

Utopia and the Doubters: Truth, Transition and the Law

Colm Campbell & Catherine Turner¹

Abstract

Truth commissions have an intuitive appeal in squaring the circle of peace and accountability post-conflict, but some claims for their benefits risk utopianism. Law provides both opportunities and pitfalls for post-conflict justice initiatives, including the operation of truth commissions. Rather than adopting a heavily legalized approach, derived from Public Inquiries, an 'holistic legal model', employing social science fact-finding methodologies to explore pattern of violations, and drawing appropriately on legal standards, may provide the best option for a possible Northern Ireland truth commission.

Introduction

The appeal of truth commissions is immediate and intuitive: the circle of post-conflict truth and justice can be squared; public 'acknowledgment' of wrong-doing offers an alternative to divisive prosecution; the grip of a conflicted or authoritarian past can be eased from the politics of the present; and all of this can be achieved in a way that generates reconciliation between former adversaries. At least in terms of frequency of

¹ Colm Campbell and Catherine Turner, both of the Transitional Justice Institute, University of Ulster (UU) (www.transitionaljustice.ulster.ac.uk). Research for this article was assisted by the award of a Senior Research Fellowship by the Leverhulme Trust to the first named author. An earlier version of this paper was presented at a conference on 'Post-Conflict Truth and Justice in Peru and Northern Ireland', Chatham House, London, 2006. Thanks to Brandon Hamber (UU), Fionnuala Ní Aoláin (UU), Todd Landmann, University of Essex and Christine Bell (UU) for comments on drafts.

adoption, the truth commission formula has been a striking (and increasing) success,² with a prominent place in the 'transitional justice' landscape.³ Since the first truth commission in Uganda in 1974, the ensuing decades have seen around thirty commissions,⁴ spanning four continents. The majority of these commissions have been established since 1989, with only 6 occurring before that time, predominantly in the mid-Eighties. The 1990s saw a dramatic increase in the use of truth commissions worldwide, with 12 being established in the period between 1990 and 2000. That truth commissions remain a popular mechanism for addressing past conflict is evident in the fact that 10 new commissions have been established since 2000, with apparent agreement in 2008 on the establishment of a commission in Kenya.

If this intuitive appeal is obvious, so too is a creeping utopianism in claims for the benefits of the truth commissions model and/or for post-conflict justice initiatives in general.⁵ And as with all utopias, doubters soon emerge. One set of criticisms that has attracted significant attention, has queried the supposed link between peace-promotion and the operation of truth commissions. Claims that truth-telling in the aftermath of conflict promotes peace by deterring future conflict, by preventing serious human rights

² Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York and London: Routledge, 2002).

³ The emerging field of 'transitional justice' is generating a vast literature. For some key critical analyses see Ruti Teitel, *Transitional Justice* (Oxford, Oxford University Press, 2000) and Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge and New York: Cambridge University Press, 2004).

⁴ Todd Landman, *Studying Human Rights* (London and New York: Routledge, 2006), 107-125; Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge and New York: Cambridge University Press, 2006), 317-325.

⁵ This is not to deny the possible benefits of utopian thinking in that the 'activating presence' of such thinking can 'set things in motion', even if Utopia is never attained. See Peter Young, 'The Importance of Utopias in Criminological Thinking', in 32 *Brit. J. Criminol.* 423 (1992), drawing on Zygmunt Bauman, *Socialism: the Active Utopia*, (London: Allen and Unwin, 1976).

abuses, by promoting democracy and social healing, and by educating towards a human rights culture are, it is claimed, largely empirically unproven.⁶ Others have been primarily concerned to critique the normative frameworks (whether legal or conceptual) that have dominated debates on post-conflict justice,⁷ with a secondary focus on the place of peace in these frameworks.

This article explores skepticisms in relation to aspects of law's role in the aftermath of conflict, including law's relationship to 'reconciliation' and 'truth'. It uses as a case-study the emerging debate on a possible truth commission for Northern Ireland in the wake of the 1998 Good Friday/Belfast [peace] Agreement (the '1998 Agreement').⁸ Part 1 sets out a range of problems associated with the role of law in the aftermath of violent political conflict. This focuses primarily on the invocation both of substantive law and of legal procedure by truth commissions, and proceeds on the assumption that legal dilemmas affecting truth commissions are best understood as a subset of the legal dilemmas of post-conflict justice in general (although this is not to suggest that truth commissions should be understood primarily as legal entities).

This leads to an exploration of law's place in some critiques of the employment of the discourse of post-conflict 'reconciliation'. One aspect that has proved particularly problematic is the formula that has sometimes been adopted of tasking truth commissions

⁶ David Medeloff, "Truth Seeking, Truth Telling and Post Conflict Peacebuilding: Curbing the Enthusiasm?" 6(3) *International Studies Review* (2006): 355.

⁷ For discussion of some criticisms, see Jonathan Tepperman, "Truth and Consequences" *Foreign Affairs* (March/April 2002): 128.

⁸ On the Agreement see Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, "The Frontiers of Legal Analysis: Re-Framing the Transition in Northern Ireland." 66 *Modern Law Review* (2003): 317-45.

to produce simultaneously both reconciliation *and* truth (as in South Africa, Chile and Timor-Leste). This latter juxtaposition is explored against a backdrop of contemporary skepticism about the viability of meta-narratives (*the* one truth), and indeed of the viability of the notion of 'objective' truth of any sort.

Part II grounds the discussion by reference to the Northern Ireland case study.⁹ The complexity of the Northern Ireland debate makes it a particularly useful site of exploration. Two sovereign states (the UK and the Republic of Ireland) are centrally involved, both with well-developed (and related) legal systems and legal cultures, and a strong formal commitment to the ideology of 'rule of law'. Both also have extensive (and overlapping) webs of international law commitments (including those arising from membership of the EU and the Council of Europe), with the result that law inescapably forces itself onto the debate in Northern Ireland. Indeed the 1998 Agreement is both a political deal partly concerned with domestic legal change, and an international law treaty (registered with the UN). The quarter century of conflict that preceded the 1998 Agreement saw significant violations by both state and non-state entities, challenging law to provide vehicles to 'capture' both sets of wrongs. That Agreement also employs a somewhat rigid democratic consociational model that has, without a prior reconciliation mechanism, placed former adversaries at the centre of government. Pointedly too, the 1998 Agreement said little about 'the past', yet there exists in many quarters a sense that diverse aspects of that past, involving state and non-state actors, demand attention. Unsurprisingly therefore, the broader Northern Ireland peace process has seen a host of

'piecemeal' (frequently law-based) initiatives in that regard,¹⁰ thereby providing concrete examples for discussion of truth-seeking, and particularly of law's possible contribution.

I. The Trouble with Law?

At least five clusters of doubts congeal around the role of law and legal procedure in the post-conflict environment: the question of what law can "capture" and "see"; dilemmas of peace *or* justice; the cost of legal procedure; law's contribution to reconciliation; and law's relationship to truth. Most have some relevance to the operation of truth commissions.

What Does Law Capture and See?

As regards the first of these, the most celebrated contribution is Arendt's assertion that Nazi atrocities '...explode the limits of the law, and that is what constitutes their monstrousness. For these crimes no punishment is severe enough.'¹¹ The result has been to provoke doubt as to whether the criminal process (or perhaps any law-based process) can, in a meaningful way, frame charges, provide penalties, or make judgments that capture the specific awfulness of mass atrocity.

⁹ For some application of transitional justice analyses to the Northern Ireland see the symposium at *Fordham International Law Journal Special Issue* (2003); see also Kieran McEvoy and Heather Conway "The Dead the Law and the Politics of the Past" *Journal of Law and Society* 31(4) (2004): 539.

¹⁰ Christine Bell, "Dealing with the Past in Northern Ireland" *Fordham International Law Journal* 26(4) (2003):1095. The most recent of these initiatives is the Consultative Group on the Past, a group appointed by the Secretary of State for Northern Ireland, and chaired by Robin Eames and Dennis Bradley to consult across the community on the best way to deal with the legacy of the past in Northern Ireland. See www.cgpmi.org

¹¹ *Hannah Arendt/Karl Jaspers Correspondence, 1926- 1969* eds Lotte Kohler and Hans Saner (R Kimber trans) (New York: Harcourt brace Jovanovich, 1992).

