Fordham International Law Journal

Volume 26, *Issue* 4 2002 *Article* 9

Dealing With the Past in Northern Ireland

Christine Bell*

*

Copyright ©2002 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). http://ir.lawnet.fordham.edu/ilj

Dealing With the Past in Northern Ireland

Christine Bell

Abstract

This Article "audits" Northern Ireland's discrete mechanisms for dealing with the past, with a view to exploring the wider transitional justice debates. An assessment of what has been done so far is vital to considering what the goals of addressing the past might be, what future developments are useful or required, and what kind of mechanisms might successfully be employed in achieving those goals.

DEALING WITH THE PAST IN NORTHERN IRELAND

*Christine Bell**

INTRODUCTION

The term "transitional justice" has increasingly been used to consider how governments in countries emerging from deeply rooted conflict address the legacy of past human rights violations.[1] While the term has a pedigree dating back to the Nuremburg Tribunals, three contemporary factors have reinvigorated interest.[2] The first factor is the prevalence of negotiated agreements as the preferred way of resolving internal conflicts. Premised on some degree of compromise between those who were engaged militarily in the conflict, these compromises affect whether and how the past is dealt with. As Huyse notes, the widest scope for prosecutions arises in the case of an overthrow or "victory" where virtually no political limits on retributive punish-

---

* Professor Bell is the Chair in Public International Law, Transitional Justice Institute, School of Law, University of Ulster, and a former member of the Northern Ireland Human Rights Commission. This Article was significantly enhanced by participation in the Transitional Justice Seminar Series based at the University of Ulster (2001-2002) funded by the ESRC, under the auspices of Professor Colm Campbell and Professor Fionnuala Ní Aoláin. The first version of this Article was presented as a paper at a seminar within the series on Dealing with the Past, organized by the Irish Human Rights Centre, University of Galway, in Belfast, May 2002. The Article has also drawn on interviews with prisoner groups, victims groups, and human rights non-governmental organisations ("NGOs"), undertaken for a project entitled "Human Rights Non-governmental Organisations and Transition" funded by the Royal Irish Academy, Third Sector Programme, and thanks are due to that organization. Many thanks are due to Johanna Keenan for her outstanding research assistance and input through discussion. Finally, thanks are due to Paul Mageann, Fionnuala Ní Aoláin, and Angela Hegarty for their comments on earlier drafts. Mistakes which remain are my own.

1. The literature is too extensive to be fully referenced here, but see, in particular, DAVID DYSENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER (1998); PRISCILLA HAYNER, UNSPEAKABLE TRUTHS (2001); IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza ed., 1995); Stan Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past*, 20 L. & SOC. ENQUIRY 7-50 (1995). Note, however, RUTI TEITEL, TRANSITIONAL JUSTICE (2000), which uses the term "transitional justice" more broadly, as dealing with the role of law across a range of issues, including constitutional law, administrative law, as well as the traditional "transitional justice" areas of criminal law, histories and reparations.

2. *Cf.* Colm Campbell, *Peace and the Law of War: The Role of International Humanitarian Law in the Post-Conflict Environment*, 839 INT'L. REV. OF THE RED CROSS 627 (2000).

ment pertain.[3] Where elites compromise, limits typically prevail, justified as necessary to sustaining commitment to a peace process.

The second factor is the rise of the assertion that accountability through investigation, prosecution, and punishment are requirements of human rights and humanitarian law.[4] These standards have galvanized an international movement towards accountability and this has affected peace agreement provisions for dealing with the past. This move towards increased accountability has counteracted domestic political imperatives towards "wiping the slate clean." Institutions and mechanisms for dealing with the past are routinely considered as part of a peace agreement's structure, and exhibit a trend "from broader to more tailored, from sweeping to qualified, from laws with no reference to international law, to those which explicitly try to stay within its strictures."[5]

The third factor is the increased interfacing of human rights and humanitarian law, so as to deal with both State and non-State actors in internal conflict. In addition to underwriting the move towards accountability, this interface has placed a range of legal standards at the disposal of politicians and lawyers who seek mechanisms with which to address the past.[6] As a result of these factors, many peace processes have produced mechanisms to deal with the ensuing transitional justice issues relating to the past, although these vary in design. Most notable is the Truth and Reconciliation Commission in South Africa, but other examples include the International Tribunals for Former Yugoslavia and Rwanda, the Truth Commission and Special Court in Sierre Leone, and the Commission for Historical Clarification in Guatemala. These examples stand in contrast to peace agreements in the early 1990s, such as in Cambodia, Mozambique, and Angola, which did not include provision for such mechanisms.

At first sight, Northern Ireland would seem to be an aberra-

3. Luc Huyse, *Justice Under Transition: On the Choices Successor Elites Make in Dealing with the Past*, 20 L. & SOC. ENQUIRY 51, 78 (1995).

4. *See e.g.*, Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

5. Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence on Amnesty*, 20 HUM. RTS. Q. 843, 884 (1998).

6. *See* CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS 197-98 (2000).

tion in the trend towards provisions for dealing with the past in peace agreements. In 1998, the Belfast (or Good Friday) Agreement was reached by all but one of the major political parties in Northern Ireland, and the British and Irish governments.[7] It was subsequently accepted by popular vote in both the Republic of Ireland and Northern Ireland.[8] The Agreement was aimed at ending the most recent phase of political violence in Northern Ireland whereby over 3,700 individuals were killed, and at least 40,000 injured.[9] While containing a substantive human rights component, no mechanism for dealing with past abuses, or "truth-telling," was established.[10] On closer examination, however, this absence has obscured the extent to which the process has in fact dealt with the past through a series of discrete measures dealing with issues such as prisoners and victims. On the one hand, it can be argued that this piecemeal approach to the past offers a useful contribution to the transitional justice debate, as responding to the distinct nature of the Northern Irish conflict and peace process. Northern Ireland, it can be argued, had a comparatively small level of State and non-State abuses compared to other conflicts. Without trivializing the atrocities that did take place, there was no genocide or mass population displacement, and torture and arbitrary execution were not widespread or systematic, as compared with other countries.[11]

7. Agreement Reached in the Multi-Party Negotiations, Apr. 10 1998, Eng.-Ir. [hereinafter Belfast Agreement]. For a comprehensive analysis of the Agreement *see* 22(4) FORDHAM INT'L L.J. (1999).

8. In referenda held on May 22, 1998, 71% of the electorate endorsed the Belfast Agreement in Northern Ireland, and 94% endorsed it in the Republic of Ireland. *See* http://www.nio.gov.uk/press/1998/jun/980601sos-nio.htm.

9. Although, as McGarry & O'Leary point out, when presented in the context of population, this amounts to the equivalent of 100,000 deaths in Britain, or 500,000 deaths, or ten times the number of Americans killed in the Vietnam war, for the United States. JOHN MCGARRY & BRENDAN O'LEARY, THE POLITICS OF ANTAGONISM: UNDERSTANDING NORTHERN IRELAND 11-12 (2d ed. 1996). For more detailed figures on deaths *see infra* nn.122-128 and accompanying text. For general history and accounts of the conflict *see* JONATHON BARDON, A HISTORY OF ULSTER (1992); PAUL BEW, PETER GIBBON & HENRY PATTERSON, NORTHERN IRELAND 1921-1996 (1996); BRENDAN O'BRIEN, THE LONG WAR: THE IRA AND SINN FÉIN FROM ARMED STRUGGLE TO PEACE TALKS (1995). For explanations of the conflict *see* JOHN MCGARRY & BRENDAN O'LEARY, EXPLAINING NORTHERN IRELAND: BROKEN IMAGES (1995).

10. For further discussion of the human rights component of the Agreement, *see* Paul Mageean & Martin O'Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*, 22 FORDHAM INT'L L.J. 1499 (1999).

11. For an overview of human rights violations during the conflict, *see e.g.*, HUMAN RIGHTS WATCH, HUMAN RIGHTS IN NORTHERN IRELAND (1991).

Criminal justice institutions functioned throughout the conflict, even if "tweaked" by emergency law. There was never wholesale impunity; non-State, and to a lessor extent, State actors were investigated, prosecuted, and punished, even if not as consistently or effectively as different groups of victims would have wanted. Unlike most other conflicts, the State at all times remained signed up to human rights standards and accountable through international human rights institutions, whose authority the State accepted, even if pushing the limits of compliance.[12] The negotiated Belfast Agreement avoided addressing what caused the conflict or the long-term solution to it, in favor of a pragmatic compromise, aimed at living more peacefully while continuing to resolve these more difficult disputes. A piecemeal approach to the past can therefore be argued not just to be a pragmatic necessity, but the most appropriate way to continue these difficult deeper negotiations.

It can further be argued that the piecemeal approach stands not merely as a testimony to context, but may have lessons for other transitional situations. The underlying goals of transitional justice mechanisms remain contested. Do they aim for accountability (and if so individual or societal); "truth" about the conflict; reconciliation of past differences; deterrence for the future; closure for victims; or ensuring "lustration" (weeding out of past violators from new structures)? Are these goals ends in themselves, or to be viewed as instrumental to the underlying and often contested aims of a peace process, such as reducing violence, ensuring stability, and moving to a more liberal and democratic future? The appropriateness of negotiated "holistic" approaches to the past, which aim to attain several goals simultaneously, is increasingly being challenged.[13] In that context, the "multiplicity" approach to the past adopted in Northern Ireland deserves some attention as a possible positive contribution to the transitional justice debate.

On the other hand, Northern Ireland arguably provides a

---

12. *See, e.g.*, Stephen Livingstone, *Reviewing Northern Ireland in Strasbourg 1969-94*, 1 IR. H.R. Y.B. 115 (1995).

13. *See*, in particular, *supra* n.2 (questioning the relationship of means to goals); *see also* TEITEL, *supra* n.1; Brandon Hamber & Richard Wilson, *Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies*, 1 J. HUM. RTS. 35 (2002) (arguing that victims' needs are diverse and are not necessarily served, and indeed sometimes negated, by social processes such as truth and reconciliation commissions).

compelling example of why the past requires addressing as part of transitions. It can be argued that the piecemeal approach has flaws, which are leading to the stalling and unravelling, both of some specific past-focused initiatives undertaken in Northern Ireland, but also, crucially, of the peace process itself. In Northern Ireland, key gaps in the issues being addressed, such as accountability for State actors, can be identified as serving to undermine the principles of equality and parity, which underlie the Agreement, and with these, confidence in the peace process. Second, transformation of key legal institutions, such as policing, is surprisingly difficult when the need for transformation and the goals of transformation all remain fundamentally contested. The absence of any official forum for addressing the past and moving towards a "social truth," which could underwrite and justify institutional transformation, haunts attempts at reform. Even more dramatically, it destabilizes political institutions. Thus, at the time of writing, devolution has again been suspended, not because power-sharing government did not work — despite many gloomy predictions it worked surprisingly well. The process has broken down arguably because the very issues a mechanism focused on the past would address, were left to be debated through survival or collapse of the political institutions. Key issues such as the democratic and human rights credentials of various parties to the Agreement, the nature of the conflict and therefore, of the transition, and the goals of that transition, have taken place through surrogate debates, such as those involving decommissioning of the provisional Irish Republican Army ("IRA"), the legitimacy of power-sharing government as a democratic device, what the Agreement's implementation entailed, and who was to blame for lack of implementation of the Agreement. As the process collapses politically, and with increasing violence on the streets, debate on how to deal with the past is giving way to the conclusion that the conflict has not ended, that the past is the present, and that attempts to "address it" more comprehensively are premature.

This Article "audits" Northern Ireland's discrete mechanisms for dealing with the past, with a view to exploring the wider transitional justice debates. An assessment of what has been done so far is vital to considering what the goals of addressing the past might be, what future developments are useful or required, and what kind of mechanisms might successfully be

employed in achieving those goals. However, the audit also serves to re-interrogate the relationship between transitional justice mechanisms and the goals of peace processes in Northern Ireland and beyond. In conclusion, it is argued that in Northern Ireland, the question of whether there is a transition, and the nature of any transition, both remain contested. Thus, debates as to whether and how to deal with the past are part and parcel of a wider disagreement about the assumptions underlying the peace process and the Belfast Agreement. The very fact that many of the systems of a liberal democracy were in place during the conflict, adds to the importance of the Northern Irish case study to transitional justice debates. The Northern Irish example exposes the reaching of a societal "truth" about the conflict as a central function of holistic mechanisms for dealing with the past, which is often missed in discussion of their accountability merits and deficits. This, in turn, poses the question of the extent to which past-focused mechanisms must await a level of political stability and some consensus as to what the conflict "was about," and the extent to which they can contribute to creating that stability and consensus by fashioning such a narrative.

I. *THE CONTEXT*

The Belfast Agreement was aimed at ending the most recent phase of political violence in Northern Ireland, dating from around 1968. Peace agreement mechanisms for dealing with the past owe something to international law, they owe something to the balance of power necessary to agreement, but they also owe something to the political and legal history of how similar dilemmas were dealt with in the distant past, and how the pre-Agreement negotiation landscape began to set the stage.[14] In Northern Ireland, historical precedents and pre-Agreement initiatives relating to the past helped to create the current context. Kieran McEvoy documents how, throughout Irish history, politically motivated offenders were released from prisons after hostilities ceased, and that this history offers "crucial insights into [the prisoner release] section of the Good Friday Agreement."[15] Sec-

14. *See* BELL, *supra* n.6, at 259-91.

15. Kieran McEvoy, *Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict*, 22 FORDHAM INT'L L.J. 1539, 1542 (1999) [hereinafter McEvoy, *Prisoners*]; *see also* KIERAN MCEVOY, PARAMILITARY IMPRISONMENT IN NORTHERN IRELAND: RESIS-

ondly, in 1969 non-prosecution was used, as an asserted attempt to de-escalate the rapidly escalating conflict, or in the words of the then Prime Minister, to "wipe the slate clean and look to the future."[16] Interestingly, this amnesty continues to have effect to this day, and must be factored into any attempt to deal with the past.[17]

In the run-up to negotiated agreement, *ad hoc* initiatives responding to discrete campaigns on aspects of the past, were established by the government in what can be broadly identified as a "confidence-building strategy."[18] With hindsight, they indicate a balancing of Unionist and Nationalist demands as to the past, with an *ad hoc* approach based on identifying relatively self-contained discrete interventions. At this stage in the negotiations, any more comprehensive addressing of the past was not possible. These initiatives amounted to a pragmatic response to some key demands as an attempt to stabilize the peace process.

