unionist victims throughout the Troubles. As mentioned earlier, compensation was not their aim, as it represented a certain kind of shame or weakness.

Dr Simpson postulated that any notion of a master narrative has to be repealed in order to engage the unengaged. He acknowledged that forgiveness is incredibly important but advised that one engages the unengaged when one stops objectifying them as unengaged, because they are engaged; it is just a question of how to engage them.

Dr Simpson concluded by referring to a biblical quotation that occurred to him because the scriptural focus of unionism and Ulster Protestantism was extremely resonant. If the aim is to engage the unengaged and those people are indeed unionists and they do just seek an apology, Dr Simpson recommended that one turns to the book of the Old Testament, Book of Isaiah, 56 Verse 5, where it says: '*Even unto them I will give in mine house and within my walls a place and a name better than of sons and of daughters: I will give them an everlasting name, that shall not be cut off.*'

Kate Turner, Healing Through Remembering

Ms Turner explained that she was going to talk through the practical experience of Healing Through Remembering in her presentation. The first question centred on who the unengaged are. She mentioned a project her organisation ran last year which was about trying to involve the “hard to reach” in the debate about dealing with the past, but they very quickly realised that they were making judgements and maybe they were “hard to reach” because *‘our arms were too short and not because of where they were positioning themselves.’* So the organisation started talking about the unengaged and recognised that it is not a value judgement on them, it is very much about saying they have opinions and thoughts, they are currently choosing not to share them.

Ms Turner also argued that one must recognise, within a post-conflict society, that one of the ways that people survive and deal with the conflict is by not talking about certain things. People avoid getting into conversations about politics or other sensitive topics, because they can either be put in a dangerous position with a stranger or it may lead into a conflict discussion with those who are regarded as friends. This is something that the generation who lived through the conflict have ended up growing up with at a completely subconscious level.

Ms Turner described how the remit of Healing Through Remembering (HTR) evolved. HTR did not decide to exist and become an organisation with dozens of people regularly engaged in dealing with the past; it developed into that type of organisation because such a large number of people approached the organisation privately, saying that they wanted to take part in this difficult conversation about the past. HTR realised that it needed to continue its work in this vein, to give people a forum to talk about the past because publicly the message that the media and politicians conveyed was that *‘we’ve got this delicate peace process and we need to not talk about the past so that we don’t destroy this peace process we’re building.’* It is the organisation’s experience that people want to engage in this if they can find a way to actually do it.

Ms Turner noted that one of the criticisms of the Consultative Group was that it was not comprised of the right people. This was because they were not seen to be bringing experience of having been engaged in the debate or bringing particular perspectives from the conflict. She acknowledged that although this was not the burning issue for the members of the Group, it was for many people they engaged with; however they listened to people and learned a great deal.

According to Ms Turner, another big issue in terms of engaging the unengaged was where some people view the conflict as being a society-wide issue, as opposed to a battle between two sides; and sometimes they are in danger of saying the unengaged need to get involved in this because they were part of the problem. But Ms Turner thought it was important, in terms of saying this is a society-wide issue, that *‘we recognise that in some way we were all part of the solution and examine some of that as much as examining the blame.’*

Ms Turner concluded by saying that HTR has always been about engaging people and talking to people about how they want to work on this. The organisation carried out work last year where it discussed engaging the “hard to reach” and this work led to the production of their Conversation Guide which is a facilitator’s workbook on holding conversations on dealing with the past. In its experience, everybody that they encountered wanted to be part of that conversation. HTR was in a new phase of its project, whereby it is going to be training facilitators to use that guide so that they can work for Healing Through Remembering in leading conversations about dealing with the past.

Brandon Hamber, INCORE & Healing Through Remembering

Mr Hamber admitted to being slightly perplexed initially by the title of this panel, so he decided to Google ‘engaging the unengaged.’ The results were very interesting and he was directed to various marketing and sales websites which contained theories about how one engages the unengaged. He proposed to discuss the five major things that he found from these marketing websites about how to engage people who are not engaged. The first rule is to ‘know your product.’ which Mr Hamber found really interesting because he was *‘not quite convinced that we do know what our product is.’* He felt that Healing Through Remembering as an organisation had been fairly successful in that the product it tried to sell was process, which is quite difficult in a marketing perspective but it engaged people in a process. He noted that there has been a difficulty in getting publicity about this process as a product, as journalists would prefer to write about something tangible like the establishment of a Truth Commission, instead of writing about people engaging in a discussion about a process. Mr Hamber suggested that one of the challenges in terms of the Consultative Group Report is that finally at least we did get a product. However he did not think that we properly capitalised on that product. He queried *‘how do you engage with people when essentially what you’re asking them to*