A distinguishable criticism is that law 'sees' only a limited range of wrongs. The origins of this critique can be traced to feminist analyses of law's place in consolidating patriarchy, and particularly in law's employment of the 'public'-[visible] 'private'-[invisible] divide. Often conflict is cast in terms of identifiable criminal acts, with a focus on murder and torture, for example, reinforcing the attitude that the conflict has been primarily about physical violence. Globally visible events in this category are quickly placed onto the law-making agenda. As a result, law comes to reflect and regulate this limited definition of harm. What happens in the 'private' sphere is deemed to be of less political significance. Excluded from the legal definition of violation are violations experienced in the home or the community and less visible in the public narrative of conflict, but of which women bear the brunt. They may take the form of socio-economic exclusion, the violation of the home or even the destruction of the family. These violations, whose impact can be as profound as those of civil and political rights, or of physical violation, often go unnoticed, or at least unmentioned.¹²

This dominant interpretation of events gradually weaves its way into the narrative of the conflict with the result that when truth commissions are established it appears natural that their focus should be on 'the most serious' violations, a standard set with reference to law. In this way the law has served to delimit what truth commissions will and will not be mandated to investigate, without any appearance of a conscious choice having been made to focus on one set of violations at the expense of another. The broader impact of this when it comes to transition is that it reinforces a particular narrative of the conflict,

¹² See generally Fionnuala Ní Aoláin and Catherine Turner, "Gender, Truth and Transition" *UCLA Women's Law Journal* 16 (2007): 229.

potentially mitigating the transformative potential of a truth commission. Whereas the report produced by a truth commission is intended to provide a basis for moving forward, and away from the politics of the past, the absences of alternative voices, of those whose experience has been different or does not match the narrative sought, may undermine the potential for deeper social and structural change. The limitation of accountability to categories which are prescribed by law therefore excludes a large part of the everyday experience of those, particularly women, who live in conflicted societies.¹³

Variants of this criticism also have resonance outside the sphere of gender:¹⁴ one implication of law's normativity may be the employment of relatively rigid categories. If a violation 'fits' the category it is 'visible'; if not, it is 'invisible'. Definition of these categories may lag behind societal expectations, particularly behind the expectations of the most disenfranchised groups. A related point is that some categories of rights in international human rights law are structured in a way that facilitates adjudication on precise claims of breaches, whereas others are not. This may operate to orientate discussion of violations towards those areas in which clear determination can be relatively easily made (perhaps due to the presence of well-developed adjudicative tools), and away from those in which a programmatic approach to rights-promotion may be the norm. Most obviously, this may operate to orientate discussion on violations of civil and political rights to the neglect of social, cultural and economic violations, a criticism that could be leveled across the board at truth commissions. Part of the issue here may be that

¹³ *Ibid.*

¹⁴ See for instance the critique of 'legalism' in transitional justice discourses in Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice" *Journal of Law & Society* 34 (2007): 411.

truth commissions are frequently promoted as alternatives to prosecution strategies. This means their focus is frequently on rights, the violation of which could be cast as criminal charges (e.g. violation of the right to life might amount to the crimes of murder, a war crime, or a part of a crime against humanity). Conflict-related violations that are incapable of being framed as criminal charges (for instance violation of most social and economic rights), may be ignored.

There is also the problem that whereas crimes by state operatives may be relatively easily framed as violations of civil and political rights, this may not be the case with violations by non-state entities (NSEs) such as guerrilla or terrorist groups. Such groups are not technically bound by international human rights law (although they may be subject to international humanitarian law).¹⁵ While the origins of truth commissions can be traced to the problem of dealing with the legacy of authoritarian rule, the model is now as likely to be drawn upon in response to the legacy of intra-state violent political conflict, in which a multiplicity of crimes may have been committed by both state and NSEs.

The final point under this heading relates to the hegemonic quality of law – its tendency to buttress the status quo, reflecting a legal culture founded on elite values.¹⁶ This criticism is not specific to post-conflict justice initiatives; rather, it is a criticism of law in general, that may have some applicability in post-conflict scenarios. Accordingly, it may

¹⁵ See generally, Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, (Cambridge: Cambridge University Press, 2002), and Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002).

¹⁶ For analyses of law along these lines (without reference to post-conflict justice), see Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (New Haven: Yale University Press, 1974); Michael McCann, (ed.), *Law and Social Movements* (Aldershot & Burlington: Ashgate 2006); and

be claimed, law is biased against challenging elite violations. In transitions in which a clear line can be drawn between the authoritarian 'past' and the democratic 'present', this may be less of a problem. The legal institutions of the old regime may be seen as so tarnished as to be incapable of mounting an effective challenge to the new, or they may have been abolished or superceded (for instance by a new Constitutional Court as in South Africa). Or indeed, it might be claimed that in the new dispensation, law may tend to buttress the new elites at the expense of the old. However, where violent conflict has taken place in a democracy, there may be particular difficulties in getting the state to recognize its wrongdoing. There may no easy line to draw between the authoritarian past and the democratic present, with the result that the state's actions during the conflict appear clothed in the garb of democratic legitimacy. Accordingly the institutions of the state (legal and otherwise), may be well placed to resist change.¹⁷

Peace or Justice?

The second area of skepticism overlaps with aspects of the first, since it also addresses rigidity springing from law's normativity. But in this case the critique is not about the rigidity of legal categories, but that of legal imperatives – specifically the legal imperative to prosecute. This is taken to mean that the most serious crimes, such as torture, grave breaches of the Geneva Conventions, and crimes against humanity, cannot lawfully be amnestied. This can lead, it is claimed, to two problems. The first is that peace-making by its nature, involves dealing with violent adversaries, some or all of

Richard Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (London: Routledge, 1995).

¹⁷ See Fionnuala Ní Aoláin and Colm Campbell, "The Paradox of Transition in Conflicted Democracies" *27 Human Rights Quarterly* (2005): 172.

whom may have committed serious crimes. Just as turkeys don't vote for Christmas, elites are unlikely to engage in peace negotiations where the outcome is likely to be their prosecution. The second problem is associated with the South African formula whereby violators were incentivised to 'tell all' at commission hearings by the prospect of amnesty. If amnesty is unavailable, so also (it is claimed) may be aspects of truth. Although this approach has yet to be adopted elsewhere, dilemmas under this heading have become ingrained in the discourse on truth commissions in general.

The Cost of Legal Procedure

The third area of skepticism has less to do with the legal norms applied, than the process by which that application takes place, though here again claims of law's hegemonic quality also surface. The criticisms here could apply both to common law and civil law systems, but they may have particular salience in relation to a particular device for truth-eliciting – the common law 'public inquiry'. Although partly inquisitorial, the procedures of public inquiries draw heavily on the adversarial common law tradition. This risks turning truth-eliciting into a lawyer's game (or bean feast) in which the capacity to draw out or suppress truths may depend to a significant extent on the strength of legal advocates. This strength may be evidenced in cross-examination of witnesses, and in the ability to convince superior courts, when judicially reviewing inquiries, of the value or otherwise, of permitting or preventing the suppression of information (typically on security grounds). Aggressive cross-examination risks leaving victims' families feeling doubly violated; those seeking evidence of law's hegemonic qualities may point to favourable treatment of security force witnesses in the process; a narrowly legal forensic

examination may focus attention away from aspects of context that many consider vital, with the result that inquiries may replicate the failings of criminal trials in this respect. Continuous challenge in the superior courts may cause the process to lose impetus; and the highly legalistic nature of the processes may mean that procedural changes or manipulation by those devising the inquiries framework may have a marked substantive effect on their capacity to elicit truth.¹⁸

Law and Reconciliation?