A. *Victims' Commission*

In October 1997, a Victims' Commission was established under the auspices of retired civil servant, Sir Kenneth Bloomfield, as part of a pre-Agreement initiative, following hard on the heels of Sinn Féin's participation in talks in what seems to have been an attempt to address the concerns of Unionists and security force members. The Commission was tasked to "look at possible ways to recognise the pain and suffering felt by victims of violence arising from the troubles of the last 30 years, *including those who have died or been injured in the service of the community*" (in an implicit reference to security force members).[19] The terms of

---

TANCE, MANAGEMENT AND RELEASE (2001) [hereinafter MCEVOY, PARAMILITARY INPRISONMENT].

16. *Hansard*, Statement by Prime Minister of Northern Ireland to Belfast Assembly (Stormont) (May-Aug. 1969), at 42.

17. In 2001, investigating the 1969 death of Samuel Devenny, the Police Ombudsman noted the application of the amnesty, "Retrospective Complaint: Samuel Devenny (deceased)." *See* POLICE OMBUDSMAN, FIRST ANNUAL REPORT NOVEMBER 2000-MARCH 2002 35 (2002).

18. The language of "confidence building" officially entered the peace process vocabulary with the REPORT OF THE INTERNATIONAL BODY ON ARMS DECOMMISSIONING (Jan. 24 1996), *available at* http://cain.ulst.ac.uk/events/peace/docs/gm24196.htm [hereinafter MITCHELL REVIEW]. The review body was established to examine how to break the impasse over the relationship between paramilitary decommissioning of weapons and inclusive peace talks.

19. SIR KENNETH BLOOMFIELD, REPORT OF THE NORTHERN IRELAND VICTIMS COMMIS-

reference were, therefore, "permissive of an inclusive approach" to who constituted "victims."[20] The Victims' Commission reported on April 29, 1998, and made a series of broad-ranging recommendations directed at criminal injuries compensation, employers, social security agencies, and government. It advocated providing for a set of practical initiatives aimed at supporting victims, consideration of special funds, a "Memorial and Reconciliation Day", and a Memorial building and garden. The Bloomfield Report did not recommend any type of Truth and Reconciliation Commission, but noted the experience of South Africa and touched on the idea with the statement that "[i]f any such device were to have a place in the life of Northern Ireland, it could only be in the context of a wide-ranging political accord."[21]

Despite Bloomfield's stated adoption of an inclusive approach to who constituted a "victim," his report was criticized for largely ignoring those who had been victims at the hands of security forces.[22] The criticism and its defence evidence the impossibility of separating even a practical approach to victims' measures from the wider transitional justice issues of responsibility and accountability for past killings. In the sixty-page report, only two paragraphs were devoted to victims of State killings, in which the Commissioner acknowledged that relatives of those killed asked him "to register their firm view that all questions of memorialisation or compensation were secondary in their minds to the establishment of the full truth."[23] He also noted allegations that the State had not fulfilled duties to protect them in the face of threat, but noted that he "had no basis upon which to judge such allegations."[24] This basic reporting of allegations was criticized as being in contradistinction to the advocacy role,

SIONER 8 (1998) (emphasis added) [hereinafter BLOOMFIELD REPORT]. Around the same time, the Department of Health and Social Services Inspectorate published a report called "LIVING WITH THE TRAUMA OF THE 'TROUBLES,'" which provided, in a series of recommendations that fed into the BLOOMFIELD REPORT, a blueprint for how health services could be directed more effectively at victims of the conflict. *Id.* at 66-68.

20. MIKE MORRISSEY & MARIE SMYTH, NORTHERN IRELAND AFTER THE GOOD FRIDAY AGREEMENT: VICTIMS, GRIEVANCE AND BLAME 8 (2002).

21. BLOOMFIELD REPORT, *supra* n.19, at 38.

22. *See, e.g.*, COMMITTEE ON THE ADMINISTRATION OF JUSTICE, RESPONSE FROM THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE TO THE HEALING THROUGH REMEMBERING PROJECT (2002) (on file with author).

23. BLOOMFIELD REPORT, *supra* n.19, at 36.

24. *Id.*

which he appeared to take with regard to non-State victims.[25] Bloomfield later defended himself against the criticism of bias on the grounds that he was not an investigatory body, court, or detective agency; accordingly, he "could honestly report that particular views were sincerely held and forcibly expressed" but was "in no position to judge whether they were soundly based."[26] However, the point remained that an alleged gap in accountability had been identified with no recommendation as to whether or how it should be addressed. A later audit noted that the perception of bias by the Nationalist community had impacted in take-up of resulting funds due to distrust.[27]

B. *Bloody Sunday*

In a similar "confidence building" vein, on January 29, 1998, the government established a judicial Inquiry into "Bloody Sunday," an incident in which security forces killed thirteen people at a civil rights demonstration in Derry on January 30, 1972 (a fourteenth dying later).[28] The Inquiry was established under the Tribunals of Inquiry (Evidence) 1921 Act under the chairmanship of English Court of Appeal, Judge Lord Saville of Newdigate. In a compromise with demands for an international inquiry, the Inquiry was also given — unusually for a domestic inquiry — international membership in the form of the other two judges, the Honourable William L. Hoyt, Court of Appeal, New Brunswick, Canada, and the Honourable John L. Toohey, High Court of Australia.[29]

This incident was singled out for inquiry for a number of reasons. While occurring relatively early in the conflict, it had

---

25. *See* COMMITTEE ON THE ADMINISTRATION OF JUSTICE, *supra* n.22.

26. Kenneth Bloomfield, *How Should We Remember? The Work of the Northern Ireland Victims' Commission, in* PAST IMPERFECT: DEALING WITH THE PAST IN NORTHERN IRELAND AND SOCIETIES IN TRANSITION 50, 52 (Brandon Hamber ed., 1998) [hereinafter Bloomfield, *How Should We Remember?*].

27. CLIO EVALUATION CONSORTIUM, EVALUATION OF THE CORE FUNDING PROGRAMME FOR VICTIMS'/SURVIVORS' GROUPS 1, 12 (2002). THIS REPORT ALSO NOTES THAT GROUPS WORKING WITHIN UNIONIST COMMUNITIES FOUND THE FUND PROBLEMATIC AS THE BODY DISTRIBUTING IT ALSO DISTRIBUTED OTHER FUNDS TO EX-PRISONER GROUPS.

28. Prime Minister Tony Blair, Statement to the House of Commons (Jan. 29 1998), *in* HOUSE OF COMMONS OFFICIAL REPORT, PARLIAMENTARY DEBATES (1998).

29. Mr. Toohey replaced the Rights Honourable Sir Edward Somers, Court of Appeal, New Zealand, who resigned from the Tribunal on August 1, 2000. The Tribunal also has a reserve member, Justice William A. Esson, Court of Appeal, British Columbia, Canada. *See generally* www.bloody-sunday-inquiry.org.uk.

remained the largest single instance of killing of civilians by the security forces. It was seen by many, particularly within the Nationalist community, as having been pivotal in escalating the conflict, and therefore key to acknowledging the government's complicity in the conflict.[30] Furthermore, the report of the contemporaneous Widgery Inquiry had blamed the victims as probable gunmen and nail bombers, adding to suspicions of State wrong-doing, and fuelling the families' assertions that only a second inquiry could right the wrong.[31] Added to this, new evidence relating to events on the day had emerged.[32]

The Inquiry commenced its work on March 27, 2000, is still underway, and is not expected to conclude before 2005. It provides an example of a legal mechanism that is focused on both State and on non-State responsibility. The terms of reference merely state:

> That it is expedient that a Tribunal be established for inquiring into a definite matter of urgent public importance, namely the events on Sunday, January 30, 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day.[33]

This leaves some scope for the Inquiry to examine the wider context before and after the day, although the Tribunal has

---

30. For accounts of Bloody Sunday, and its implications, *see* BLOODY SUNDAY IN DERRY: WHAT REALLY HAPPENED (Eamonn McCann & Maureen Shiels eds., 1992); CIVIL RIGHTS MOVEMENT, MASSACRE AT DERRY (1972); EDWARD DALY, MISTER, ARE YOU A PRIEST? (2000); RAYMOND MCCLEAN, THE ROAD TO BLOODY SUNDAY (1983); DON MULLAN, EYEWITNESS BLOODY SUNDAY (1997); PETER PRINGLE & PHILIP JACOBSON, THOSE ARE REAL BULLETS, AREN'T THEY? (2000); DERMOT P.J. WALSH, BLOODY SUNDAY AND THE RULE OF LAW IN NORTHERN IRELAND (2000).

31. RIGHT HON. LORD WIDGERY, REPORT OF THE TRIBUNAL APPOINTED TO INQUIRE INTO EVENTS ON SUNDAY JAN. 30, 1972, at para. 10 (1972) [hereinafter WIDGERY REPORT]. For the limits and problems with the WIDGERY REPORT, *see* BRITISH/IRISH RIGHTS WATCH SUBMISSION TO THE UNITED NATIONS' SPECIAL RAPPORTEUR ON SUMMARY AND ARBITRARY EXECUTIONS: THE MURDER OF 13 CIVILIANS BY SOLDIERS OF THE BRITISH ARMY ON BLOODY SUNDAY, 20 JANUARY 1972 (1994) [hereinafter BRITISH IRISH RIGHTS WATCH]; SAMUEL DASH, JUSTICE DENIED: A CHALLENGE TO LORD WIDGERY'S REPORT ON "BLOODY SUNDAY" (1998); IRISH GOVERNMENT, THE IRISH GOVERNMENT'S ASSESSMENT OF THE WIDGERY REPORT AND THE NEW MATERIAL PRESENTED TO THE BRITISH GOVERNMENT IN JUNE 1997 (1997) [hereinafter IRISH GOVERNMENT]; BLOODY SUNDAY IN DERRY: WHAT REALLY HAPPENED, *supra* n.30, at 91-129.

32. *See* BRITISH IRISH RIGHTS WATCH, *supra* n.31; IRISH GOVERNMENT, *supra* n.31; MULLAN, *supra* n.30; WALSH, *supra* n.30.

33. WIDGERY, *supra* n.31.

often sought to limit the scope of cross-examination to immediate context. Interestingly, what it does not include is any evaluation of the contemporaneous Widgery Tribunal and its validity or failings, and again, the Tribunal has sought to limit questioning to this end.

While it is too early to evaluate the Inquiry's effectiveness, its operation thus far has begun to raise a number of matters which are pertinent to any future discussion about mechanisms to deal with the past, either with relation to the conflict as a whole, or with relation to other disputed deaths.[34] First, the hearings have begun to demonstrate the capacity of examination of one event in the conflict to open up some of the deepest questions about the responsibility and justifications for the use of violence both with respect to the incident in question, and more broadly, with respect to the conflict itself. The testimony of a range of civilian, military (State and non-State), and governmental (national and devolved) witnesses, has provided a fascinating public interrogation of the relationship of State and different communities to notions of legitimacy, public order, and violence. In effect, the Tribunal is fulfilling some of the functions of a truth commission, even though it was not intended to operate as such. Second, the operation of the Tribunal thus far has also begun to indicate the difficulty of any domestic Tribunal in holding the State's military actors to account, even when the State, through its Prime Minister, has asserted its commitment to being held to account.[35] Destruction of army weapons by the Ministry of Defence, the Ministry's repeated judicial reviewing of Tribunal decisions, and the resultant anonymity and screening of soldiers, all bear witness to these difficulties. The Tribunal's operation has also generated concerns about equality of treatment of civilian and military witnesses, concerns about the type of support systems which are needed for victims who testify, and concerns about the relationship between the costs of the Tribunal and its effectiveness as a mode of inquiry.

---

34. *See* further Angela Hegarty *The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland*, 26 Fordham Int'l L.J. 1148 (2003).

35. *Cf.* PHIL SCRATON, HILLSBOROUGH: THE TRUTH (1999) (indicating the difficulties of getting to truth through public inquiries in much less politically contested issues in the rest of the United Kingdom).

II. *BELFAST AGREEMENT*

In one sense, it can be argued that the entirety of the Belfast Agreement is aimed at "dealing with the past." The Agreement has three main dimensions: devolution to a power-sharing executive, a North/South, East/West "confederal" dimension, and a human rights dimension. Each dimension, in its own way, can only be explained with reference to the past and the experience of the conflict. While devolution has also taken place in Scotland and Wales, the distinctive power-sharing government of Northern Ireland is a mechanism often preferred in societies with deep divisions, but was only turned to in Northern Ireland in an attempt to address violent conflict. The North/South, East/West structures also bear witness to an attempt to address concerns about sovereignty, identity, exclusion, and domination. Finally, the issues addressed with respect to rights safeguards do not constitute a complete institutional overhaul, but rather, respond to the perceived problems of the past — the absence of a rights framework or mechanisms for enforcing rights, policing and criminal justice.[36] Thus, the Agreement's structures for the future are influenced and shaped by the experiences of the past. However, a focus on mechanisms to address the past in the narrower sense indicates that the Belfast Agreement does not provide a "past-specific" mechanism addressed at accountability or truth-telling, but does address discrete issues of prisoners and victims.[37] Thus, the Agreement built on the *ad hoc* "pragmatic" confidence-building approach developed during the negotiations, rather than offering a more comprehensive approach to the past.

It is worth digressing somewhat to consider why this was, in a discussion that hearkens back to the factors justifying a piecemeal approach to the past, as summarized in the Introduction.[38] The Agreement is clearly a framework agreement, providing a

36. BELL, *supra* n.6, at 213-21.

37. Belfast Agreement, *supra* n.7, Rights Safeguards and Equality of Opportunity, Reconciliation; and Rights Safeguards and Equality of Opportunity, Economic, Social and Cultural Issues, Prisoners.