do is like asking turkeys to vote for Christmas. That is the core challenge of this issue, trying to engage the media, police, etc, in an exploration of the past, partly to criticise the way they dealt with it. He argued that one has to engage people in some sort of process, but the problem with that is it is hard to sell that as a product.

The second point advocated by marketing gurus is 'know the benefits of your product and be honest'; if you are honest and believe in your product, you will be able to sell your product much better. Mr Hamber believed that there are some serious challenges here also, particularly that we do not completely know the benefits of our product and some of the issues from the discussion on dealing with the past are quite ambivalent outcomes. What does one really expect to get out of these processes? He advocated the implementation of a process where the outcome is to encourage people to think critically and ask questions, rather than trying to convince them about whether this truth or that truth was right.

The third principle of engagement is 'know your customer', i.e. who exactly are the unengaged? Mr Hamber argued that one of the difficulties that exists particularly in both social science and a political context, is that we have very categorised ways of thinking about this. People are either categorised as victims or perpetrators, witnesses, unionists or loyalists, etc, but one fails to contemplate who the ordinary people are. The big concern for Mr Hamber was how we would have an ordinary discussion with our family members about these sorts of issues. There was one quote from the marketing websites which he favoured, where one of the gurus advised to *'interview prospects to educate yourself and not to close the sale.'* Mr Hamber found this extremely interesting as it encouraged one to talk to people about the product, rather than actually going out there in the first instance to sell the message. He acknowledged that some people, including Dr Simpson, are already carrying out this type of research but he suggested that we still have some way to go. Mr Hamber stated that when we attempt to analyse where the unengaged are located, we assume that there are differing views between communities, but not within communities. We assume that all members of a specific community share certain ideals and beliefs, but Mr Hamber argued that actually the biggest benefit in the dealing with the past debate is exploring and uncovering inconsistencies within communities, as was his experience in South Africa. Things shifted in South Africa when they tackled the inconsistencies within communities, not actually the different views between communities and they realised that things were not actually holistic within specific communities.

The fourth principle in the marketing guru's approach to 'engaging the unengaged' is 'know who is using your product and why', which Mr Hamber stated is an issue which is not actually being widely dealt with. There is a real need to reach out and have individuals from different communities who can speak within and inform from different perspectives, as Healing Through Remembering have tried to do. One needs to engage people from those communities and not just those who are seen to be the 'do-gooders' who are coming from a certain type of perspective and attempting to push a certain agenda. Mr Hamber suggested that it would also be interesting to talk about 'the engaged', asking questions such as, who are the people who are engaged, why are they engaged, what have they got to benefit from it? According to the marketing information, people engage because they feel included in the process, they have something to gain, or they feel that they have to for some sort of reason, whether it is the greater good or something else.

The fifth and final point is 'do unto others,' with one the websites advocating a decidedly obvious approach when it said, 'sell unto others as you would like to be sold.' Mr Hamber felt that principle related to the first point about engaging the wider society. He described how this was one of the most tricky issues in the South African process. The media were all in favour of the Truth Commission because it was a good story. However, they were not in favour of it when the Commission said, *'we'd now like to interview all the editors of the newspapers for you to explain how you reported in the past.'* For those who might be perceived as having the most to lose, obviously there is a tension within that process. Mr Hamber argued that *'if we're prepared to say we want others to engage in this, we need to be thinking about our own institutions and our own groups in which we work, and I think it's when we engage with that we start to realise how difficult it actually is to start to engage with the unengaged.'*

While researching for this presentation, Mr Hamber read about a new marketing concept called 'viral marketing' which is based around the idea that the best way that products get sold is actually by word of mouth; it is the new social networking, from one person to another. It is not billboards and it is not governments giving big macro messages. He found this quite interesting and as this is a small enough society, he thinks this one-to-one type of process can be used to engage people in Northern Ireland. He concluded by saying that what one really needs to be doing in this context right now is finding a way to give some air to the Eames/Bradley report. Even though it is a flawed product, it is still a product that one can work with. He felt that the real shame of the debate over the last number of

months was that it had not been given any air. *'So the unengaged that we've been talking about haven't even really been able to form an informed opinion about what this report is actually about.'*

Discussion

One contributor spoke of how, in her experience of the unionist community and Protestantism in particular, victimhood does not sit very comfortably. Dr Simpson agreed, stating that victimhood does not sit comfortably with the unionist population at all, for a plethora of reasons.