Identifying a coherent theory of law's place in post-conflict 'reconciliation' is not easy,¹⁹ not least because of the mercurial quality of the term, a quality due in part to the secular transposition of a theologically rooted concept.²⁰ Reconciliation has a strong resonance in Judaeo-Christian thought, beginning with the expulsion from Eden: the relationship between mankind and the Deity has been broken, leading to the need for forgiveness and healing. The phrases 'reconciliation' and 'conciliation' are now used virtually interchangeably, but if their origins are examined, it is clear that 'conciliation' implies a pre-existing unity (from the latin 'conciliare' to combine), and re-conciliation implies the re-creation of a unity that has been fractured. From this springs the theological imperative to restore the relationship between the Deity and either humanity in general or individual humans (hence the related concept of 'atonement' the origin of which also implies the re-creation of a former unity ('at-one-ment')).

¹⁸ See Marny Requa, "Truth, Transition and the Inquiries Act 2005" (2007) 4 *European Human Rights Law Review* 404.

¹⁹ For some incisive contemporary analysis of 'reconciliation' in a transitional context see Andrew Schapp, *Political Reconciliation* (London and New York: Routledge, 2005), and of law and reconciliation see Scott Veitch (ed.), *Law and the Politics of Reconciliation*, (Aldershot and Burlington: Ashgate, 2007).-

Conceptual transposition across disciplines is never easy. In the context of transitional societies it is possible to explore [re-]conciliation at two levels of abstraction. The higher focuses on the recreation of a bond between former adversaries on the basis of a common bond of humanity. This is frequently cast in term of an 'enemy'/'other' who has been treated as a dehumanized entity during the conflict, a process that reconciliation reverses by recognizing her humanity. But in any vibrant democracy, differences of class, gender and ethnicity are frequently strongly articulated. Politics in democratic societies is not about the removal of conflict – it is about channeling conflict through peaceful, democratic practices and institutions. On this understanding, opponents are to be seen as adversaries whose views are to be challenged, rather than as enemies to be defeated or eliminated. The centrality of conflict in a democracy means that such politics has a vital agonistic dimension,²¹ and legal claims-making is frequently a means of giving expression to this agonism. A notion of reconciliation insisting on simplistic concepts of societal togetherness (or at-one-ment) may have difficulty in incorporating such agonism, casting law as the enemy of reconciliation. At a lower level of abstraction, conciliation might be seen as building a shared society; in some deeply divided societies there may have been precious little sharing, with the result that at this level, what is proposed is an original conciliation rather than a re-conciliation.

²⁰ The South African TRC drew somewhat uneasily on both religious and secular concepts of reconciliation. See Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), 98-111.

Those who see ethnic antagonisms as caused by self-interested power-elites, and argue that law's role is to prosecute these 'big fish', typically focus on reconciliation at the higher level of abstraction. Reconciliation is seen as springing from such prosecutions, as each ethnic group comes to realize that it was not an opposing group that was responsible for the violence, but rather the leaders on both sides. In this vein as well, a place is envisaged for 'commission of truth based on popular participation or public gestures of atonement by leaders'²². One weakness of these views is that they may downplay latent pre-conflict ethnic antagonism with a rosy view of pre-conflict societal conciliation. It may be more productive to recognize that ethno-national divisions can run very deep, historically, socially and psychologically; that attributing blame to a handful of leaders risks scapegoating; and that if conciliation is to mean not simply a common bond of humanity, but a bond of humanity *as part of the same society*, re-conciliation at a high level of abstraction is likely to proceed (if at all), only in parallel to a process of conciliation at a lower level.²³

Another quandary with reconciliation has to do with the instrumental benefits for which the discourse has been adopted. A critique from some quarters in South Africa is that the concept may have been employed partly to camouflage a deal whereby white elites lost political power but retained economic power, while Black elites gained political power and some economic power, in a process that left much of the black population economically

²¹ For views of democratic politics as agonistic encounters see Chantal Mouffe, 'Deliberative Democracy or Agonistic Pluralism' Political Science Series, Institute for Advanced Studies, Vienna (2000), and Schapp, *supra* note 19.

²² Payam Akhavan, "Justice in The Hague, peace in the former Yugoslavia? A commentary on the United Nations war crime tribunal" *Human Rights Quarterly* 20(4) (1998): 737. Our emphasis.

²³ For some reflections on related themes see Antonia Handler Chayes and Martha Minow (eds.), *Imagine Coexistence: Restoring Humanity After Violent Ethnic Conflict* (San Francisco: Jossey-Bass, 2003).

disenfranchised.²⁴ Once such deals are given the required patina (perhaps through the operation of a legally constituted truth and reconciliation commission), to appear to question them may open the questioner to accusations of harming reconciliation. Law therefore risks being complicit in a renewed disenfranchisement.

Truth, Reconciliation, Hubris and Law

An overlapping problem has to do with the relationship of reconciliation to truth (or truths). To task a body to produce both truth and reconciliation may risk subordinating truth to the demands of a nebulous concept of reconciliation. This may require the suppression of truths that may be seen to be antipathetic to reconciliation, and the selection and championing of only those truths useful in a reconciliation-focused teleology. Law may be implicated where this process is executed through a legally constituted process, where 'useful' legal norms are drawn upon, and 'inconvenient' norms ignored. Not all victims may seek reconciliation, or if they do, it may only be after a process of retribution. This teleology risks airbrushing feelings such as resentment out of existence, but such feelings may be quite widespread post-conflict, and also have a keenly articulated (typically Nietzschean) philosophical heritage.²⁵

Another set of doubts raises the spectre of hubris in relation to claims for the potential of post-conflict truth eliciting. One cluster surrounds the viability of truth. The most radical critique is orientated towards what Cohen has referred to in this context as the

²⁴ Brandon Hamber, "Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland" *Fordham International Law Journal* 26 (2003): 1074, 1080.

²⁵ Brandon Hamber and Richard A. Wilson, "Symbolic Closure through memory, reparation and revenge in post conflict societies" *Journal of Human Rights* 1 (2002): 1.

'postmodernist black hole'²⁶. From a postmodernist perspective, the truth commission may establish a 'truth', but this truth is devoid of any 'objectivity'. A less radical critique springs from contemporary doubts about the viability of historical or social meta-narratives (doubts given added impetus in East and Central European transitions by the perceived failure of Marxism following the Fall of the Wall). On this view, claims that a truth commission (or post-conflict trial), could establish *the* [one overarching] truth about a conflicted or authoritarian past are misplaced, since such a truth would have to rest on an illegitimate meta-narrative. This critique though differs from the former, in that it accepts that it may be possible to establish some truths post-conflict, and that such truths may have claims to objectivity (at least that degree of objectivity that attaches to being in accordance with the best available data). Law may be seen as providing a useful reference point in this regard in that it provides pre-existing norms, not specific to particular conflicted societies, around which data can be collected. Truth commissions with a freedom to draw on a wide range of norms, and untrammelled by conventional legal procedure may have some advantages over prosecution.

Further doubts relate to this data, and specifically how (and from whom and by whom) it might be assembled? One critique (largely derived from the South African experience) questions assumptions that submissions to truth commissions (and particularly commission hearings) provide adequate sources.²⁷ The hearings may virtually monopolise the work of

²⁶ Stanley Cohen, "State crimes of previous regimes: Knowledge, accountability and the policing of the past" *Law and Social Inquiry* 20 (1995): 12; See also Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Polity, 2001).

²⁷ Audrey Chapman and Patrick Ball, "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa and Guatemala" *Human Rights Quarterly* 23 (2001):1.

commissioners. Since giving space to all victims who wished to testify would be logistically impossible, there is an inevitable process of selection aimed at achieving a representative or reflective group of victims. Since this selection involves pre-determination as to what the appropriate violations to be examined are, it risks prejudging the substantive issue. It might also be argued that to create a mechanism where such hearings operate, in effect, as prime data sources, risks confusing two goals: Providing a forum where victims can recount their experiences may be a worthwhile objective in its own right, meeting strong social expectations; collecting appropriate levels of data from which overall conclusions can be drawn may be quite another.