38. *Cf.* Pricilla Hayner, *Past Truths, Present Dangers: The Role of Official Truth Seeking in Conflict Resolution and Prevention*, *in* INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR 338 (Paul C. Stern & Daniel Druckman eds., 2000) (identifying three "real" or "perceived conditions" which determine whether peace negotiations tackle the question of transitional justice mechanisms to address past abuses: the interests of the parties to the peace talks, a perception that violence would increase with investigations,

broad institutional blueprint with the details to be filled in at the implementation stage. Thus, the Agreement merely provided broad terms of reference for teams of experts, including independent and international experts, to suggest the way forward on policing, review of criminal justice, and the bill of rights. It is unsurprising, therefore, that there was no specific institution suggested for dealing with the past. However, the absence of a broad commitment to such a mechanism requires further explanation and fundamentally, the answer lies in the lack of agreement at the heart of the Belfast Agreement. The Agreement's language is "constructively ambiguous" as regards the causes of the conflict and the nature of the self-determination dispute, and explicitly leaves the long-term constitutional outcome unresolved.[39] In this context, establishing a holistic mechanism to deal with the past would have been tantamount to establishing a mechanism to undo the deal. This was less because such a mechanism could unravel the power balances at the heart of the Agreement, and more because part of the deal was that there was no deal on these matters.

To this, however, the balance of power considerations must be added. Clearly key parties, in particular Sinn Féin and the State, would have been reluctant to expose their own misdeeds through a mechanism to deal with the past,[40] particularly given that the final agreement and its reciprocal implementation were both uncertain at the time of negotiations. In such context, often it is the voice of civil society, which pushes for past abuses to be dealt with, and the strength of civil society's commitment to this can be determinative.[41] In Northern Ireland, the sections of civic society who might have been expected to assert this pressure, also placed primary importance on the need for political agreement and a range of human rights demands aimed at reform for the future. While many were agreed that the past needed to be "dealt with," there was no agreement on what the

---

and whether there are community-based mechanisms that will fill demands as regards dealing with the past).

39. Christine Bell & Kathleen Cavanaugh, *Constructive Ambiguity or Internal Self-determination? Self-determination, Group Accommodation and the Belfast Agreement*, 22 FORDHAM INT'L L.J. 1345 (1999).

40. A further complication exists in the fact that none of the paramilitary groups participated directly or openly in the talks, although political groupings associated with them were represented.

41. *See* Hayner, *supra* n.38.

goals or scope of inquiry should be, and thus no concerted pressure towards one specific mechanism. Campaigns around particular incidents had mechanisms outside of the peace process (such as the European Court of Human Rights ("ECtHR")) for progressing these issues. Addressing them in the text of the Belfast Agreement would have meant subjecting the issues to the trade-offs of the political negotiation. Civic society pressure was, therefore, not sufficient to counteract other imperatives against dealing with the past.

These reasons for the absence of a comprehensive mechanism to deal with the past also go some way to explaining the approach to the past which was adopted, and which continued post-Agreement. This was the piecemeal, pragmatic approach, whereby aspects of the past were disaggregated and addressed separately and discretely.

A. *Victims*

The Agreement provides for acknowledgement of the "suffering of the victims of violence as a necessary element of reconciliation."[42] A commitment is made to remember and address the concerns of victims, and to support groups who are working with them. Reference is made to the outcome of the Victims Commission, which had been established in November 1997.[43]

In May 1998, the government appointed Adam Ingram (then Security Minister) as Minister for Victims. In June 1998, Ingram established the Victims Liaison Unit ("VLU") within the Northern Ireland Office, to take forward the recommendations in the final report of the Victims Commission.[44] Shortly after this, the government announced that it would be allocating Irish £5 million to the VLU, to be used to help victims of the conflict.[45] After consultation with groups about the Bloomfield Report, the VLU over time established a number of other initiatives for victims of the conflict, which addressed both practical relief, and established structures for continuing to deal with victims' issues:

42. Belfast Agreement, *supra* n.7, at para. 11.

43. Belfast Agreement, *supra* n.7, at paras. 11-13.

44. *See* Bloomfield, *How Should We Remember?*, *supra* n.26.

45. *See* CLIO EVALUATION CONSORTIUM, *supra* n.27, at 9.

- A Family Trauma Centre (run by South and East Belfast Trust, with yearly running costs of Irish £700,000);
- Educational Bursary Pilot Scheme (launched in January 1999, and now closed and to be revised);
- Touchstone Group (established to represent victims' interests and liase with government over victims' policy);
- Victim Support Grant Scheme (Irish £225,000 available to community and voluntary organizations to take forward aspects of Bloomfield);
- Northern Ireland Memorial Fund (operating with a number of different sub-schemes, and initially allocated Irish £3 million, to be allocated at the rate of Irish £1 million a year);
- Core Funding for Victims/Survivors Groups Grant Scheme (Irish £3 million over two years to be administered by Northern Ireland Voluntary Trust and aiming "to sustain the work of groups and organisations providing services to victims");
- REAL (capacity building) Programme (to support the Core Funding Grant scheme).[46]

Later in 2000, Peace II funding (European Union and government-matched monies in support of the peace process) for victims groups was announced with allocations of Irish £6.67 million being promised.[47] In February 2001, Victims Minister Ingram announced a £12 million funding package for victims and survivors, with 20% of this being allocated to the Northern Ireland Memorial Fund, and with some money being made available to a range of smaller projects. The devolved government's Victims' Unit was also allocated Irish £420,000 for distribution in 2000 — 2001 and a further Irish £650,000 in 2001-2002.[48] On July 5, 2001, funding of Irish £250,000 for victims in Great Britain was announced by the government, of which Irish £50,000 was to go to the Legacy Project (based in Warrington, England, the site of an IRA bomb). More funds were also contributed to British victims later.[49] It was announced in January 2002 that a further Irish £3 million would be allocated to a second Cord

46. For further details on all these schemes *see* http://www.nio.gov.uk/issues/victims.htm; *see also* CLIO EVALUATION CONSORTIUM, *supra* n.27, at 9-10.

47. *See id.* at 10.

48. *Id.*

49. Press Release, *Northern Ireland Office, Victims Minister Announces Funding in GB* (July 5, 2001), *available at* http://www.nio.gov.uk/press/010705v.htm.

Funding Programme.[50] The government claimed in February 2001, that it had committed over Irish £18.25 million to support measures for victims of the Troubles.[51] The current Minister with responsibility for victims is Mr. Des Browne MP.

The Bloomfield Report had also raised concerns about the criminal injuries compensation scheme[52] and, as a result, the government commissioned an independent Review of Criminal Injuries Compensations, also led by Bloomfield. The subsequent report led to a number of recommendations for reform, later introduced in legislation.[53] Two recommendations were particularly relevant to the issue of the past: first, the removal of the terrorist exception in which conviction of a criminal offence, including terrorist-related offences, automatically disentitled a person from compensation;[54] and second, the Government's acceptance that payments of Irish £10,000 should be made to the family of anyone who had disappeared from the UK between January 1,1969 and April 10, 1998, where it could "be shown on a balance of probability that that person had been murdered by members of a terrorist organisation and where their remains remained undiscovered after three years."[55]

Victims' policies have also been initiated by the devolved government (at times causing confusion among victims as to the

50. *See* CLIO EVALUATION CONSORTIUM, *supra* n.27, at 10. The Northern Ireland Voluntary Trust ("NIVT") is the Intermediary Funding Body responsible for the administration of the Core Funding for Victims of Violence Programme on behalf of the Victims' Liaison Unit. *Id.* at i-ii.

51. Press Release, *Northern Ireland Office, Victims Minister Announces £12M for Victims and Survivors — Largest Ever Funding Package* (Feb. 22, 2001), *available at* http://www.nio.gov.uk/press/010222v-nio.htm.

52. BLOOMFIELD REPORT, *supra* n.19, at 27-29.

53. Press Release, *Northern Ireland Office, Report of the Review of Criminal Injuries Compensation* (July 2, 1999), *available at* http://www.nio.gov.uk/press/1999/jul/990702b-nio.htm; *see also* Press Release, *Northern Ireland Office, New Compensation Scheme Removes Inequality* (Mar. 5, 2002), *available at* http://www.nio.gov.uk/press/020305b.htm. The resulting legislation is Criminal Injuries Compensation Order (Northern Ireland) (2002), and Northern Ireland Criminal Injuries Compensation Scheme (2002).

54. The criminal conviction reform is only applicable to spent convictions. *See* Rehabilitation of Offenders Act, para. 14(e)(1974) (Eng.); *see also* Criminal Injuries Compensation Order (Northern Ireland) (2002) (Eng.).

55. Press Release, *Northern Ireland Office Online, Report of the Review of Criminal Injuries Compensation in NI, available at* http://www.nio.gov.uk/press/r/000726z-cjp.htm (this money was to be distributed separately from any criminal injuries compensation scheme); *see also* Sir Kenneth Bloomfield, *Compensation and Reparation, in* DEMOCRATIC DIALOGUE, FUTURE POLICIES FOR THE PAST 73 (2001), *available at* http://cain.ulst.ac.uk/dd/report13/report13c.htm.

source of policies and funding among victims).[56] In July, 2000, the devolved government's Office of the First and Deputy First Minister ("OFMDFM") established a Victim's Unit,[57] and shortly afterwards, two victims' representatives were appointed to the Civic Forum.[58] An inter-departmental Working Group on Victims' Issues was set up through the OFMDFM. The draft *Progamme for Government* committed the Executive to preparing a Victims' Strategy by April 2001. Later revisions to the draft *Programme for Government* extended the time scale to 2001-2002, and the current programme aims to put a new strategy for victims in place in 2004 by building on current progress, and during 2003/2004 to "commission a recognition and reconciliation" project.[59] On August 6, 2001, the OFMDFM made public a Consultation Paper on a Victims' Strategy,[60] and a summary of responses to the document was published in January 2002.[61] On April 11, 2002, the Victims Unit launched the resultant new strategy called "*Reshape, Rebuild, Achieve*" and committed Irish £3 million to implement the strategy.[62] This report focused on practical support to victims, and explicitly left issues of "truth-telling" to await the outcome of the *Healing Through Remembering* project.[63]

B. *Prisoner Release and Reintegration*

The Agreement's section on prisoners commits the govern-

56. See CLIO EVALUATION CONSORTIUM, *supra* n.27, at 48.

57. For more details about the different roles and functions performed by the Victims Unit and the Victims Liaison Unit, *see* http://www.nio.gov.uk/issues/victims.htm.

58. *See* http://capacitybuilder.co.uk/comnews/512.htm. The appointed victims' representatives are Alan McBride and Patricia McBride.

59. NORTHERN IRELAND EXECUTIVE, BUILDING ON PROGRESS: PRIORITIES AND PLANS FOR 2003-2006 19 (2002).

60. Victims Unit, *Consultation Paper on a Victims Strategy* (2001), *available at* http://www.victimsni.gov.uk/victimsstrategy/foreword.htm.

61. Victims Unit, *A Summary of Responses to a Consultation Paper on a Victims Strategy* (2002), *available at* http://www.victimsni.gov.uk/pdf/victimsstrategy.pdf.

62. Victims Unit, *Reshape, Rebuild, Achieve: A Cross-Departmental Strategy to Deliver Practical Help and Services to Victims of the Troubles* 19 (2002), *available at* http://www.victimsni.gov.uk/pdf/victimsbrochure.pdf [hereinafter *Reshape, Rebuild, Achieve*]. This report defined victims as "[t]he surviving physically and psychologically injured of violent, conflict related incidents, and those close relatives who care for them, along with those close relatives or partners who mourn their dead." *Id.* The strategy was preceded by a report on the current level of service provision for victims identifying gaps. *See* Deloitte & Touche, *Summary Report on the Evaluation of Services to Victims and Survivors of the Troubles* (2001), *available at* http://www.victimsni.gov.uk/pdf/researchdoc.pdf.

63. *See infra* Part. III.E.

ment to "put in place mechanisms to provide for an accelerated programme for the release of prisoners."[64] A review process was provided to be completed "within a fixed time frame and set prospective release dates for all qualifying prisoners," and "any qualifying prisoners who remained in custody two years after the commencement of the scheme would be released at that point."[65] Thus, prisoners were to be released within a categorical two-year time frame. No provision was made for those not yet convicted, or convicted, but not in prison. The Agreement also provided that the British and Irish governments "continue to recognise the importance of measures to facilitate the reintegration of prisoners into the community by providing support both prior to and after release, including assistance directed towards availing of employment opportunities, retraining and/or re-skilling, and further education."[66]

The Northern Ireland (Sentences) Act of 1998 subsequently implemented the prisoner release commitment, and statistics now show that determinations have been made in all but approximately three cases.[67] The Sentence Review Commission has recently provided an analysis as to what extent the scheme, in practice, meant shortened sentences for individuals.[68] These figures

64. Belfast Agreement, *supra* n.7, at para. 1. Prior to the Agreement there had been continuation and development of "progressive measures such as home leave, life sentence releases, and improved arrangement for visitors." In 1995, 50% remission was restored, as had applied up until 1989. However, there had been no provision for early release up until the Agreement. *See* McEvoy, Paramilitary Imprisonment, *supra* n.15, at 325-27.

65. Belfast Agreement, *supra* n.7, at para. 3.

66. Belfast Agreement, *supra* n.7, at para. 5.

67. E-mail from Don Anderson, Press Office, Sentence Review Commission (Jan. 22, 2003 (on file with author). For details of the release scheme, *see* The Northern Ireland (Sentences) Act (1998) (Eng.); *see also* McEvoy, Paramilitary Inprisonment, *supra* n.15, at 335-38.

68. Sentence Review Commissioners, Annual Report (2002). In summary, the report indicated that the average length of time served by life sentence prisoners who had initial sentences falling between twelve and eighteen years, was just under ten years. Half of those released under the scheme had already spent between eight and twelve years in prison, and only three prisoners served the minimum two-year period. This resulted in an average reduction of time served being four years and ten months. Overall, the time actually served by prisoners has been calculated at 67% of time to be served prior to early release scheme. As regards fixed term sentence prisoners, the average period actually served was just over five and a half years, with over 60% of the prisoners serving between three and seven years. Over 50% of the prisoners eligible for the scheme had already served more than two-thirds of the half sentence period, and a further 30% were released at the statutory two-thirds point. Only ten prisoners, who

support the argument that the early release system did not dramatically negate accountability through the courts.