It was also queried whether there is any conversation going on about why people from a unionist background do not speak out against the state for fear of being perceived anti-state and therefore being equated with republicanism and nationalism. Dr Simpson stated that again there are a number of reasons as to why people do not speak out, including fear of reprisal during the conflict and now, fear of identifying oneself as different and speaking out about what happened. Dr Simpson also noted that, from an anthropological point of view, especially amongst the more Calvinistic elements of the unionist people, there is a sort of time limit on how long the grief is allowed to be publicly expressed.

One speaker from the Irish government suggested that this event represented the beginning of an engagement with the engaged, and that perhaps there has been a silence since the Eames/Bradley report came out. It was communicated to him that there has been a perception around this process that perhaps Dublin is not engaged. He said that they are and they wish to be engaged. However, he argued that the real space to take this forward will not be carved out by the government in Dublin or London, but by what the people here particularly want and that is why he believed there is a very important role for the people attending this seminar to be the marketers that Mr Hamber talked about. He finished by stating that he thinks it has been a very valuable re-launch or renaissance of something that maybe had a very difficult birth.

One contributor was interested by the maturity of this conference. He complimented Northern Ireland on its phenomenal collective energy and responsibility, commitment and professionalism. He employed the marketing terminology and referred to how the transitional justice model in Northern Ireland is being looked at as 'an export product.' The product may be fuzzy for some, and Eames/Bradley may be contested but it has

essentially been validated as a useful, worthwhile basis to move forward. He discussed how intrinsically governments will be reluctant, but he argued that the only way to overcome that is precisely to have the kind of impetus that is being mustered at this event, by which he was very impressed.

One speaker discussed the dark events of 1975/1976, including the Miami Showband Killings, the O'Dowd and Reavey families in South Armagh and the Kingsmill Massacres. He was conscious of how far this society has come and he said that we must remind ourselves of that. He made three observations:

1. He suggested that people in Northern Ireland are exhausted from living through and surviving the Troubles, and he added that there is a certain wisdom that ordinary people have in knowing to switch off and be disengaged, at least for a while, which one needs to respect. It is not a sign of dysfunction; in fact it can be a sign of how healthy ordinary people are. So those who are driven professionally and vocationally to be involved in this must address the issues but they need to keep it in perspective; they *'need to connect to that ordinariness (of the ordinary people).'*
2. He stated that the past must inform our present and our future, but not define it.
3. He felt that we need to encourage a tired society to go a bit further now, just at a time when so many people want to switch off. *'There is a whole art/skill/craft that we must all in our various disciplines develop together that encourages our tired people to do a bit more, lest it come back in a generation in some way.'*

One contributor commented on Mr Hamber's marketing analogy. With regards to marketing, he said that it refers to a situation where people's needs have been met, yet you are still trying to sell them something. So what you are doing is in fact selling people something that they did not know they needed, and if truth be told they actually possibly do not need. One of the surest ways to engage people is to show them that the product works. It is only when the process gets to the point where things start to be delivered that people start jumping on board.

A representative from the British Irish Parliamentary Assembly mentioned that the Assembly debated the problems that were raised by the media's treatment of the report when it came out. It was viewed as unfortunate

because they looked at a very narrow angle of it and they did not look at the totality of the report and what it was trying to do. For this reason, he viewed this two day seminar as a very positive development which has pushed the report out further and has provided a valid analysis of where people see this report going.

Mr Hamber explained that the aftermath of the process is the next problem. The marketing gurus emphasise that the product does not work if there is no after sales support. This was a lesson learned from the South African Truth Commission, where a good product was sold to the people and it did work largely, but there was not enough support afterwards. People went back to impoverished backgrounds, not feeling they got enough of the peace dividend. Therefore what is needed is to approach this process in a holistic way.



ISBN 978-1-873285-20-6

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