There may also be a risk that highly ambitious notions of truth commissions as producing the definitive account of aspects of 'the past', may set the commission (and the lawyers centrally involved in the process) up as a substitute for historians, by an implicit claim that they can function *as* historians. Such claims may smack of hubris, and face the objection that historical evaluations are necessarily contingent and subject to re-evaluation by future generations of historians. Insofar as truth commissions are the articulators of history, that must also be true of their work. The outcome may be to question any claims for the 'definitiveness' of overall truth commission findings, and to leave the work of commissions open to methodological criticism from professional historians.

The final critique relates to the question of the ownership of truth[s]: The starting point here is the oft-quoted claim that truth commissions can [help] create 'a shared social narrative' [among/between previously conflicted groups]. This criticism overlaps with

those articulated earlier. Is 'sharing' predicated on the assumption that previous social divisions have been overcome and that 'at-one-ment' has been achieved, or does it assume that the narrative produces the degree of unity assumed by 'sharing'? If the former, the assumption of a shared social narrative only seems possible once ambitious (perhaps overblown) notions of reconciliation have been already been achieved; if the latter, there may be a risk of distortion of the narrative in order to meet the requirements of 'sharing'. In either case, law may be complicit.

II The Northern Ireland Case Study

As discussed above, Northern Ireland can be considered *the* site for the exploration of the legal dimension/dilemmas of truth commissions. Amongst the web of international commitments ratified by both the UK and the Republic of Ireland are the Rome Statute of the International Criminal Court (which amongst other things, helps to define current norms on the imperative to prosecute, and therefore to delimit the amnesty option), and the two 1977 Protocols to the Geneva Conventions (Protocol II of which obliges states in the aftermath of high intensity internal conflict to 'grant the broadest possible amnesty'²⁸). Both states also provide contemporary examples of the opportunities and threats provided by attempts to address allegations of past wrong-doing through the common law 'public inquiry' model: principally the Bloody Sunday Inquiry (the 'Saville Inquiry') in Northern

²⁸ Article 6(5) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.

Ireland,²⁹ and the various inquiries into discrete allegations of corruption and police malpractice in the Republic of Ireland.

Given that the Saville Inquiry represented a dedicated vehicle for addressing a key episode from the conflict, it provides an important reference point which any analysis of law's role in dealing with Northern Ireland's past will need to take account of. The Inquiry was established by the British Government in 1998, pursuant to the Inquiries Act 1921, to investigate the events of Bloody Sunday (when, in January 1972 13 people died when troops opened fire following disturbances at a civil rights march). Comprising both British and international judges, Tribunal hearings lasted from March 2000 until January 2005, during which time oral evidence was heard from 921 witnesses,³⁰ both civilian and military. The Tribunal also received around 2,500 written statements. Although stated that the Inquiry should proceed with "fairness, thoroughness and impartiality"³¹, the proceedings have not been without controversy. While the terms of reference of the Tribunal leave scope for investigation into the wider context of the events of Bloody Sunday, in practice the Tribunal tended to restrict its cross examination to immediate context, with the result that it failed to adequately address the legacy of the Widgery

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²⁹ Angela Hegarty, "Truth, Law and Official Denial: The Case of Bloody Sunday" *Criminal Law Forum* 15 (2004): 199.

³⁰ Report of the Healing Through Remembering project, *Making Peace with the Past: Options for truth recovery regarding the conflict in and about Northern Ireland* (Belfast: Healing Through Remembering, 2006), <http://healingthroughremembering.org>.

³¹ For the terms of reference of the Inquiry see <http://www.bloody-sunday-inquiry.org.uk/index2.asp?p=7> (accessed 15 Jan 2008).

Report³² produced shortly after the original incident, and the injustice that it was felt to have caused.³³

An overall judgment on the extent to which the work of the Inquiry illustrates the hegemonic quality of law must await the Inquiry's report. However, differences between the treatment of civilian witnesses and soldiers have raised questions as to the capacity for such public inquiries to act impartially and in such a way as to achieve legitimacy in the eyes of the public.³⁴ Cost has also been a significant factor in evaluating the work of the Tribunal: the total bill now exceeds £175 million,³⁵ or about twenty times the typical cost of truth commissions.³⁶ More than half these costs have been consumed by legal fees (totaling approximately £86 million³⁷). A significant portion of these have been accumulated not in the Tribunal itself, but in legal challenges in the civil courts to aspects of the Tribunal's operation – typically, in applications by the Ministry of Defence designed to reduce the exposure of military witnesses and sources.

While this very high cost can partly be explained in terms of some unique features of the exercise, the example of the Republic of Ireland suggest that costs of this order of

³² 'Report of the Tribunal appointed to inquire into the events on Sunday, 30th January 1972, which led to loss of life in connection with the procession in Londonderry on that day' by The Rt. Hon. Lord Widgery, O.B.E., T.D, HMSO London H.L 101, H.C. 220 (1972).

³³ Christine Bell, *supra* note 10.

³⁴ Healing Through Remembering, *supra* note 30; Bell, *Ibid*.

³⁵ The Secretary of State for Northern Ireland confirmed in parliamentary questions that the cost for the Bloody Sunday Inquiry stood at £178.264 million at the end of April 2007. See <http://www.publications.parliament.uk/pa/cm200607/cmhansard/cm070726/text/70726w0050.htm> (accessed 15 Jan 2008).

³⁶ See Freeman, *supra* note 4 at 31.

³⁷ Healing Through Remembering, *supra* note 30.

magnitude may be an inherent risk of the highly legalized, public inquiries model.³⁸ Given that the Saville Inquiry is focusing on the events of just one day, the costs alone dictate that the public inquiry process does not provide an appropriate model for an overall truth commission.

In view of these these issues and the many dilemmas of law post-conflict canvassed in part 1, there may be a temptation for some policy-makers to seek to abandon law in this context, and to frame a truth commission without legal reference points. This legal 'zero option' invites responses at a number of levels. Pre-existing legal norms would remain in place; and unless legal privilege were extended to those testifying to the commission, such people would risk leaving themselves open to civil or perhaps criminal liability for their contributions. Without this legal protection the commission's capacity to uncover truths about events would be diminished. This capacity would also be diminished were the commission not to have the legal power to compel witnesses and to order the production of documents. Perceptions that a commission was 'toothless' would be likely to damage communal perceptions of its work.

A diminution might also be likely were there not to be some incentivisation for wrongdoers to confess their guilt. The only credible incentive is something along a scale from reduction of sentence to amnesty, the delivery of which would require legal intervention. A variant of the 'zero option' would be to grant an unconditional blanket amnesty on the calculation that at a stroke, the role of law would be minimized. Such a blanket amnesty would almost certainly be in breach of international law. While it is extremely unlikely

³⁸ 'Tribunal Will Cost €300 million Writes Judge Mahon', <http://www.rte.ie/news/2007/0215/mahon.html>

that any case from Northern Ireland would finish up in the International Criminal Court (since jurisdiction is not retrospective), an unconditional blanket amnesty would leave the state open to challenge in Strasbourg under the European Convention on Human Rights on the basis that the state had failed to uphold Convention rights and had failed to provide an effective remedy; some corresponding issues could arise at domestic level under the Human Rights Act 1998. In any case, the actions of an officially established commission would be subject to judicial review in the civil courts. Such review, whether actual or potential, would force law into the operation of any truth commission; as the Saville Inquiry has indicated, it could also result in quite an expensive overall exercise, even if the costs of the commission per se were lowered by a non-legalized approach. The overall picture therefore is that the degree of juridification of the 21st century western state is such that there is no escape from law.

The Holistic Statistical Approach

If the dilemmas of post-conflict law are inescapable for truth commissions, they need not apply equally to all aspects of the commission's work at all times. The salience of these dilemmas may be being sharpened by an approach that sees the truth commission in a given society as discharging its mandate through one uniform procedure. The salience is likely to be even greater in analyses that fail to take adequate account of the varying imperatives of different post-conflict societies.