The Commission identified three groups into which life sentence prisoners fell. First were the prisoners who had served over two-thirds of their sentence by April 10, 1998. These prisoners did not get the benefit of the full one-third off their sentence, as at the time of the scheme's implementation less than one-third of their sentence was left to run. Around 44% of the released prisoners fell in this category. The second group, around 30%, were people for whom a reduction of sentence by one-third happened sooner than the two-year cut off, and for whom the scheme's implementation meant that their sentences were reduced by one-third. Accordingly, over two-thirds of life prisoners released under the scheme benefited by less than six years. The last group, around 25%, did not reach the two-thirds stage of their sentence, but were released after two years from April 10, 1998, or from when their sentence started (if after that date). They, therefore, served sentences shorter than two-thirds of their original sentence, and in three cases, only the minimum two-year period was served. Much of the debate around prisoner release has taken place in the absence of these figures, which were only released in July 2002. To date, only two prisoners have been recalled (one of these on two separate occasions). In both cases, the recall mechanism was challenged for violating the fair trial provisions of the European Convention on Human Rights ("ECHR") through the Human Rights Act 1998, but for reasons of expediency, the challenges were not pursued to completion through the courts; a challenge to the most recent recall (that of Johnny Adair) is on-going at the time of writing.

Parallel initiatives on prisoner release took place in the Republic of Ireland. Within months of the 1994 IRA ceasefire, the Irish government began releasing prisoners; around thirty-six out of seventy IRA prisoners were released by 1996 to "consolidate the peace process."[69] The Criminal Justice (Release of Prisoners) Act of 1998 established a Release of Prisoners Commission to advise the government on the release of prisoners, but

---

served less than forty percent of the period, would actually have served without the scheme being implemented. The time actually served by the fixed term sentence prisoners was 72% of the time to be served prior to the early release scheme.

69. McEvoy, Paramilitary Inprisonment, *supra* n.15, at 323. These releases halted with the IRA ceasefire breakdown and recommenced with its reinstatement.

left sole responsibility for specifying "qualifying prisoners" and the actual release of prisoners, with the Minister for Justice, Equality, and Law Reform.[70] A judicial review did do something to make criteria of this process more transparent.[71] By 2002, the Irish Republic had released 121 prisoners, fifty-seven as a result of the Agreement.[72] One qualifying prisoner, Dessie O'Hare, remained in custody; two prisoners failed in their applications and subsequent court proceedings to be considered as 'qualifying prisoners."[73] In addition, eight other prisoners who applied for early release, have not been "specified" as qualifying prisoners by the Minister; these include the five persons sentenced for their involvement in the death of Detective Garda Jerry McCabe, leading to allegations of Irish government double standards with respect to their support for release of those prisoners in the North, who had murdered Royal Ulster Constabulary ("RUC") members.[74]

With relation to reintegration, prisoners' groups have received funding primarily under Peace and Reconciliation funding headings — measures dealing with marginalised groups and also, to a lesser extent, cross border funds. Republican prisoner organisations have also received some money from the Irish government and both Loyalist and Republican prisoner organisations have received funding from the National Lottery. In total, anecdotal evidence suggests that the amount is just under Irish £5 million.[75]

After the Agreement, in the Republic of Ireland, a Victim's Commissioner was set up on May 21, 1998. The Victim's Commissioner, Senator John Wilson, published his final report in July 1999.[76] This report ruled out the establishment of a truth commission "while we are still trying to reach and implement a

70. *See* O'Hare v. Minister for Justice, Equality, and Law Reform, [2001] IEHC 121.

71. *Id.*

72. E-mail from Andrew Brennan, Prisons Division (Operations), (May 16, 2002) (on file with author).

73. *Id.*

74. There are currently seventy-two "subversive prisoners" in custody in the Republic of Ireland, eleven aligned to the Provisional IRA grouping, thirty-nine to the "Real" IRA grouping, ten to INLA, and four to the "Continuity" IRA. The remaining eight are not now aligned to any particular grouping. *Id.*

75. Interview with Mike Ritchie, Coiste na n-Iarchimí (May 25, 2002).

76. JOHN P. WILSON, A PLACE AND A NAME: REPORT OF THE VICTIMS COMMISSION (1999).

political settlement," although Wilson did not "rule it out at some future date in more settled political circumstances."[77] However, Wilson recommended that the Irish government choose a former Supreme Court Judge "to enquire privately" into the issue of the Dublin and Monaghan bombings of May 17, 1974, on a non-statutory basis. The Dublin and Monaghan bombings were carried out by Loyalist paramilitaries, with the alleged collusion of the British State and alleged foreknowledge of the Irish State. Wilson also recommended that a similar process be conducted in relation to the case of Seamus Ludlow, killed by Loyalist paramilitaries in the Republic of Ireland, "along the lines of the enquiry into the Dublin-Monaghan bombings."[78] In other cases linked to the conflict, Wilson recommended that reports should be produced on the murder investigations where no one had been made amenable in order to ensure transparency of the Gardai, and that any reports on killings in disputed circumstances should be published.[79] Families of the victims and a representative non-governmental organization ("NGO"), Justice For The Forgotten, rejected the private enquiry model for the Dublin-Monaghan bombings.[80] After negotiations with the Irish government, an independent commission of inquiry was established, which is currently headed by retired Supreme Court Judge Henry Barron. The commission's task is to review the evidence relating to the cases of the Dublin-Monaghan bombings, the Dundalk bombing (carries out by Loyalist paramilitaries, December 19, 1975), and the murder of Seamus Ludlow.[81] The Commission's recommendations will be put to the Joint Oireachtas Committee in order to determine whether independent inquiries should be established.

III. *POST-AGREEMENT INITIATIVES FOCUSED ON "THE PAST"*

Post-Agreement initiatives have seen some developments in dealing with the past; however, these remain piecemeal. Some

77. *Id.* at 40, at para. 4.5.1.

78. *Id.* at 42-3, at para. 4.5.3.

79. *Id.* at 43, at para. 4.5.4.

80. Statement of Justice For the Forgotten (Aug. 7 1999), *available at* http://cain.ulst.ac.uk/othelem/organ/docs/justice3.htm.

81. TERMS OF REFERENCE OF THE DUBLIN, MONAGHAN AND DUNDALK BOMBINGS (on file with author).

initiatives, such as those on victims and prisoners, continue to build on the Agreement's provisions. Other developments relate to institutional reform, which has addressed aspects of the past implicitly and explicitly. Finally, the post-Agreement landscape has involved a wide variety of actors and both formal and informal, official and non-official, engagement with the past. The different initiatives do not form a holistic attempt to deal with the past, but do begin to address some issues.

A. *Institutional Reform*

Post-Agreement attempts at institutional reform, in practice, have touched on the past in a number of respects. They provide some additional mechanisms through which to address aspects of the past, as illustrated by the retrospective powers of the Police Ombudsman's office. However, they also indicate the impossibility of progressing institutional reform, without implicitly adopting positions on the nature of the conflict and on transition from it.

1. Policing

While the Agreement avoids any narrative about the conflict, it can be argued that reform of policing and criminal justice stand as testimony to past human rights concerns and a need for further legitimacy of these institutions in the future.[82] The Belfast Agreement provided for the establishment of an independent commission to make recommendations for future policing arrangements.[83] Former Conservative Minister and last British Governor of Hong Kong, Chris Patten, chaired the Commission, and their recommendations were published in September 1999.[84] As part of its consultation process, the Patten Commission conducted public hearings on policing, moving around the community, often in locations where a majority of participants were either from Nationalist/Republican or Unionist/Loyalist communities, respectively, and sometimes in more "mixed"

---

82. This view is, however, contested, with Unionists apparently arguing that the Royal Ulster Constabulary met the Agreement's principles without reform.

83. Belfast Agreement, *supra* n.7, at para. 3.

84. REPORT OF THE INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND, A NEW BEGINNING: POLICING IN NORTHERN IRELAND 9 (1999) [hereinafter PATTEN REPORT]. The Police (N. Ir.) Act (2000) brought the results of the PATTEN REPORT and subsequent parliamentary debates into legislation.

settings. Commissioners commented that the hearings, in dealing with the future of policing, brought out stories about the past and, as such, took on a quality of truth hearings: "we were not established as a truth and reconciliation commission, yet we found ourselves inevitably hearing the sort of stories that such a commission would be told."[85] While stories were indeed told, there was no clear mechanism for acknowledging the stories, and the experience of those participating in the debates was at times one of dismissal, with Commissioners responding that their stories were focused on the past and not the future. However, the Commission stands as an example of a participative mechanism, which opened up difficult questions of the relationship between the past and the future, and raised a question about the limits of story-telling as in itself having value for victims.[86]

Substantively, the resulting Patten Report, impacted on the past in a number of ways. No "lustration" (weeding out) mechanism was suggested for police officers who had abused rights. Instead, a human rights oath was recommended as a forward-looking protection.[87] Regarding entrance of those from paramilitary backgrounds into the police force, the Patten Commission stated: "we emphatically do not suggest that people with serious criminal or terrorist backgrounds should be considered for police service."[88] It did, however, recommend "that young people should not be automatically disqualified for relatively minor criminal offences, particularly if they have since had a number of years without further transgressions, and that the criteria on this aspect of eligibility should be the same as those in the rest of the United Kingdom."[89] It also recommended that "there should be a procedure for appeal to the Police Ombudsman against disqualification of candidates."[90] This limited inclusion was justified, not as a conflict resolution device, but as an affirmative action measure aimed at "young people from communities alienated from the police," who were "more likely than others to

85. *Id.* at 9.

86. *Cf.* Hamber & Wilson, *supra* n.13.

87. *See* Police (N. Ir.) Act, Part VI, Sec. 38(1) (2000) (Eng.).

88. *See* PATTEN REPORT, *supra* n.84, at 89, para. 15.13.

89. *Id.*

90. *Id.*

have had minor run-ins with the police."[91] These measures indicate implicit acceptance of the narrative that the conflict was between State forces, with at least some legitimacy, and illegitimate paramilitary groups. It marks one of the few points in the Report where the Commission did not steer a neutral path with respect to conflicting narratives regarding the past — something the Commission had self-consciously aimed to do.[92]

Also relating to the past and policing was the announcement in November 1999 that the RUC was to be awarded the George Cross medal.[93] The George Cross is the highest civilian honour for gallantry, and this represented only the second time that the medal had been awarded collectively.[94] While its aim was to recognise the death, suffering, and high level of risk which the RUC had undergone, it also marked State underlining of the legitimacy of the RUC, countering any criticism suggested by reform and name change.

A number of benevolence funds for former RUC officers and widows of officers, who died as a result of the conflict, have been established. In accordance with Recommendation 88 of the Patten Report, regular funding and new premises were secured for the RUC Widows Association in September 2000. On November 7, 2000, it was announced that Irish £2 million would be paid to fund lump sums for RUC widows, whose husbands had died as a result of terrorist activity before 1982.[95] On the same day, the government also announced that a new fund would be established to help seriously injured RUC officers, re-

---

91. *Id.*

92. In a debate, a Commissioner indicated in response to the suggestion that police pain and sacrifice had not been sufficiently acknowledged in the report that "[t]he Commission was acutely aware that the genesis of the project was caused by the marked controversy about how well or how badly policing in NI had been performed," and that "in drawing a line under the past and failing to be judgmental about allegations of police misconduct, it would have been inappropriate to be judgmental in any other way either"(paraphrased comments *quoted in* PATTEN COMMISSION: THE WAY FORWARD FOR POLICING IN NORTHERN IRELAND? REPORT OF CONFERENCE PROCEEDINGS (Oct. 8, 1999).

93. Press Release, *Royal Ulster Constabulary, Queen Honours the RUC with George Cross* (Dec. 4, 2000), *available at* http://www.ruc.police.uk/press/2000/apr/george.htm.

94. *Id.*

95. This followed the publication of a report authored in response to a request from the British government to carry out a review of the proposed fund, as a result of Recommendation 87 of the PATTEN REPORT. PATTEN REPORT, *supra* n.83; *see also* JOHN STEELE, REVIEW OF THE PROPOSAL FOR A NEW POLICE FUND (RECOMMENDATION 87 OF THE PATTEN REPORT) (2000).

tired officers and their families, as well as widows, in line with Recommendation 87 of the Patten Report.[96] In addition, the Security Minister, Jane Kennedy, announced additional funding of Irish £3.6 million to the Police Rehabilitation and Retraining Trust ("PRRT") for the next two years. This was in addition to the government providing Irish £4.5 million funding to the Trust when it was established three years earlier.[97]

A new Police Ombudsman office opened its doors in November 2000 to deal with complaints against the police, again with implications for accountability for past State abuses.[98] While there is a limitation period of one year, there is provision for complaints, which go back further, even to cases where there was a previous investigation, if "the complaint is grave or exceptional," or "there is new evidence which was not available before, and the . . . complaint is grave or exceptional."[99] This mechanism has been used thus far to investigate the Devenny case, and the Ombudsman is at the initial stages of investigating four other cases relating to past cases: the cases of the Claudy bombing in 1872; the death of Sergeant Joe Campnell, who died in 1977; Raymond McCourt Junior, who died in 1997; and Alice McLaughlin, who died in 1991.[100] In addition, three other cases relating to "the past" are being investigated under other powers: the Omagh bombing investigation, the Robert Hamill case, and the Rosemary Nelson case.

In the Devenny case, the main result of the investigation was to acknowledge that RUC officers had beaten Mr. Devenny on the head, and kicked and batoned him in front of his young

---

96. Press Release, *Northern Ireland Office, Government Announces Lump Sum Payments for RUC Widows* (Nov. 7, 2000), *available at* http://www.nio.org.uk/press/2000/nov/001107a-nio.htm.

97. Press Release, Northern Ireland Office, *Minister Announces Additional Funding for Police Rehabilitation and Retraining Trust* (Mar. 7, 2002), *available at* http://www.nio.gov.uk/press/020307b.htm.

98. Police (N. Ir.) Act, Part VII, Secs. 50-65 (1998) (Eng.); Police (N. Ir.) Act 2000, Part VIII, Secs. 62-66 (Eng.). The Ombudsman's office had been suggested prior to the Agreement; however, the PATTEN REPORT endorsed the creation of a strong office as part of its package of reforms. PATTEN REPORT, *supra* n.84, Recomm. 38.