It was noted in Part I that many characteristics of the operation of truth commissions owe something to their being seen as an alternative to prosecutions. At a macro level this may

result in some form of accountability for the *institutions* (rather than the individuals) involved in abuses. At a micro level this can help to explain why truth commissions may focus on the forensic truths of particular atrocities (hence the focus on violations of the most important civil and political rights). This kind of micro-forensic, atomized examination is likely to be the most highly legalized, partly because it is intended to perform functions that might otherwise be performed by a criminal trial.

This can be contrasted with an holistic approach, which looks at patterns of violations. If an accurate as possible a picture of violations by the main perpetrating institutions and groups over the span of the conflict can be created, this can contribute to accountability of sorts, albeit that this is unlikely to be at the individual level.³⁹ The highly legalized atomized approach may have an inherent tendency to seek cases which will support the claim that a violation of a domestic or international legal rule has occurred, arguing that a norm was violated and seeking to support that claim in the strongest possible terms.⁴⁰ In contrast, what a social science, or statistical, approach poses is a number of different questions, identified by Chapman and Ball. These include “how often was the norm violated, in absolute and proportional terms? Was the norm violated more frequently in some circumstances or during some periods than in others? Why might the norm have been respected on occasion? And most importantly, how can we find evidence to address these questions by methods which are not self-fulfilling?”⁴¹ Whereas it is argued that the narrative produced by truth commission is often shaped by a number of factors such as

³⁹ Patrick Ball, HF Spierer and L Spierer, (eds) *Making the Case: Investigating Large Scale Human Rights Violations Using Information Systems and Data Analysis* (Washington DC: American Association for the Advancement of Science, 2000); Landman, *supra* note 4.

⁴⁰ Chapman and Ball, *supra* note 27.

the selection of witnesses or events,⁴² the intervention of questioners,⁴³ or the interpretation of particular testimonies, a statistical approach seeks to identify patterns of abuse independent of the biases of the process. Indeed it is this ability to provide a macro-analysis of the conflict which has proved elusive where truth commissions have relied solely on making findings in individual cases.

A simple aggregation of cases is insufficient for establishing a broader narrative, for such an approach tends to overlook those cases that do not fit neatly within the general trend. In contrast, a statistical approach can identify not only patterns of behaviour, but also offers the possibility of “finding the unexpected and refuting underlying assumptions.”⁴⁴ It is also presented as a means of countering ideological biases amongst the population which may skew the distribution of people giving testimony.⁴⁵ This can be particularly beneficial in contexts where the truth commission is seen as a means of advancing the cause of one side at the expense of the other.⁴⁶ Thus while a truth commission model centred on public hearings can generate much publicity and debate about past events, in the South African context Chapman and Ball suggest that it is less than clear that the Truth and Reconciliation Commission (TRC) hearings “provided objective data so that the debates about the broad truths of the past could be resolved in ways that would withstand subsequent criticism”.⁴⁷ This is not to suggest that the data from the hearings

⁴¹ *Ibid* at 20.

⁴² *Ibid*.

⁴³ Fiona Ross, *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa* (London: Pluto Press, 2003): 89.

⁴⁴ Chapman and Ball, *supra* note 27 at 22.

⁴⁵ Landman, *supra* note 39 at 110.

⁴⁶ See for example Bill Rolston, “Dealing with the Past: Pro-State Paramilitaries, Truth and Transition in Northern Ireland” *Human Rights Quarterly* 28 (2006): 652.

⁴⁷ Chapman and Ball, *supra* note 27 at 23.

and other statements was invalid or mishandled (the TRC established an effective database which was drawn upon by its researchers). Rather the argument is that more robust conclusions might have been possible if the collection of victims' testimony had followed best available social science methodologies, and if it had been supplemented by appropriate data from other sources. These possible shortcomings of the South African TRC can be contrasted with the more technical approach to truth recovery taken in Guatemala and Peru, where social scientists were employed to manage and analyse data received from testimonies and other sources.⁴⁸

Sole reliance on 'headline' legal categories can result in miscounting of violations that occurred during the period under consideration. As noted above, many truth commissions tend to focus on what they categorise as the most serious violations of human rights. The problem identified with this approach is that it serves to obscure other violations, which may occur simultaneously. Thus the broader context of the violation is lost. By documenting the testimony of the victim, however, a range of acts can be identified and recorded. By focusing on the violation as the unit of analysis, a statistical approach to truth can allow for the identification of a much broader range of harms, and avoid some of the limitations inherent in a more legalistic method. Thus for example the testimony of a woman whose husband was killed as a suspected informer may include examples of traditionally defined abuse such as arbitrary killing, cruel treatment and enforced disappearance. The risk with a legalistic approach is that only the most serious abuse, in this case arbitrary killing, is documented, with the result that other aspects of physical

⁴⁸ *Ibid*; Patrick Ball et al., *How Many Peruvians Have Died?* (Washington DC: American Association for the Advancement of Science, 2003).

abuse or the 'disappearance' aspect are under-represented in the final report. A statistical approach ensures that the incidence of the lesser violations is nonetheless recorded.⁴⁹

Furthermore, in addition to these more traditional violations, this testimony may also contain details of the effect that these violations had on the family. Information such as how many children were left without a father? What were the economic and social consequences of the loss of a husband? From this one testimony a picture can be built up not only of those abuses falling within the scope of human rights or humanitarian law, but also of the harms suffered as a result of those abuses, and the effect that they had. By providing a more flexible framework of analysis this model addresses a significant shortcoming of truth commissions that have chosen to focus solely on "the most serious violations of human rights" defined as murder and torture. Specifically it can be used to counter the lack of any gender based analysis of the effects of the conflict, or recognition of the much broader range of harms that exist in a time of social unrest.⁵⁰ Analysis of similar testimonies can help to build up a picture of the prevalence of the execution of suspected informers and the effect that such killings had on families and communities, thus going some way towards addressing the isolation and stigmatisation inherent in such acts. In this way the truth commission will be better equipped to look at the relationship between different types of violation such as the effect of murder on socio-economic rights, or the disproportionate way in which such violations affected members of a

⁴⁹ Landman, *supra* note 4 at 113.

⁵⁰ Ní Aoláin and Turner, *supra* note 12.

particular social class, thus highlighting how individual cases relate to others and how they fit into the larger context of events.⁵¹

A statistical model of human rights inquiry does not rely on testimony alone but rather makes use of multiple sources of information to build up a broader picture.⁵² Thus for example coroner's records, details of compensation claims, or records kept by non-governmental organizations may be used as a means of supporting the patterns emerging from testimonies.⁵³ This can be used to control for the more systematic sources of bias, and allow inference to be generated about the true extent of violations.⁵⁴ Similarly, what Landman describes as "endogenous sources of bias", lying, timidity or political mobilization of testimony, can also be controlled through analysis of reporting densities.⁵⁵ A statistical approach can also go some way to ensuring that those political communities that are less well-mobilized and represented have their stories heard.⁵⁶

It is possible to imagine a truth commission taking this statistical approach as its leitmotiv employing three techniques for data gathering in a way that takes appropriate account of the applicable legal norms (including those of international human rights law and international humanitarian law).⁵⁷ The first could involve a set of statistical studies, some based on pre-existing records, some involving fresh data gathering using appropriate sampling techniques. This could entail, for instance, an examination of all deaths and

⁵¹ Landman, *supra* note 39 at 125.

⁵² *Ibid.*

⁵³ See eg Chapman and Ball, *supra* note 27 at 24.

⁵⁴ Landman, *supra* note 39 at 117.

⁵⁵ *Ibid.*, 119.

⁵⁶ Chapman and Ball, *supra* note 27 at 37.

⁵⁷ See generally, Freeman, *supra* note 4.

injuries caused by the security forces and paramilitary groups, and exploration of patterns of perceptions of harassment of the civilian population.

These techniques are likely to be most effective where there is little institutional resistance to the disclosure of information. Where such resistance is likely to be strong (for instance when violations are claimed to be linked to the secret state), a second technique, involving more heavily legalized investigative procedures may be more appropriate. This second approach need not entail the quasi-adversarial procedures employed in institutions such as the Saville Tribunal. Instead, experienced investigators operating under a commission with the capacity to order the production of documents and to compel appropriate persons to submit to questioning might be more effective,⁵⁸ an approach that could also draw on earlier police investigations, the outcomes of which may have remained partly confidential.⁵⁹ A precedent exists in the operation of the Police Ombudsman's office,⁶⁰ which is perceived to have been effective in investigating allegations of collusion between paramilitaries and elements in the security forces, at a time when a number of initiatives in the same area organized on the public inquiry model have struggled to achieve acceptance by, and cooperation from, affected families. Critical elements to the success of such an enterprise are likely to include independence from the security forces and thoroughness. It is far from clear at this point whether the 'Historic Inquiries Team' established by the PSNI Chief Constable to examine all unsolved

⁵⁸ *Ibid*, at 188-221.

⁵⁹ The investigations by Sir John Stevens into allegations of security force collusion with loyalist paramilitaries in Northern Ireland provide an example. See 'Stevens Enquiry: Overview and Recommendations', 17 April 2003, available at <http://cain.ulst.ac.uk/issues/collusion/stevens3/stevens3summary.pdf>

⁶⁰ See generally <http://www.policeombudsman.org>

conflict-related deaths⁶¹ will have the effectiveness of the Police Ombudsman's investigations. While the workings of the Truth Commission's inquiry teams would be confidential, their reports would be fed into the public workings of the Commission. The aim, on the statistical model, would be to conduct an appropriate number of in-depth investigations, and to extrapolate from these on the prevalence of the violations being investigated.

The third technique could be an Open Forum, which would provide a largely public space where victims and perpetrators could recount their experiences, with appropriate legal protections. An important element of this exercise would be to meet public expectations that victims' voices would be adequately heard. While those contributing to such a forum, might or might not provide a representative picture of the violations complained of, levels of overall bias could be lessened by an integration of all three investigative techniques. For instance complaints aired under the third technique could be contextualized by reference to patterns established under the first, and/or could trigger an investigation under the second. The holistic, statistical approach has the benefit of drawing upon law in a process of establishing truths that have the validity springing from employment of appropriate social science methodology. It does not claim to establish *the* [one overarching] truth about the conflict, but neither does it retreat into an easy post-modern relativism. It has the strengths, but also the limitations and weaknesses, of any statistically-based operation. Careful attention is therefore needed to issues around sampling, and selection of appropriate tools time-frames and data sets, any of which may skew results.

⁶¹ See http://www.psnipolice.uk/index/departments/historical_enquiries_team.htm

On this model the truth commission operates in a way that is complementary to, rather than in substitution for, the work of historians. In its legally mandated power to discover documents and to compel appropriate persons to submit to questioning, the commission could gain access to data that would be beyond the contemporaneous historian's reach. A statistical analysis of patterns of violation would have validity as a reference point for subsequent analysis by historians and others in its own right; documents and testimony made public through the truth commission process could provide historians with primary material; and the Truth Commission would itself provide an object for historians' scrutiny. But claims for an holistic model must also avoid charges of hubris. The point is not that it can paint a picture of violations during conflict that has an absolute 'accuracy'; rather it is that the picture that emerges could make a claim to a greater *degree* of accuracy and objectivity than that likely to emerge from a highly legalized process.

Normative Frameworks

Because of its multi-layered quality, the holistic statistical model lends itself to analysis that extends beyond major violations of civil and political rights, to include such areas as violations of social cultural and economic rights, and gender-based rights linked to the conflict. The entire corpus of treaty-based, and customary law human rights commitments entered into or binding upon the state could therefore be drawn upon in assessing what could constitute a 'violation'. It would also be possible to draw upon emerging legal analysis challenging the 'public-private divide' in a way that could throw new light on gendered-violations relating to the conflict. This model could therefore draw

upon a broader range of normative legal resources than has frequently been the case with truth commissions. Since norms are being drawn upon as part of a statistical inquiry, there would appear less possibility of the hegemonic quality of law dominating, given that data collection and analysis would not be solely in the hands of legal professionals immersed in a culture calculated to replicate this hegemony.

Arendt's critique of the failure of law to 'capture' the awfulness of mass atrocity appears to have less purchase in relation to a social science-based, statistical inquiry, that draws upon legal norms, particularly in situations such as Northern Ireland. An appropriate statistical approach could *quantify* the scale of violations, in a way that the criminal trial process (around which Arendt framed her comments) is less likely to. Furthermore, it is far from clear that the *quality* of the violence in Northern Ireland came close to matching that to which Arendt was referring. Finally, as Osiel points out, Arendt's criticism could also be applied to retributive theories of justice in the ordinary criminal justice system:⁶² how can a sentence of X years ever 'capture' the grievous harm that an 'ordinary' defendant may have inflicted on an 'ordinary' victim?

Violations by Non-State Entities

An overall human rights normative framework is of less use in defining and assessing violations by armed non-state entities (NSEs), because human rights law, for the most part, primarily binds states. International humanitarian law ('the laws of war'), by contrast binds both state and NSEs, setting out distinct rules for international and non-

⁶² Mark Osiel, "Why Prosecute? Critics of Punishment for Mass Atrocity" *Human Rights Quarterly* 22 (2000) 118, 129.

international 'armed conflicts'. International armed conflicts include 'wars of national liberation' under 1977 Protocol I to the 1949 Geneva Conventions. Non-international armed conflicts are governed by article 3 common to the 1949 Geneva Conventions, (which provides a 'mini-convention'). Where such conflicts reach a relatively high level of intensity they are also governed by 1977 Protocol II to the Geneva Conventions. In relation to violent political conflicts falling below or hovering around the threshold of 'armed conflict' a number of sets of principles and standards have been elaborated, but while these draw upon legal reference points, and have received a degree of international validation, they do not have the status of strict law.⁶³

The Northern Ireland conflict is generally viewed as having hovered in the grey area around some form of non-international armed conflict (governed by common article 3 and meeting at least some of the requirements of 1977 Protocol II), and the lower intensity category of 'situations of internal disturbances and tensions'.⁶⁴ While there are good reasons for suggesting an 'armed conflict' existed in 1972, the situation in 1994 is less clear. A further complicating factor is that towards the end of the Northern Ireland conflict there was a degree of norm-shift at the international level, largely arising from the wars in the Former Yugoslavia. The result was the elaboration of doctrines that breaches of the laws of non-international armed conflict could attract international

⁶³ See HP Gasser, "A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct" *International Review of the Red Cross* 262 (1988); Theodore Meron and A Rosas, "A Declaration of Minimum Humanitarian Standards" *American Journal of International Law* 85 (1991): 375; O Eide, A Rosas and T Meron, "Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards" *American Journal of International Law* 89 (1995): 215; and Jean-Daniel Vigny and C. Thompson, "Fundamental Standards of Humanity: What Future?" *Netherlands Quarterly of Human Rights* 20(2) (2002): 185.

criminality, and that many of the customary rules applicable to international armed conflicts were also applicable in non-international conflicts. An additional complication is that neither the UK nor the Republic of Ireland ratified the 1977 Geneva Protocols until after the emergence of the Northern Ireland peace process.

The resulting taxonomic headaches, though, are not insuperable. It would be open to a truth commission to view the Northern Ireland conflict in whole or in part as constituting a common article 3 armed conflict, and to conduct a statistical analysis of paramilitary (and state) violations by reference to this article, and to the customary law rules applicable in non-international armed conflicts. It would also be open to a commission to conduct such an analysis by reference to the principles of international humanitarian law, while leaving open the question of whether the threshold of 'armed conflict' was reached at particular times during the conflict. Either approach could incorporate insights arising from the increasing focus on the gendered aspects of violation of international humanitarian rules and principles.⁶⁵ It would not be legitimate however, for a commission to proceed on the basis that international humanitarian law was at no time applicable to the Northern Ireland conflict.

Imperatives to Prosecute?