99. RUC (Complaints etc.) Regulations 2001, Sec. 6 (Eng.); *see also* Police Ombudsman, *How You Can Complain to the Police Ombudsman for Northern Ireland, available at* http://www.policeombudsman.org/main/complain.htm.

100. *See* POLICE OMBUDSMAN FIRST ANNUAL REPORT NOVEMBER 2000-2002, *supra* n.17, at 35-39. New cases confirmed in an interview with police Ombudsman's Office (Apr. 1, 2003) (on file with author).

children, leaving him badly injured. No prosecutions could be brought due to the 1969 amnesty, and it was not possible for the Ombudsman to re-open medical evidence so as to establish a connection between the beating and Mr. Devenny's death four days later.[101]

Other cases raising issues from the past have also been investigated by the Ombudsman. An investigation into the Omagh police investigation was initiated as a result of serious allegations regarding the RUC's investigation of the bombing, as well as allegations that the bomb could have been prevented. It resulted in a set of recommendations, aimed at the manner in which the investigation should be handled in the future, and most controversially "[t]hat Her Majesty's Inspector of Constabulary should carry out a focused review into Special Branch."[102] The report highlighted the degree to which the use of informants by a largely unaccountable intelligence branch of the police, creates a series of dilemmas as regards preserving the safety and status of the informant, and preventing crime. These concerns are also highly pertinent to outstanding allegations of collusion between State forces and loyalist paramilitary groups (discussed further below).

The Ombudsman is investigating the RUC handling of death threats against defence solicitor Rosemary Nelson, prior to her death.[103] The report has been prepared, but is awaiting the result of a judicial review challenging the Ombudsman's refusal to release information, before publication. The Ombudsman is also investigating into the death of Robert Hamill, inherited from the previous Independent Commissioner for Police Complaints, concerning the incident where Hamill was attacked and killed, with police allegedly being present and not intervening.[104] Both these cases have also been referred to an indepen-

---

101. *See id.* at 35. The Ombudsman did, however, acknowledge that "the Devenny family will, understandably, continue to hold the view that there was an indisputable link between [police beating] and the subsequent deterioration of their father's health four days later and his death." *Id.* at 36.

102. *See id.* at 38; *see also* Police Ombudsman for Northern Ireland, Statement by the Police Ombudsman for Northern Ireland on her Investigation of Matters Relating to the Omagh Bomb on August 15, 1998 (2001) [hereinafter Statement by the Police Ombudsman for Northern Ireland].

103. *See* POLICE OMBUDSMAN, FIRST ANNUAL REPORT NOVEMBER 2000-2002, *supra* n.17, at 36.

104. *Id.* at 38.

dent judge for consideration as to the need for a public inquiry.[105]

2. Bill of Rights

The Bill of Rights process has also found it necessary to grapple with the past, and again, the resulting problems indicate the difficulties of institutional reform in the absence of any consensus on the nature of the conflict. The Belfast Agreement provided that the new Northern Ireland Human Rights Commission ("NIHRC") "consult and . . . advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience . . . to constitute a Bill of Rights for Northern Ireland."[106] This process is continuing and in September 2001, the NIHRC published a draft bill of rights.[107] This document deals with the past in several respects. First, the preamble uses the language from the Belfast Agreement relating to the past. Second, the section on Victim's Rights provides a right to some type of mechanism for the past for victims "of the conflict," and rights for the future for *all* victims, whom the Bill defines broadly. As regards victims of the conflict, the Bill states that:

> with a view to promoting the principles of truth and reconciliation in the aftermath of a lengthy period of conflict, the Government shall take legislative and other measures to ensure that the loss and suffering of all victims of that conflict and the responsibility of State and non-State participants are appropriately and independently established and/or acknowledged.[108]

Thus, the Bill essentially aims to put a legally enforceable obligation on the government to design a mechanism for dealing with the past, without stating what that mechanism should be. The draft Bill further sets out a right to the highest possible

---

105. *See infra* Part. III.C.

106. Belfast Agreement, *supra* n.7, at para. 4.

107. NORTHERN IRELAND HUMAN RIGHTS COMMISSION, MAKING A BILL OF RIGHTS FOR NORTHERN IRELAND: A CONSULTATION BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION (2001) [hereinafter CONSULTATION BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION].

108. *Id.* at 56.

level of social care for victims of the conflict.[109]

"The conflict" is not defined, and neither is the term "victim of the conflict." This is particularly significant, given that almost everything about the conflict is contested, and that this has specific implications for debates around and between different victims. As Gormley argues, there are two ends of the spectrum:

> At one end, people insist that some victims were "innocent," either uninvolved in any violence or properly joining the security forces in the "fight against terrorism." It is an insult to link them with killed, wounded or imprisoned terrorists and their families. At the other end, are those who denounced the supposed "hierarchy of victims" operated by statutory agencies, with the "innocents" at the top, and those connected with paramilitary organisations at the bottom. Many of these people insist that their side was fighting a just war.[110]

In failing to define to whom the rights apply, the draft Bill essentially leaves the definition to the future and the government. The draft Bill, therefore, insists on a mechanism, but avoids all the difficult questions which designing a mechanism gives rise to.

With regard to all future victims (not just of the conflict), the Bill sets out a programmatic provision that legislation be provided to give effect to:

- the right of every victim to be treated with compassion and respect for dignity;
- the right to redress;
- the right to have the crime in question investigated thoroughly, promptly and impartially;
- the right to be informed of the progress of any relevant investigation and to have concerns taken into account;
- the right of every victim to reasonable assistance during trial; and
- that there be provision on violence against women.[111]

Here, the definition of "victim" is a broad one, including

109. *Id.*

110. Brian S. Gormley, *Victims and the Bill of Rights*, 52 N. IR. LEGAL Q. (2001); for controversy over victims *see also* Colin Knox, *The "Deserving" Victims of Political Violence: "Punishment" Attacks in Northern Ireland*, 1(2) CRIM. JUST. 181, 181-91; MORRISSEY & SMYTH, *supra* n.20.

111. CONSULTATION BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION, *supra* n.107, at 58.

those with "physical and mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws."[112] A person may be considered a victim regardless of whether the perpetrator is apprehended, prosecuted, or convicted, and "regardless of the familial relationship between the perpetrator and the victim."[113] The definition further includes "where appropriate, their family, their dependants, those with whom they have a close relationship and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation."[114] Even though applying to *all* victims, again the definition runs up against a conflict-related problem. In only covering those who are victims of a crime, it potentially excludes certain victims of human rights abuses, where it has not been established that a crime has been committed — for example a killing by the security forces where there is no prosecution, or a controversial acquittal on grounds of self-defence.

The Bill of Rights also touches on the issue of prisoners through an anti-discrimination measure. This clause provides that "everyone has the right to be protected against any direct or indirect discrimination" and establishes grounds for which groups are to be included, including those in "possession of a criminal conviction."[115] The provision does not distinguish between conflict and non-conflict convictions. This failure to distinguish has been criticised for not recognising the distinctiveness of conflict-related prisoners, both by those who would wish a more proactive approach to reintegration of conflict-related prisoners, and by those who would oppose reintegrative measures altogether.[116]

112. *Id.* at 57.

113. *Id.*

114. *Id.*

115. *Id.* at 31.

116. "While [the anti-discrimination] provisions are welcome, the Commissioners have disappointingly failed to recognise the distinction between political and criminal convictions. There is a reference in the text that they do not wish to create a 'hierarchy of ex-prisoners.' One wonders therefore where the members of the Commission have been over the last decades. We are not talking of hierarchies, merely wishing to recognise the facts. While some of the systems in place are appropriate for ordinary criminals, they do not fit the profile of republican ex-prisoners." Letter from Coiste na n-Iarchimí accompanying their publication Coiste Comm. (Sept. 6, 2001) (on file with author). Unionist commentators argued that the anti-discrimination measures were a subtle attempt to overturn the ban (endorsed by Patten), on recruiting those with con-

These specific problems with drafting provisions on victims and prisoners are not easily resolvable. Indeed, the problems inherent in these provisions expose a key dilemma relating to the past and going to the heart of the Bill of Rights project as a whole. Namely, this dilemma is the tension between explicitly addressing the legacy of conflict and self-consciously forging a transition from that conflict, or assuming a situation where the rule of law prevails and creating a bill of rights that operates within traditional assumptions and constitutional theories of rights.[117] Thus, the controversy over which victims or prisoners to address rights to is symptomatic of the lack of agreement at the heart of the Agreement and the fact that the Agreement was forged with no common understanding of the causes of, and therefore the solutions to, the conflict. Resolving specific dilemmas relating to victims and prisoners coherently in the Bill of Rights would require working towards that deeper consensus, and then translating it into specific policies — an attempt that was made to some degree by the Patten Commission, which attempted neutrality between histories.

B. *Paramilitary Initiatives*

1. Apologies

When declaring their cease-fire, the Combined Loyalist Military Command (speaking on behalf of all Loyalist paramilitary groupings) included the sentence "[i]n all sincerity, we offer to the loved ones of all innocent victims over the past twenty years, abject and true remorse. No words of ours will compensate for the intolerable suffering they have undergone during the conflict."[118] Given the ambiguity over the Loyalist definition of which victims were "innocent," the scope of the apology was also ambiguous.[119] On April 16, 2002, the anniversary of "Bloody Fri-

victions for serious offences to new police service. *See* Stephen King, *How the "Rights" Commission Manages to get Issues Wrong*, BELFAST TELEGRAPH, Oct. 28 1999, at 14. Others still, have criticized the anti-discrimination provision for not dealing specifically enough with the special situation of sex offenders, which could undo current policies, such as the pre-employment checks on those working with children.

117. *Cf.* Christopher McCrudden, *Not the Way Forward: Some Comments on the Northern Ireland Human Rights Commission's Consultation Document*, 52 N. IR. LEGAL Q. 372 (2001).

118. Combined Loyalist Military Command ("CLMC") Ceasefire Statement (Oct. 13, 1994), *available at* http://cain.ulst.ac.uk/events/peace/docs/clmc131094.htm.

119. Immediately prior to the cease-fire declaration, an Ulster Defence Association

day," when a series of bombs planted by the IRA resulted in the deaths of nine civilians with many more injured, the Provisional IRA issued an apology.[120] This apology was offered to all "non-combatants," again with ambiguities as to scope. Notions of "legitimate targets" during the conflict might suggest that many who would be regarded as non-combatants under humanitarian law, were in fact defined by the IRA as combatants. However, in an interesting engagement with the "hierarchy of victims" debate, the Statement also noted:

> There have been fatalities amongst combatants on all sides. We also acknowledge the grief and pain of their relatives. The future will not be found in denying collective failures and mistakes or closing minds and hearts to the plight of those who have been hurt. That includes all of the victims of the conflict, combatants, and non-combatants. This will not be achieved by creating a hierarchy of victims in which some are deemed more or less worthy than others. The process of conflict resolution requires the equal acknowledgement of the grief and loss of others. On this anniversary [Bloody Friday], we are endeavouring to fulfil this responsibility to those we have hurt.[121]

2. The "Disappeared"

Post-Agreement, the IRA came under increasing public pressure to give information about the whereabouts of the bodies of some of those people whom the IRA was alleged to have "disappeared" — that is, murdered and buried without acknowledgement. The IRA provided information about the location of the bodies, thus implicitly acknowledging its responsibility for the disappearances, but not all of the bodies were recovered as a result of the information provided. As a precursor to the provision of information, in 1999, legislation was passed dealing with

---

Officer in Command, Maze Prison, claimed that legitimate targets included members of the IRA and "anyone who supported Sinn Féin or the SDLP," which would have included most of the Catholic population in Northern Ireland. *See* Interview with Ulster Defence Association Officer in Command, Maze Prison (Oct. 18, 1996) (notes on file with author).

120. Irish Republican Army ("IRA"), *Statement of Apology* (July 16, 2002), *available at* http://cain.ulst.ac.uk/events/peace/docs/ira160702.htm.

121. *Id.*

the location of victims' remains.[122] The purposes were "to make provision connected with Northern Ireland about locating the remains of persons killed before April 10, 1998 as a result of unlawful acts of violence committed on behalf of, or in connection with, proscribed organisations, and for connected purposes."[123] Among other things, the Act provided that evidence gathered in the process of locating remains of victims, and in identifying them, is to be "inadmissible in criminal proceedings."[124] Similar legislation was also passed in the Republic of Ireland.[125] While not amounting to an amnesty, the legislation represented a compromise between obtaining information and collecting evidence relevant to investigation and future prosecutions. Although this happened prior to the extension by the ECtHR of its Article 2 standard, discussed below, the legality of this with reference to Article 2 requirements as regards adequate investigations, may now be in question.

C. *NGO and Academic Costing of the Conflict*

Other non-governmental, non-paramilitary attempts to account for and classify civilian or military status, religion, and political belief of those killed in the Troubles, are beginning to be produced. Most notably among them are LOST LIVES, the Cost of the Troubles Study, and Sutton's database of conflict related deaths.[126] Recently, the Ardoyne Commemoration Project adopted a story-telling approach to the ninety-nine deaths in the nationalist Ardoyne district of North Belfast.[127] These studies

---

122. Northern Ireland (Location of Victims' Remains) Act (1999) (Eng.), *available at* http://www.hmso.gov.uk/acts/acts1999/19990007.htm.

123. *Id.* pmbl.

124. *Id.* Sec. 3.

125. Criminal Justice (Location of Victims' Remains) Act (1999) (Eng.), *available at* http://www.ucc.ie/law/irlii/statutes/1999_9.htm.

126. *See* DAVID MCKITTRICK ET AL., LOST LIVES: THE STORIES OF THE MEN, WOMEN AND CHILDREN WHO DIED AS A RESULT OF THE NORTHERN IRELAND TROUBLES (1999); *see also* FIONNUALA NÍ AOLÁIN, THE POLITICS OF FORCE: CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND (2000) [hereinafter NÍ AOLÁIN, THE POLITICS OF FORCE] (focusing on deaths by State agents); MARIE THERESE FAY ET AL., MAPPING TROUBLES-RELATED DEATHS IN NORTHERN IRELAND 1969-1998 (1998); MALCOLM Sutton, *An Index of Deaths from the Conflict in Ireland* (2001), *available at* http://cain.ulst.ac.uk/sutton/tables/index.html.