The holistic statistical model is not oriented towards individual prosecution. It is not incompatible with prosecution, but its aim is to generate as accurate a picture as possible

⁶⁴ Colm Campbell, "Wars on Terror' and Vicarious Hegemons." *International and Comparative Law Quarterly* 54 (2005): 321; Fionnuala Ní Aoláin, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Belfast: Blackstaff, 2000).

of violations, rather than to facilitate prosecution, and this involves an implicit claim that in some situations, the adoptions of a non-punitive strategy, or a strategy in which the punitive element is greatly reduced, may be an appropriate price to pay for truth-recovery and peace. Northern Ireland's peace process, which has brought into a consociational model of government, elected politicians who were formerly engaged in armed opposition to the state, and in which there was no wholesale disbandment of the old security apparatus, may be particularly at risk from a strategy oriented towards individual prosecution. In any case, such prosecutions, sometimes in relation to decades-old events, would face formidable evidential problems.⁶⁶

The orientation away from prosecution towards analysis of patterns raises the question of the compatibility of such strategies in situations such as that in Northern Ireland with international law. While the debate surrounding the issue of amnesties and alternative forms of justice in international law started out as one polarized between those who favour prosecution as the only legitimate, and indeed internationally acceptable, means of dealing with the past,⁶⁷ and those who argue that insisting on justice at all costs may actually prolong conflict and result in further loss of life,⁶⁸ it has moved a long way towards engaging the practical and moral dilemmas associated with dealing with the past.

⁶⁵ See Rosalind Dixon, "Rape as a Crime in International Law" *European Journal of International Law* 13(3) (2002): 697.

⁶⁶ See Healing Through Remembering 'The Viability of Prosecution Based on Historical Enquiry: Observations of Counsel on Potential Evidential Difficulties' (2006).

⁶⁷ See eg Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" *Yale Law Journal* 100 (1991): 2537; M Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability" *Law and Contemporary Problems* 54 (1996): 9; Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law" *California Law Review* 78 (1990): 449.

⁶⁸ Carlos Nino, *Radical Evil on Trial* (New Haven and London: Yale University Press, 1996); Anonymous, "Human Rights in Peace Negotiations" *Human Rights Quarterly* 18 (1996): 249.

While general international opinion has tended to favour the need for some means of establishing accountability,⁶⁹ the Rome Statute of the International Criminal Court (ICC) appears to offer some degree of leeway in relation to the form that such accountability should take. Contemporary literature assessing the admissibility requirements contained in the Rome Statute suggest that there may not be an absolute imperative to prosecute, but that there may exist situations in which the Court would defer to the judgement of a nation state in deciding on what form justice and accountability should take.⁷⁰ Two main features of the admissibility regime underlie this suggestion. First, article 17 of the Statute provides that a case shall be admissible only where the state in which the atrocities occurred is unable or unwilling to investigate or prosecute. Article 17(1)(b) also provides that a case will be inadmissible if it has been investigated by a State which has jurisdiction over it, but the State has decided not to prosecute. Thus it would seem that if a state has properly investigated a case and decided not to initiate criminal proceedings, such a decision may be respected by the ICC, provided it was consistent with an intention to bring the person to justice, as required by Article 17(2). Where a programme of conditional amnesty is tied to a broader process such as a truth commission, or is intended to further the cause of peace and reconciliation, it has been suggested that the Statute provides sufficient flexibility for this to be considered an investigation within the scope of Article 17.⁷¹ This may even be the case where such investigations are followed

⁶⁹ Bassiouni, *supra* note 67; John Dugard "Dealing with Crimes of the Past: Is Amnesty Still an Option?" *Leiden Journal of International Law* 12 (1999): 1004.

⁷⁰ Roderick O'Brien, "Amnesty and International Law" *Nordic Journal of International Law* 74 (2005): 261; Carsten Stahn, "Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court" *Journal of International Criminal Justice* 3 (2005): 695; H Abigail Moy, "The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity" *Harvard Human Rights Journal* 19 (2006): 267

⁷¹ O'Brien, *Ibid*; Stahn, *Ibid*; Naomi Roht- Arriaza, "Amnesty and the International Criminal Court" in *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* ed. Dinah

by merely symbolic prosecution or minimal punishment.⁷² Second, Article 53 of the Statute allows for the Prosecutor to decline to prosecute if, considering the gravity of the case, that prosecution would not serve the interests of justice. Given that crimes that come within the jurisdiction of the ICC are those deemed to be international in nature, and in respect of which an international interest is deemed to exist,⁷³ it is only crimes of a widespread and systematic nature which meet the requisite standard of severity for prosecution before the ICC. Such crimes are held to be of the most serious concern to the international community as a whole, which leads to the rationale that no individual state has the authority to grant an amnesty for such crimes that would preclude the international community from discharging its obligations in respect of them.⁷⁴ Recent decisions made on the question of amnesties have relied on the international character of the offences committed. Thus in *Prosecutor v Kallon* the Special Court for Sierra Leone found that an amnesty granted could not cover crimes under international law that are the subject of universal jurisdiction.⁷⁵ The ICC, acting pursuant to a referral from Uganda, has issued arrest warrants for several Lord's Resistance Army leaders in spite of existing amnesty policies, but has yet to provide a decision on the status of amnesties *per se*.⁷⁶ The requirement that crimes meet a certain threshold of severity, however, would suggest that the Court may be happy to defer all but the most serious international cases to national investigation and, where necessary, prosecution. Such an approach would dovetail with the requirement in Protocol II that the authorities in power grant 'the

Shelton (Ardsley NY: Transnational, 2000): 79; Eric Blumenson, "The Challenge of a Global Standard of Justice: Peace, Pluralism and Punishment at the International Criminal Court" *Columbia Journal of Transnational Law* 44 (2006): 801.

⁷² Stahn, *supra* note 70.

⁷³ Dugard, *supra* note 69.

⁷⁴ *Prosecutor v Kallon* (2004) 16 BHRC 252.

⁷⁵ *Ibid.*

broadest possible amnesty'; the stipulation that the amnesty be 'possible' is taken to be recognition that to amnesty some crimes would be impossible.

While the violence in Northern Ireland was egregious by western European standards, it did not reach the genocidal ferocity of many contemporary conflicts. Northern Ireland also saw thousands of prosecutions for NSE activities (although very few for violations by state actors). It could therefore be argued that violations in Northern Ireland are not such as to be of major concern to the international community, with the result that two options may be open to a truth commission. The first is to grant an amnesty for any activity for which full disclosure is made to the commission. The second is to provide a judicial hearing for individuals who make full disclosure, according to a special procedure in which a conviction would be recorded, but with a minimal or non-existent sentence. In either case the rationale would be that the approach was an integrated part of a democratically agreed process that was necessary to promote peace. The first would almost certainly be considered lawful in relation to all crimes other than those (such as torture) for which universal jurisdiction exists. As regards the second, a strong case for lawfulness could be made, even in such extreme cases. However, on a note of caution, it must be acknowledged that even where measures can be deemed to be lawful they may prove to be politically unpopular with one or more powerful constituencies in Northern Ireland, raising thorny questions of democratic ratification.⁷⁷

Constitutional Aspects

⁷⁶ Moy, *supra* note 70.

As regards constituting a truth commission, one option is to have a commission established solely by UK legislation, with a geographical remit limited to the territory of Northern Ireland, subject to review by the Northern Ireland courts, and ultimately by the House of Lords. This has a number of related shortcomings: Firstly such a limited geographical remit omits from the frame the significant violence and human rights issues associated with the Northern Ireland conflict that occurred in the Republic of Ireland and in Great Britain. Secondly, vesting the legal authority for the commission solely in British law runs counter to the bi-national (British and Irish) approach that has underpinned the Northern Ireland peace process. If the Republic of Ireland dimension of the Northern Ireland conflict is to be addressed, a legal framework will be required that has the force of law in that jurisdiction. Thirdly, leaving the commission's work subject to review by the domestic courts risks replicating, and indeed multiplying, the costs and delays that have dogged the Saville Inquiry.

All of these issues could be addressed by establishing the truth commission according to the bi-national pattern of the Agreement, following the contours of international instruments already ratified by both states. The foundation of the Commission could be a British-Irish international treaty, which, like the Agreement, could be registered with the UN. This could mandate the establishment of the commission, providing for a membership that could comprise suitably qualified appointees from Northern Ireland, Great Britain, the Republic of Ireland; there would also be international appointees with

⁷⁷For example opposition to legislation proposed to deal with so-called 'On the Runs' resulting in the proposals being dropped. http://news.bbc.co.uk/1/hi/northern_ireland/4602314.stm

appropriate post-conflict experience.⁷⁸ The geographical remit would centre on, but not be limited to Northern Ireland, and the thematic remit would be in accordance with the holistic statistical model outlined above. The international treaty would be supplemented by dedicated UK and Irish domestic legislation.

A solution to the potential problem of the costs and delays associated with applications and appeals within the domestic court system could be found by following a model already binding in EU law on both states. Under the 'preliminary reference procedure' a question of EU law can be referred directly by domestic courts and tribunals (even those of primary jurisdiction) to the European Court of Justice (ECJ), without the necessity for first exhausting all appeals within the domestic system;⁷⁹ the result is a relatively streamlined procedure that can short-circuit potential costly domestic delays.

The jurisdiction of the ECJ over such matters has been established in both states through national laws giving effect to the state's membership of the EU: the European Communities Act 1972 in the UK, and through a constitutional amendment in the Republic of Ireland. If this juridical architecture were followed, the British-Irish treaty could establish not only a truth commission, but also a Judicial Body comprising eminent British, Irish and international jurists. This Judicial Body could have exclusive jurisdiction over any applications for review of the operation of the Truth Commission or

⁷⁸ This reflects findings made by Lundy and McGovern that of those in favour of a truth commission in Northern Ireland, 46.6 % favoured the involvement of an international organisation such as the United Nations, making this the single most popular option. See Patricia Lundy and Mark McGovern, "Attitudes Towards a Truth Commission for Northern Ireland: A research report submitted to the Northern Ireland Community Relations Council based upon research conducted as part of the Northern Ireland Life and Times Survey 2004" (Belfast: Community Relations Council, 2006).

⁷⁹ See Paul Craig and Grainne de Burca, *EU Law* (Oxford: Oxford University Press, 2008).

any appeals against orders made by the Commission, and determinations by the Judicial Body would be final. Being judicial, the body would satisfy British administrative law requirements for a judicial remedy, and since the Body was grounded in a constitutional amendment, it would be shielded from constitutional challenge in the Republic of Ireland. Standards of fairness of due process would not be compromised: in discharging its functions the panel would be bound at all times to comply with the obligations arising under the ECHR and other human rights instruments binding on both states in respect of due process. The benefit of such a model lies primarily in practical terms. While the panel would need a dedicated secretariat to support its work, the panel could be based in existing courtroom facilities to avoid the expense of dedicated premises.

Conclusions: [Re-]Conciliation?

In part 1, concepts of conciliation at two levels of abstraction were set out: the first (highest) level saw conciliation in terms of a bond of common humanity (with reconciliation as the re-creation of that bond); the second saw conciliation in terms of building a shared society. While it could be argued that all post-conflict situations require reconciliation at the higher level of abstraction, conciliation at the lower level is only necessary where former adversaries share the same territory, bringing the issue firmly within the increasingly internationalized frame of contemporary peace processes and peace agreements.

The diminution of state sovereignty, globalization, the increasing normative claims of international law, and the increasing juridification of contemporary society, frequently

pushes towards 'hybrid' domestic and international law agreements.⁸⁰ The 1998 Agreement and its outworkings (including the 2006 St. Andrew's Agreement) can be considered a prime example of such a hybrid instrument.⁸¹ Accordingly the Agreement provides an important marker for contemporary shifting notions of state sovereignty, in that it provides for a possible variable geometry of British and Irish sovereignty over time.

The point here is that the process represents a complex attempt at conciliation in this second sense – as the first time that the political representatives of virtually all sections of Northern Ireland population and of all the people of Britain and Ireland agreed on a political dispensation. This is not re-conciliation, because there was no pre-existing conciliation. The telos of this process has an open-ended quality; likewise, the process has an *agonistic* quality – there are political battles to be fought (through democratic means) – but this need not be an expression of ethnic *antagonism*.

Within this process, the past might be addressed along the model by which the future is being addressed: as open-ended processes, without pre-determined outcomes. On this understanding, dealing with 'the past' can be understood not as being subordinated to a goal of re-conciliation, but as being part of a process of conciliation. The holistic truth model may offer more to such a process of conciliation because it goes beyond a focus on the major violations of civil and political rights, allowing more voices to be heard, and more conversations to take place.

⁸⁰ Christine Bell, "Peace Agreements: Their nature and legal status" *American Journal of International Law* 100 (2006): 1.

It is also legitimate to view the Northern Ireland debate at a higher level of abstraction in terms of reconciliation around a common bond of humanity. But to be meaningful in a democratic society, particularly one emerging from violent conflict, such a concept needs to take account of the agonism of politics, involving what is likely to be a complex engagement with 'the other' in a process of *political* reconciliation.⁸² On this understanding, reconciliation in the immediate aftermath of conflict or atrocity is unlikely to take place quickly, and is without a guaranteed eventual outcome. A truth process may help to create the conditions in which this reconciliation may occur, but it cannot be tasked with itself generating reconciliation. Agonistic conversations are central to the process, and in situations such as Northern Ireland, the holistic model may offer a wider forum for conducting the conversations than would be provided by a prosecution-based strategy, or by a truth process focusing solely on major violations of civil and political rights. Acceptance of the inherent agonism of the process though, opens space for those who wish to air feelings of resentment and to demand retribution, voices that might be silenced by the adoption of simplistic notions of reconciliation that demand a pre-determined telos of 'togetherness'.⁸³

This focus of agonism evinces a suspicion of 'shared narratives'. The holistic model is unlikely to produce a shared social narrative, but it may produce a narrative that will infuse separate communal narratives that are in many respects divergent. In Northern

⁸¹ Campbell, Ní Aoláin and Harvey, *supra* note 8.

⁸² Schapp, *supra* note 19.

Ireland, it may therefore produce a degree of sensitization to the harm that significant sections of each community have inflicted upon the other, that may (or may not) have an impact in the longer term

The process of conciliation analysed above was one involving not only Northern Ireland's two main communities, but also two states. The role of the state must also be factored into the process of political reconciliation. Given the troubled history of the relationship between Britain and Ireland over many centuries, a comprehensive British-Irish reconciliation strategy risks swamping a Northern Ireland-specific initiative, but broader British-Irish reconciliation moves (particularly at the state level), may contribute to a *context* in which engagement in Northern Ireland takes place. A critical examination of the state's role during the conflict might (or might not) therefore contribute directly to a process of reconciliation within Northern Ireland (in that the state critically affected the inter-relationship between communities), while also serving as an element helping to define a broader British-Irish reconciliation context.

The Northern Ireland case study points to the validity of several of the skepticisms in relation to law's post-conflict role, but it also points to opportunities as well as to threats in relation both to legal procedure and legal norms. As regards procedure, Northern Ireland warns of the dangers of ceding ownership of the process to legal professionals (in the public inquiry model), but it also points to creative solutions whereby legal procedure might be drawn upon to gain data from otherwise inaccessible sources. As regards legal

⁸³ For a critique of 'community relations'- based concepts of reconciliation in Northern Ireland, see Leslie McEvoy, Kieran McEvoy and Kirsten McConnachie, 'Reconciliation is a Dirty Word: Conflict,

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norms, Northern Ireland points to the possibility of a broader range of normative legal resources than are frequently invoked by truth commissions, being drawn upon by researchers other than legal professionals. Such a process could establish truths that have a validity springing from their adherence to appropriate social science methodologies, though it would need to be insulated from conventional legal challenge. Finally, Northern Ireland also points to differences between those post-conflict societies in which the enormity of atrocity demands prosecution and punishment, and those involving violations of a lesser order, in which alternative approaches may be justified.

Community Relations and Education in Northern Ireland', 60 *Journal of International Affairs*, 81 (2006).