127. The victims ranged from civilians to combatants on active service to alleged informers. Perpetrators included security force personnel, Loyalists, and Republicans. ARDOYNE COMMEMORATION PROJECT, ARDOYNE: THE UNTOLD TRUTH (2002).

have begun to account quantitatively, and also qualitatively, for deaths, injuries, and the "damage" of the conflict. There are discrepancies between the quantitative data, most of which can be accounted for in definitional terms, and start and end dates. The tables below show the general trends.[128]

Table Showing Number of Deaths by Organization Responsible

Organizational affiliation of victims	Lost Lives (1966-1999)	Cost of the Troubles (1969-1998) (2 ed.)	CAIN database (1969 - 2001)
Security forces	367	422	368
Loyalist paramilitaries	1050	983	1020
Republican paramilitaries	2139	2001	2054
Civilian/ not known/ other	80	11 (civilian) 216 (other)	81
Total	3636	3593	3523

Table Showing Number of Deaths by Status of Victim

Organisational affiliation of victims	Lost Lives (1966-1999)	Cost of the Troubles (1969- 1998) (2 ed.)	CAIN database (1969 - 2001)
Security forces	1012	1129	1111
Loyalist paramilitaries	144	119	151
Republican paramilitaries	392	363	395
Civilian / not known / other	2088	1990	1866
Total	3636	3601	3523

As Morrissey and Smyth point out, the data "challenges both "Loyalists'" and "Republicans'" sense of their own victimhood. Most obviously, it challenges Republicans by showing their predominant role in causing deaths, and it challenges Loyalists by showing that Catholics have suffered more than Protestants in terms of deaths and injuries."[129]

The unofficial accountings also indicate that much of the substance of truth commissions — documenting who (in institutional terms) did what to whom — is already known in Northern Ireland. However, there are gaps in the information. This ac-

128. There are a number of reasons for the statistics being different. The main reason is that different sources use different start and end dates for the statistics recorded. It is also possible that different research has attributed the same individuals to different categories, or defined categories slightly differently. Nevertheless, the broad patterns are similar across the three sources. *See* McKITTRICK, *supra* n.126; *see also* FAY, *supra* n.126; Sutton, *supra* n.126.

129. *See* MORRISSEY & SMYTH, *supra* n.20, at 10.

counting does not reveal the "dark figure" of Loyalist killings, which had a level of State collusion.[130] Another information gap relates to the extent to which persons responsible have been held accountable for killings. No comprehensive statistics are available on how many non-State killings were successfully followed up, resulting in prosecution and/or imprisonment for murder, or at least a police file being closed. Police statistics claim that out of 2,788 murders between 1969 and 1998, 955 murders resulted in persons subsequently being charged.[131] In the absence of clear statistics for prosecution or punishment, different figures are asserted by opposing groups in attempts to indicate where the need for further accountability lies. Thus, Republican prisoner groups claim that 15,000 prisoners have collectively served around one million years in prison, while police assert that persons were convicted of murders in only 21% of murders.[132] Figures are available for killings by State agents, which indicate that between 1974 and 1994, there were twenty-four prosecutions involving thirty-four persons, with eight law-enforcers being convicted of criminal offences arising from the use of force exercised while on duty. Although this data does not fully account for appeals, neither is there information regarding internal sanction.[133]

D. *NGO Campaigns*

Human rights organizations, victims' groups, and investigative journalists, all continue to raise a series of issues relating to accountability for the past, with respect to both State and non-State actors. A number of groups have been and are campaign-

130. *See, e.g.*, BRITISH IRISH RIGHTS WATCH, JUSTICE DELAYED: ALLEGED STATE COLLUSION IN THE MURDER OF PATRICK FINUCANE AND OTHERS (2000).

131. *Security Situation Statistics for Northern Ireland* (provided by Police Service of Northern Ireland, Jan. 22, 2003) (on file with author).

132. E-mail from Mike Ritchie, Coiste na n-Iarchimí (Nov. 20, 2002 (on file with author). Between 1970 and 1980 alone, more than 8,270 people were convicted of indictable "scheduled" (i.e., terrorist-type) offenses. Hansard, *Commons Written Answers to Questions*, Col: 769-73 (Mar. 6 1998).

133. *See* NÍ AOLÁIN, THE POLITICS OF FORCE, *supra* n.126, at 73. In the case of two convictions for murder, those involved were allowed to return to normal military duty in the Scots Guards. *See* In the Matter of the Application by Jean McBride for Judicial Review, [2002] (Ir. H. Ct.), *available at* http://www.serve.com/pfc/#mcbride. This was an unsuccessful judicial review by the mother of Peter McBride against a decision of an army board to permit in, upon release from prison, the guardsmen who were convicted of the murder of her son.

ing with regards to the accountability of the State with relation to specific cases, where State agents were directly responsible, or where some degree of evidence as to active collusion between state and non-state actors exists.[134] A significant development also has been the rise in victims' NGOs throughout the peace process, who have a specific focus on victims of non-State actors, and are located predominantly within the Protestant community. These victims' groups at times articulate competing demands, which also have changed over time. These demands variously include: accountability of paramilitaries (including, in some cases, revoking prisoner release provisions, or the participation of Sinn Féin in power-sharing arrangements, or in some instances, the Agreement itself); acknowledgement of victim status; and acknowledgement of loss and suffering and forms of memorial.[135] Underlying the different non-governmental campaigns, are different understandings of the rights and wrongs of the conflict, and consequently, different understandings of guilt and innocence and accountability.

Investigative journalism and television reports on the past activities of Loyalist and Republican organisations, and covert State operations, also have played a part in raising issues dealing with the past, and prompted public debate about the causes for, and complicity in, political violence. A review is not possible here, but investigative reports have included: reports into collusion between the State and Loyalist paramilitaries with respect to the killing of Catholics;[136] programmes of the IRA and Loyalist paramilitary groups, which have addressed these issues;[137] and programmes examining the cases of Catholic solicitors, Rosemary Nelson and Patrick Finucane.[138] A series of books also have raised these issues from different perspectives, although to

---

134. For more information about the main groups and the cases they are currently working on, *see* Committee on the Administration of Justice, *at* http://www.caj.org.uk; Pat Finucane Centre, *at* http://www.serve.com/pfc; Relatives for Justice, *at* http://www.relativesforjustice.com.

135. *See e.g.*, Families Acting for Innocent Relatives, *at* http://www.victims.org.uk.

136. *Lost Justice* (UTV Insight, Nov. 27, 2001) looked at the case of Patsy Kelly. UTV Insight also looked into the case of Robert Hamill (Dec. 3, 1997).

137. *See e.g.*, *Provo's* (British Broadcasting Corporation ("BBC"), Sept.-Oct. 1997); *Loyalists'* (BBC, Feb. - Mar. 1999).

138. *See e.g.*, *A Licence to Murder* (BBC Panorama, Part I, June 19, 2002, Part II June 23, 2002) looked at the case of Pat Finucane and other victims who died as a result of alleged collusion between loyalist paramilitaries and the Force Research Unit. *Justice on Trial* (UTV Insight, Dec. 4 2001) looked at the case of Pat Finucane. *Licensed to Kill*

a lesser public attention.[139] These sources have continued the debate about the past so as to produce a complicated, if incomplete and contested, picture of accountability and responsibility for the conflict.

E. *Post-Agreement Negotiations*

Post-Agreement, it has been necessary on several occasions for the parties to reach further agreement in order to implement the Belfast Agreement.[140] The negotiations prior to the negotiations currently taking place, significantly further addressed the past. The emerging Weston Park Proposals noted the acceptance by the governments that "certain cases from the past remain a source of grave public concern, particularly those giving rise to serious allegations of collusion by security forces "in each of our jurisdictions."[141] Accordingly, the government committed to appointing a judge of international standing from outside both jurisdictions to undertake "a thorough investigation of allegations of collusion in the cases."[142] The cases listed, many of which had been the subject of NGO campaigns, in-

(UTV Insight, Jan. 30, 2001) looked at the cases of Pat Finucane, Rosemary Nelson, and Robert Hamill.

139. Recent examples include: ED MALONEY, A SECRET HISTORY OF THE IRA (2002); LIAM CLARKE & KATHRYN JOHNSTON, MARTIN MCGUINNESS: FROM GUNS TO GOVERNMENT (2001); RAYMOND MURRAY, STATE VIOLENCE: NORTHERN IRELAND 1969-1997 (1998); BILL ROLSTON, UNFINISHED BUSINESS: STATE KILLINGS AND THE QUEST FOR TRUTH (2000); NIALL O DOCHARTAIGH, FROM CIVIL RIGHTS TO ARMALITES: DERRY AND THE BIRTH OF THE IRISH TROUBLES (1997).

140. This has happened most notably on three occasions. In November 1999, when it was clear that the formation of the power-sharing executive had stalled, George Mitchell conducted a review of the process leading to what appeared to be an unwritten agreement to a sequence of events, which would enable all parties to move towards implementing the Agreement. In May 2000, another, apparently unwritten, agreement as to a similar choreography, was also reached to persuade Ulster Unionists to re-enter the devolved institutions, from which they had withdrawn. *See also* BELL, *supra* n.6, at 64-65. In July 2001, the pro-Agreement parties and representatives of the British and Irish governments met for negotiations on the key outstanding issues of the Agreement requiring implementation, namely — policing, normalization, the stability of the institutions, and decommissioning. The resulting political package was published jointly by the Northern Ireland Office and the Department of Foreign Affairs on Aug. 1, 2001, in the form of a letter to the party leaders, *available at* http://cain.ulst.ac.uk/events/peace/docs/bi010801.html [hereinafter Weston Park Proposals (2001)]. At the time of this writing, the devolved Assembly has been suspended and negotiations aimed at implementation of the Belfast Agreement are ongoing.

141. Weston Park Proposals, *supra* n.140, at para. 18.

142. *Id.* at para. 19.

cluded the following murders: Chief Superintendent Harry Breen and Superintendent Bob Buchanan (murdered by the IRA with alleged involvement of the Garda Siochona); Pat Finucane (Catholic solicitor murdered by Loyalists with alleged State collusion); Lord Justice and Lady Gibson (where the involvement of the Garda Siochona has been alleged); Robert Hamill (a Catholic beaten to death by Loyalists, with police allegedly watching but not intervening); Rosemary Nelson (Catholic solicitor murdered by Loyalists with alleged State collusion); and Billy Wright (a Loyalist, killed by Republicans while in prison, with allegations of State collusion). The Weston Park Proposals provided that the review was to begin no later that April 2002 "unless this is clearly prejudicial to a forthcoming prosecution at that time." The Proposals also provided that "in the event that that a public inquiry is recommended the relevant Government will implement that recommendation."[143] The review, headed by retired Canadian Judge Peter Cory, commenced on May 29, 2002, and continues at time of writing.[144]

The Weston Park Proposals also dealt with the issues of the so-called "on-the runs" — Republicans who were being sought by the British State for offenses. There are four categories of "on-the-runs": those who believe they are being sought by the authorities with respect to an offence; those who have escaped from prison following conviction; those who have absconded while on bail prior to conviction; and those awaiting extradition. None of these categories were dealt with in the Belfast Agreement or the subsequent prisoner release legislation. It has periodically been reported that the government has allowed some "on-the-runs" to return to Northern Ireland, or dropped charges against certain suspects. This is difficult to confirm, but it seems that some people residing in the South have written to the DPP to confirm whether they are being sought for offences, and have received a reply in the negative.[145] However, a Republican pris-

---

143. *Id.*

144. Review is *available at* http://www.nio.gov.uk/press/020529j.htm. The family of Pat Finucane and other campaigners have consistently called for a full public judicial inquiry into this case. They do not believe that the mechanism established as a result of the negotiations at Weston Park is satisfactory. *See also* http://www.serve.com/pfc/pf/pf12022002b.html.

145. Interview with Mike Ritchie, Coiste na n-Iarchimí (Dec. 5, 2002) (on file with author).

oner group has stated that there are a number of other people who believe they are still being sought.[146] This "mechanism" does not cover the approximately sixty people for whom warrants had been issued, nor those who jumped bail, escaped, or who are being sought for extradition. These people would require some type of formal withdrawal of charge, or amnesty, in order to avoid detention.

The Weston Park Proposals state that "it would be a natural development of the scheme for prosecutions not to be pursued and . . . as soon as possible, and in any event before the end of the year, [the British and Irish governments will] take such steps as are necessary in their jurisdictions to resolve this difficulty so that those concerned are no longer pursued."[147] Despite the stated timetable, no announcement or legislation has been forthcoming. It can be speculated that until recently, this was due to the legal difficulties of fashioning a suitable legal device, as addressed further below. Early informal discussions seemed to indicate that the government was contemplating using a variant of the early release scheme.[148] This would have meant that specific individuals would go forward for a determination by the Sentence Review Commission. If they had been sentenced and then applied for release, they would now have been released. While providing a mechanism for escapees who have already been convicted, it is difficult to apply this scheme satisfactorily to those who still wish to contest their innocence. Around April 2002, the government seemed to have moved to considering a form of amnesty. This, however, runs into two related problems: to what extent would any amnesty apply to both State and non-State actors; and to what extent would any amnesty, particularly one which extended to State actors, be compliant with international human rights law commitments, in particular the Article 2 standards of the ECHR, as recently interpreted by the European Court (see discussion below)? The recent crisis in the peace process has apparently halted implementation of these Weston Park Proposals, and it is likely that the issue of "on-the-runs" will be further addressed in the current round of negotiations, as linked to other issues, such as decommissioning.

---

146. *Id.*

147. Weston Park Proposals, *supra* n.140, at para. 20.

148. *See* Interview with Mike Ritchie, Coiste na n-Iarchimí (May 25, 2002); *see also* interview Brian Currin, Sentence Review Commission, May 28, 2002).

F. *Article 2 of the European Convention on Human Rights*

In May 2001, a development unrelated to the peace process took place, regarding Article 2 (right to life). It now holds significant implications for how the past is dealt with, and is probably in part responsible for the difficulties in implementing the Weston Park commitment on dealing with "on-the-runs," which existed prior to the current political crises. The European Court delivered judgement in four joined cases, *Jordan, Kelly, McKerr* and *Shanaghan* v. *United Kingdom*, unanimously deciding that the State had failed to protect the right to life of twelve persons by failing to carry out an effective and thorough official investigation following their deaths.[149] A full analysis of the cases is beyond the scope of this Article; however, it is dealt with briefly here, as it is important to attempts to deal with the past.[150]

The cases of *Jordan, Kelly,* and *McKerr* involved members of paramilitary groups and a civilian killed by security forces. Shanaghan was killed by Loyalist paramilitaries with the alleged active collusion of the State. The decisions in all four cases extended the jurisprudential direction toward interpreting Article 2 by requiring the State to move beyond negative enforcement, involving restraint in the use of lethal force, to positive enforcement, involving establishing adequate mechanisms for accountability after a killing by an agent of the State.[151] In particular, all four judgements referenced the need for an "effective official investigation." The facts of each case were slightly different, and the basis for the court's finding that each investigation in question had been inadequate was slightly different. However, in summary, the court found that the following types of deficits gave rise to an Article 2 violation: lack of independence given that investigators of the death (e.g. RUC) were in a hierarchical relationship with those who had done the killing (e.g. British army and RUC); the failure by the Director of Public Prosecu-

149. Hugh Jordan v. UK, Applic. No. 24746/94; McKerr v. UK, 34 EUR. CT. H.R. 553 (2002); Kelly and Others v. UK, Applic. No. 30054/96; Shanaghan v. UK, Applic. No. 37715/97. Judgement was made in each of these cases by the European Court of Human Rights at Strasbourg, on May 4, 2001.

150. For a full discussion of the case, *see* Fionnuala Ní Aoláin, *Truth Telling, Accountability and the Right to Life in Northern Ireland*, 5 EUR. H.R. L. REV. 572 (2002) [hereinafter Ní Aoláin, *Truth Telling*].

151. In so doing, it built on the jurisprudence of McCann v. United Kingdom, 21 EUR. H.R. REP. 97 (1996), and Kaya v. Turkey, 28 EUR. H.R. REP. 1 (1997), which had strengthened the procedural requirement of Article 2.

tions to give public reasons for decisions not to prosecute; and the inadequacy of the inquest system, on several grounds, as an accountability mechanism. The key to an official investigation being "effective" was its capacity to produce outcomes, namely, establishing the facts concerning a death, but also being capable of leading to a determination of whether force was justified under the circumstances.[152]

While the government has made a number of responses to the judgement, these are piecemeal and it can be argued that they do not come close to dealing adequately with the issues raised by killings by State security forces.[153] The Committee of Ministers is currently continuing to examine the information submitted by the government in its role of supervising the execution of the judgements of the Court.[154] Between 1969 and 1994, 350 people were killed by State forces.[155] As Ní Aoláin writes, these cases "represent a unique class of cases intimately linked with the progress and form of the conflict itself" and "an enor-

152. *Jordan*, *supra* n.149, at para. 106; *Kelly*, *supra* n.149, at para. 96; *McKerr*, *supra* n.149, at 113; *Shanaghan*, *supra* n.149, at para. 90. The judgments were reinforced with the later decision of McShane v. UK, 35 EUR. CT. H.R. 593 (2002) (extending the rulings to army killings and finding that the police investigators were in a hierarchical institutional relationship with those they investigated, and looking to the nature of the relationship between the police and the army on the ground at the time of the incident).

153. On March 19, 2002 the government sent a package to the Committee of Ministers of the Council of Europe, outlining the measures it intended to take to comply with the judgement. This package included a broad range of measures: the appointment of a police lawyer on human rights; the establishment of the independent Police Ombudsman's office; on-going inquests and litigation regarding investigations; police family liaison officers; the Human Rights Act responsibility of public authorities, including the DPP and Coroners; amendment to the Coroners' (Practice and Procedure) Rules (Northern Ireland) 1963 regarding compellability of witnesses; *ex-gratia* legal aid payments to families; and changes in the law relating to public interest immunity certificates. *See* NORTHERN IRELAND – ARTICLE 2 CASES: JUDGMENTS IN THE CASES OF JORDAN V. THE UNITED KINGDOM, MCKERR V. THE UNITED KINGDOM, KELLY AND OTHERS V. THE UNITED KINGDOM, SHANAGHAN V. THE UNITED KINGDOM (on file with author). Few of these measures were brought in as a direct result of the judgements, but others were the result of other processes, and have been criticized as failing to amount to an adequate response. *See* COMMITTEE ON THE ADMINISTRATION OF JUSTICE, THE UK RESPONSE TO JORDAN, KELLY, SHANAGHAN, AND MCKERR (2002).

154. Committee of Ministers, 819th (DH) Meeting, Annotated Agenda and Order of Business, Public Information Version, Sec. 4.2 (Dec. 3 2002, Dec. 5, 2002) (UK), *available at* http://cm.coe.int/stat/E/Public/2002/agendas/2002cmdelojot819.htm#P2710_139275.

155. *See* NÍ AOLÁIN, THE POLITICS OF FORCE, *supra* n.126, at 248-59.

mous accountability gap for the State."[156] Given the collusion-related facts of *Shanaghan*, this gap relates not just to killing by State agents, but to killings by paramilitary groups where some — and it is unclear how much — evidence of collusion with State forces exists.[157] This considerably widens the impact of *Jordan et al.* in terms of the numbers of cases affected: killings by the State and Loyalists together amount to around half of the killings in the conflict.

The decisions, therefore, provide a basis for requiring Article 2-compliant investigations in a potentially large number of cases spanning the conflict. A legal battle pressing for renewed investigations is on-going through domestic judicial reviews aimed at two distinct ends: first, arguing for changes in the inquest system, which could make the inquest suffice as an Article 2-compliant investigation for cases which have not yet had an inquest; and second, by arguing for new investigations for other relevant cases.[158]

Discussions among civic society as to how to deal with the past have tended to be unaware of the implications of Article 2 as regards killings where State agents were involved. Article 2 also, however, provides a basic requirement for criminal proceedings after non-State deaths, of which amnesties would seem to run afoul.[159] Indeed, curiously, Sinn Féin seems unaware of

156. *See* Ní Aoláin, *Truth Telling*, *supra* n.150, at 588.

157. Here, the Court particularly took into consideration the fact that the family was not permitted to raise issues relating to the loss of identity photographs by the security forces and the threats made to Shanaghan by the RUC officers — meaning that "serious and legitimate" concerns of the family and the public had been excluded from legal review. *Shanaghan*, *supra* n.148, at para. 111.

158. *See* In the Matter of Applications by Hugh Jordan for Judicial Review, NICA (May 28, 2002) (judicial review relating to whether the inquest should include a jury verdict on culpability in the case of death caused by agents of the State); In the Matter of an Application by Jonathon McKerr for Judicial Review [2003] NICA 1 (where the court found that there was "a continuing breach of Article 2(1) which requires to be addressed by the respondent Government" in the on-going failure to have an Article 2-compliant investigation). In this case, the Court merely made a declaration, stating that it would await the Committee of Ministers ruling on the government's package of measures before ordering relief. *See also* In the Matter of an Application by Jonathan McKerr for Judicial Review, NIHCt QBD (July 26, 2002) (arguing for a new investigation in the case of Gervaise McKerr). In addition, the father of Billy Wright was unsuccessful in judicially reviewing the Chief Constable's decision not to release to him the investigation file. The judge did, however, acknowledge the need for an effective investigation. IR. NEWS, Mar. 8, 2003, at 5.

159. Article 2(1) of the ECHR provides an express, positive obligation for States to provide the right to life "by law." The responsibility of the State as regards non-State

the contradictions and conflict between its support for amnesty for a small number of people on the one hand, and its pressure for accountability for State perpetrators of human rights abuses, on the other. However, it is unlikely that the government is similarly unaware. It can be speculated that the *Jordan et al.* decisions were responsible for the failure to progress amnesties for "on-the- runs," as discussed above.

On the one hand, the *Jordan et al.* decisions arguably make some type of a truth process, which could answer the Article 2 cases in a collective fashion, perhaps at the expense of full disclosure and linked to paramilitary concessions, more desirable to the government. However, such a process would need to be creatively designed to satisfy current Article 2 requirements, while fulfilling broader political goals. This may not be possible. Conversely, the fact that the scope of the judgement particularly impacts on killings in which the State was implicated, as opposed to non-State killings, means that until such a process is designed, the government is unlikely to implement *Jordan et al.* as requiring new investigations, without further legal challenge. The current indications are that this legal battle is one that may be prolonged indefinitely, pending other developments.

G. *Healing Through Remembering Project*

Various academic and voluntary sector debates have addressed aspects of dealing with the past.[160] While these have all contributed to the debate, one initiative in particular, has been aimed at comprehensively addressing the past, by aiming at the goal of "healing." In October 2001, a project called "*Healing Through Remembering*" was established by Victims' Support Northern Ireland, the Northern Irish Association for the Care and Resettlement of Offenders, and the Community Relations Council.[161] The project set out its vision as "[a]n acknowledgement of

actors clearly extends to the enactment of a general homicide law, and to securing its effective enforcement, with more stringent positive obligations where death occurs at the hands of security forces. *See* Colin Warbrick, *The Principles of the European Convention on Human Rights and the Response of States to Terrorism*, 3 EUR. H.R. L. REV. 287-314, 290 (2002).

160. *See, e.g.*, Economic and Social Research Council, Transitional Justice Seminar Series (run by Professors Ní Aoláin and Campbell, School of Law, University of Ulster), *available at* http://transitionaljustice.ulster.ac.uk.

161. The project emerged consequent to a visit by the former Deputy Chair of the South African Truth and Reconciliation Commission, Dr. Alex Boraine, and his subse-

the events connected with the conflict in and about Northern Ireland, and, in so doing, individually and collectively to have contributed to an understanding of, and the healing of, the wounds of society."[162] Its specific vision was to "identify and document possible mechanisms and realisable options for healing through remembering for those people affected by the conflict in and about Northern Ireland."[163] Although the project presented itself as a quasi non-governmental initiative, the Office of the OFMDFM Victims' Unit has thus far abrogated to it the consideration of "truth-telling."[164]

In June 2002, the *Healing Through Remembering* project made seven key recommendations, which were, in summary:

- Establishment of a network to link "diverse forms of commemoration and remembering work";
- Establishment of a storytelling process known as "Testimony";
- An annual "Day of Reflection";
- A permanent living memorial museum;
- "That all organisations and institutions that have engaged in the conflict . . . honestly and publicly acknowledge responsibility for past political violence due to their acts of omission and commission";
- (If acknowledgement is forthcoming) that inclusive and in depth consideration be given to "the establishment of an appropriate and unique truth recovery process" with local and international expertise;
- A Healing Through Remembering Initiative Committee that will be a visible expression of society's commitment to move forward while remembering and learning from our violent past.[165]

---

quent Report entitled "*All Truth is Bitter*" (1999). One of the recommendations of this Report was that it would be useful to hold a wide-ranging discussion to explore and debate ways of examining the past and remembering, so as to build a better future. This formed the basis for the *Healing Through Remembering* project.

162. HEALING THROUGH REMEMBERING PROJECT, THE REPORT OF THE HEALING THROUGH REMEMBERING PROJECT iii (2002).

163. *Id.*

164. The Victims' Unit Report acknowledges that the issue of truth and justice "is being examined currently by a separate project" which is "completely independent from the devolved administration." The Report notes that the project is due to submit its findings to the OFMDFM and British and Irish governments later in 2002, and notes that "in the light of this it is felt that it would not be appropriate to comment further on these issues at this stage." *See* RESHAPE, REBUILD, ACHIEVE, *supra* n.62, at para 3.20.

165. Transitional Justice Seminar Series, *supra* n.160, *passim*.

Central to the approach of the Report was that "[t]here is no single treatment for the healing process," but rather, a multiplicity of actions should be recommended. As regards truth processes, the Report offers a possible way forward, without the detail of a mechanism, but conditions this possibility on prior acknowledgement of wrongdoing by State and non-State groups. The Report suggests that the British and Irish governments should lead the way in acknowledging their own wrongdoing, with paramilitaries following suit.[166] The Report sets out a process for promoting and debating a "truth recovery process," which could be established subsequent to such an acknowledgement.[167] It therefore suggests that issues of accountability must await acknowledgement and this broader process.

IV. *DEALING WITH THE PAST: AN EVALUATION*

The above discussion illustrates that while there was no holistic mechanism for dealing with the past in the Belfast Agreement, it has been dealt with in a number of discrete, piecemeal measures. Mechanisms such as truth commissions, centrally provide for knowledge as to how and by whom people were killed, together with some measure of accountability through prosecution, punishment, or other measures, such as reparations. Mendez suggests that there are four "accountability" obligations for States which past-focused mechanisms should aim to deliver. He conceived of these as being rooted in a right for victims. The obligations are:

1. Investigate, prosecute, and punish perpetrators (right to see justice done);
2. Disclose to the victims, their families, and society all that can be reliably established about those events (right to know the truth);
3. Offer the victims adequate reparations (right to compensation and also non-monetary forms of restitution); and
4. Separate known perpetrators from law enforcement bodies and other positions of authority (right to new,

166. *See* HEALING THROUGH REMEMBERING PROJECT, *supra* n.162, at 53, at para. 5.6.5.

167. *Id.* at 54, at para. 5.6.6.

reorganized, and accountable institutions).[168]

Hayner points to a similar scope, suggesting that such mechanisms clarify and acknowledge the past, respond to the needs and interests of the victims, outline institutional responsibility, and facilitate accountability.[169] It can be argued that, in Northern Ireland, much of the basic information necessary to achieving these goals has been made available through the processes described in the audit. Which organizations committed which killings, a measure of accountability through prosecution and punishment, along with other measures aimed at victims, have all been delivered to some extent by discrete processes. This conclusion addresses the extent to which there are gaps, and whether a past-focused mechanism is a useful or necessary way to address these gaps.

A. *Accountability*

A measure of accountability for non-State actors was provided through criminal trials during the conflict and peace process. The prisoner release mechanism based on early release rather than amnesty, while controversial, arguably preserved the principle of accountability. There are, however, clear gaps in the accountability provided so far. First, in terms of the conflict as a whole, how much accountability of non-State actors was provided through criminal trials is not specifically known. Second, a clear gap in accountability exists as regards victims of State human rights abuses, in particular killings in which the State was directly or indirectly involved. The Bloody Sunday Tribunal, and the Weston Park "independent judge" mechanism, amount to a partial and mainly symbolic, rather than a systematic, addressing of this gap. Evaluation of their effectiveness must also await the completion of the tasks assigned. The *Jordan et al.* cases now establish clear criteria for what amounts to accountability in investigative terms. Third, while institutional responsibility for individual killings is largely known, there is a gap as regards any broader corporate or institutional responsibility of either State or non-State groups for the conflict *per se.* None of the official or unofficial mechanisms for the conflict are aimed at this broader

168. *See* Juan E. Mendez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 261 (1997).

169. *See* HAYNER, *supra* n.1, at 24-31.

"story," and indeed, many of the piecemeal measures (for example draft Bill of Rights measures, and policing reform) have been carefully crafted, so as to avoid engagement with broader narratives of fault. Lustration has been eschewed in favor of forward-looking institutional protection, explicitly in the area of policing, and implicitly elsewhere.

Most transitional justice discussions accept that some partiality in accountability is inevitable as a pragmatic matter. Accountability mechanisms often deal with only the most serious offences, limit time periods under consideration, and provide outcomes, which fall short of traditional notions of prosecution and punishment. Partiality due to practical and logistical constraints is often justified in terms of the underlying goals of transitional justice mechanisms: while partial processes may not present a comprehensive accounting, they are accepted as legitimate when they present a broad clarification of, and accounting for, corporate responsibility for the conflict.[170] However, the deficits in accountability in Northern Ireland are different in nature. Gaps in the accountability of State actors, and the absence of a mechanism for corporate responsibility for the conflict as a whole, represent not a practical compromise, but the hegemony of one contested (State) narrative of the conflict. According to this narrative, the State had no primary institutional responsibility, but merely responded to inter-communal conflict. Whether or not this narrative has any legitimacy, it is a fact that any basis for establishing its legitimacy is absent. This partiality cannot be justified in terms of the aims of the Agreement and related goals of truth-telling, as has been the case in contexts such as South Africa. Indeed, given that one of aims of the peace process and the Belfast Agreement would appear to be to legitimate Northern Ireland in the eyes of Nationalist/Catholic community, this partiality, in practice, stands to undermine this aim.

170. *See, e.g.*, Mendez, *supra* n.168, at 128 (stating that "a government will be in general compliance as long as it lives up to [the goals] even if in the end it obtains only a partial result."); *cf.* TEITEL, *supra* n.1, at 27-67 (noting that the "partial criminal sanction" characterises transitional societies' attempts to deal with the past, and is justified in terms of the goals of transition); Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1 (justifying the compromises in transitional justice in South Africa, in terms of the liberal democratic direction of the process).

B. *Victims*

Victims have been acknowledged in the peace process, in particular through funds aimed at addressing their needs. However, the failure to recognise the need for information as a key need particularly for victims of State violence, but also for victims of paramilitary groups, evidences a gap in the provision. At the community level, the victims' debate has also been an area where responsibility for the conflict has been contested through notions of "guilt" and "innocence," and discussions around hierarchies of victims. Attempts to address victims' needs have sought to avoid these debates in favour of a pragmatic, needs-based approach. However, the audit reveals that separating needs from analyses of the conflict is not always possible, as the Bloomfield Report, the Bill of Rights debate, and to some extent the *Healing Through Remembering* recommendations all indicate.

The separation of victims' measures from issues of accountability, may have positive effects and constitute a development from which other processes could learn. As Hamber and Wilson suggest, victims' needs are varied and contradictory.[171] Where measures for victims are delivered within the context of broader mechanisms, they are often tied into delivering concepts of accountability and/or reconciliation, which require the victim to "buy-in" to an official social narrative of the conflict. Hamber and Wilson argue that the "[N]ation-building discourses of truth commissions homogenize disparate individual memories to create an official version, and in so doing they repress other forms of psychological closure motivated by less ennobled (although no less reasonable) emotions of anger and vengeance."[172] Expecting victims to give up retributive desires in favour of reconciling narratives may not contribute to their "healing" at all. Mechanisms such as truth commissions may also politicize some victims' issues to their detriment. For example, locating financial assistance to victims within a "reparations" framework may cause the State to resist implementing payments until the wider issues of accountability and responsibility are settled, by which time payment may be easier to resist on grounds of financial constraints. Divorcing monies for victims from reparations may both facilitate their payment, and enable victims' needs to be

171. *See* Hamber & Wilson, *supra* n.13.
172. *Id.* at 36.

addressed relatively free from the constraints of wider political agendas. Symbolic reparation payments, however, may still be important, even if delivered separately from other support. Particularly where other forms of accountability are partial or missing, reparations may offer public State acknowledgement of wrong-doing, and with it, a measure of accountability.

Clearly, there are gaps in how Northern Ireland has dealt with the past. It is important to note, however, that many of these gaps could be filled by processes other than a once-off mechanism, such as a "truth commission." Some cases, like those submitted to Peter Cory, may be processed by public inquiries or other mechanisms; a broad response to *Jordan et al.* could be fashioned to deal with outstanding cases of State killings (direct ones at least); different paramilitary groups or even the State could initiate processes for examining their own culpability and generating public information about their role in the conflict; information around past accountability through trials could be audited by a well-designed research project. Non-governmental community projects could continue to fill in the qualitative picture and provide for a debate. Any of these measures would contribute to an understanding of the past, which is being built up.

In comparative situations, one of the motivations of establishing a holistic mechanism for the past was to create a set of mutual trade-offs in an attempt to bring a measure of accountability. Most notably, in South Africa, this involved a trade-off between truth (information and acknowledgement), and punishment. The audit for Northern Ireland reveals that some of the possible trade-offs that these mechanisms typically use have been pre-empted by developments thus far. Prisoner release, for example, has taken place without any linkage to repudiation of acts, public acknowledgement, or exchange of information. However, the audit also reveals a set of complex dynamics whose overall impetus may give different parties to the conflict some reasons to design and implement some of the above processes unilaterally.

The *Jordan et al.* cases must be dealt with in some form by the government, and would seem to require some type of broad response. The prevalence of the public inquiry model, with its adjudicative function and State defences, should not obscure the fact that the British government could volunteer information

through making files public, re-opening investigations, providing descriptions of fact with rationales to public and families, and engaging with public challenges. Similarly, the same political pressures that prompted paramilitary apologies, together with the very hegemony of State narratives of the conflict, create some measure of self-interest for paramilitary groups to provide processes and information as regards their own actions and rationales.[173]

C. *Self-Limiting Dynamic*

The audit reveals that while the approach to the past in Northern Ireland has enabled some issues to be moved forward and could be further developed, the piecemeal pattern also has a self-limiting nature. Further measures to deal with pro-active reintegration of prisoners and victims cannot be designed without implicitly taking a position on the nature of the conflict and the goals of transition. Anti-discrimination measures for ex-prisoners and rights for victims require some addressing of *which* prisoners and *which* victims are being discussed. In particular, a decision must be made as to whether to specify that these are victims and prisoners of the conflict, and if so, whether it is all such victims or prisoners or merely some. Justifications and denial of special measures for some conflict-related prisoners and victims must resort to notions of "fault" and "innocence," "deserving" and "less deserving," all of which are rooted in contested analyses of the conflict, and contested analyses of the goals (or existence) of transition. Issues which appear to be logically required by the "pragmatic" approach, such as extending the prisoner release program to deal with "on-the- runs," in implementation, run aground against the very debates over accountability and responsibility, which the piecemeal approach aims to avoid. Similarly, victim needs as regards acknowledgement of victimhood and accountability, cannot be addressed within a "past-neutral" framework. The decision of the ECHR in *Jordan et al.*, provides a reminder that this is not just a matter for internal political debate, but that it also has a normative element.

173. This pressure may be stronger for Republican groupings than Loyalist groupings, due to the politics of the process, but also because their own narratives are more directly oppositional to State ones.

D. *Societal Narratives*

The gaps in current provision, together with their self-limiting nature, reveal the failure to move towards an accepted social narrative of the conflict's causes and consequences. This is a key deficiency of the piecemeal approach. Furthermore, the Northern Ireland example reveals that such a societal narrative may play a more central role in the transitional justice mechanisms than is often acknowledged. Somewhat hidden in Mendez' and Haynor's articulation of the goals of past-focused mechanisms and their acceptance of partiality, lies an acceptance that a primary goal is to establish a single "narrative" of accountability for the conflict, rather than individual accountability alone.[174]

In Northern Ireland, the Belfast Agreement was fashioned so as to avoid the need for a societal narrative, and this has continued to underwrite developments relating to the past. The above audit poses the question as to whether the peace process can continue without a specific forum for addressing competing narratives about the conflict. Key questions arise as to whether, to be workable, such a forum requires a degree of pre-existing political consensus as to the past, or whether, such a forum could have a role in constructing that consensus.

Teitel, in one of the most interesting contributions in this area, suggests that in times of transition, legal institutions are both "constituted by, and constitutive of" transition.[175] To apply this to the current discussion, a past-focused mechanism may emerge and develop as a dynamic response to the need to address the past, but through its working practices it will shape the very direction of transition. This may well be the best way of understanding the types of legal institutions, which emerge, and how they approach transitional dilemmas. Yet, the discussion begs the question of what constitutes the best practice approach to designing such an institution. In Northern Ireland, where the goals and even the existence of transition are contested, it is precisely the capacity of a past-focused mechanism to consolidate the direction of transition that currently forms a stumbling block to any such mechanism being designed. Different parties fear

174. *See* TEITEL, *supra* n.1, at 69-118 (indicating the dynamics around creating "official" histories of conflicts).

175. *Id.* at 6.

that the wrong mechanism might consolidate the "wrong" transition.

Interestingly, comparative examples are not entirely encouraging in evidencing the ability of transitional justice mechanisms to construct societal histories in the absence of a pre-existing inter-communal consensus as to the past. The designing of a mechanism capable of producing a societal narrative, or the move of previously designed mechanisms towards this product, tends to happen some time after a political settlement has, in effect, already established an implicit narrative of the conflict. The Truth and Reconciliation Commission in South Africa was not a negotiated mechanism; it was a mechanism established by the new government on foot of a negotiated provision touching on amnesties.[176] The Truth and Reconciliation Commission provides different layers of "truth," but one of these layers is a societal truth about the conflict. In one short paragraph in a five-volume report, the Commission states:

> [G]ross violations of human rights were perpetrated or facilitated by all the major players in the conflicts of the mandate era . . . [a]t the same time, the Commission is not of the view that all parties can be held to be equally culpable for violations committed in the mandate period . . . [t]he preponderance of responsibility rests with the [S]tate and its allies.[177]

This "truth" matched with the African National Congress' ("ANC") analysis of the conflict, an analysis that had already been implicitly accepted by all parties in the negotiated Interim Constitution.

Similarly, it was only with the trial of Milosovic, that the International Tribunal on Former Yugoslavia directly, publicly engaged with the meta-conflict that underwrote the violent conflict in Yugoslavia, and with competing narratives of guilt and innocence as regards the conflict as a whole. The NATO war with the Federal Republic of Yugoslavia and the deposition of Milosovic arguably marked the final step towards a dominant narrative as to the responsibility for the conflict, which enabled this shift. The very picture of one of the signatories of the Dayton Peace

176. *See* P. Parker, *The Politics of Indemnities, Truth Telling and Reconciliation in South Africa: Ending Apartheid Without Forgetting*, 17 HUM. RTS. L.J. 1 (1996); *see also* BELL, *supra* n.6, at 273-78.

177. 5 TRUTH AND RECONCILIATION COMMISSION, FINAL REPORT ch.6, at paras. 66-68 (1998).

Accords on the dock, indicates a complex re-writing of the settlement, which was both reflected in the trial, and consolidated by it.

Sierra Leone arguably provides another example, where truth processes proved difficult to implement following a clear compromise agreement, and only became consolidated after the agreement had collapsed and been essentially re-written. A Truth and Reconciliation Commission was provided in the Lomé Peace Agreement, which also controversially provided an amnesty for perpetrators of atrocities.[178] Renewed fighting frustrated the implementation of this Commission, but also caused the government to reassess the amnesty and approach of the United Nations (which, as observer, had dissented from the amnesty), resulting in the establishing of a Special Court.[179] Again, approaches to justice changed over time and became easier to establish, as compromises gave way to dominant narratives of responsibility, although the effectiveness of either mechanism must await further evaluation.

Policy discussion over transitional justice mechanisms has often focused over the much-vaunted clash between justice and peace, principle and pragmatism, which are often posited to lie at the heart of transitional justice debates.[180] The Northern Irish example, along with others, suggests that this clash may change over time.[181] Peace processes are dynamic and often attempt to move from immediate goals of "stopping the war," to longer-term institution-building aimed at ensuring participation and "positive" peace.[182] As they so move, common understandings of the causes and costs of conflict may emerge. Instead of focusing on "how much principle" is needed *versus* what is pragmatically possible, this insight raises a different set of questions, which future debate might well focus on. How should societies move to-

---

178. Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999, art. IX.

179. Established by U.N. Security Council Resolution, U.N. Doc. S/RES/2000/1315; *see also* Special Court Agreement (Ratification) Act (2002) (Eng.).

180. *See supra* n.1.

181. *See* TEITEL, *supra* n.1, at 62-66 (considering "the paradox of the passage of time").

182. *Cf.* Fen Osler Hampson, *Making Peace Agreements Work: The Implementation and Enforcement of Peace Agreements Between Sovereigns and Intermediate Sovereigns*, 30 CORNELL INT'L L.J. 701 (1997) (addressing the implications for justice/peace debates of the tensions between long-term and short-term demands of peace-building).

wards common goals for transitions? What normative content should these goals have? How is the transition towards these goals managed over time? At what points might past-focused mechanisms be useful in this process? Which mechanisms are useful at which time? To what extent can and should future possibilities be left open by mechanisms established? The Northern Irish situation exhibits possible ways of staging processes relating to the past, while not perhaps evidencing best practice in how this has been done. The broad notion of "staging" deserves further creative attention, as having taken place in other conflicts, and as potentially offering new insights for managing transitions from violent conflict.