

## **Response from Prof. Colm Campbell, Transitional Justice Institute UU to NIO Consultation on the Report of the Consultative Group on the Past**

The overall thrust of the ‘Report of the Consultative Report on the Past’ (hereinafter ‘the Report’), is to be welcomed. It represents a strategy for dealing with Northern Ireland’s contentious past that avoids some of the dangers of an highly legalistic approach. It is also generally (though not completely) in accordance with best international practice. The Report therefore presents something of a draft template that can be further developed in order to provide a mechanism that fully meets international standards, and is fully in accordance with best international practice.

This submission lists 6 (non-exhaustive) areas where attention is required if the Report is to be made operational in a way that meets these objectives:

- *The use of international legal standards*
- *Legal standards and non-state entities.*
- *Thematic Review: Content and Analysis*
- *Definition of Victim*
- *Gender*
- *Miscellaneous Issues.*

### *The use of International Legal Standards*

While the Report’s avoidance of some legalistic pitfalls is to be welcomed, a distinction should nevertheless be drawn between excessively legalised *procedure*, and the use of substantive legal *standards*. The latter can be employed without excessive procedure, and should be deployed if outcomes are to be in accordance with international standards.

For reasons that are unclear, the Report focuses mainly on the European Convention on Human Rights (ECHR), and much of the discussion in this area appears telescoped into a discussion of state responsibility under Art. 2 ECHR for conflict-related deaths (an area in which the state is subject to strict monitoring by the Council of Europe). In relation to deaths such as these, a host of international legal standards, both hard and

soft are applicable. Some of these are set out in appendix 1 and could usefully be drawn upon. It is also unclear why there should be such a focus on deaths. If the aim is to focus on non-derogable rights violations, there should as a minimum also be coverage of violations of the right to be free from torture and from inhuman and degrading treatment. This would entail employment of the international standards set out in Appendix 2.

*Legal standards and non-state entities.*

A related issue is that the Report proposes a thematic exploration of ‘certain paramilitary activities’, but does not suggest any legal basis for this examination. Where extensive violence by armed non-state entities (NSEs) is in question, the applicable international standards are those found in international humanitarian law. A baseline can be found in art. 3 common to the four Geneva Conventions of 1949 (‘common article 3’), which sets out standards applicable in an ‘armed conflict not of an international character’ (see Appendix 3). In the words of the international Court of Justice (ICJ), common article 3 provides a ‘minimum yardstick’ against which the behaviour of NSEs can be measured.

There can be little doubt that, at least during its most intense period, the conflict in Northern Ireland amounted to a non-international armed conflict. At other times the conflict may have fallen below the threshold, but by virtue of the ICJ ruling quoted above it is still legitimate to apply the ‘yardstick’ provided by common article 3. Doing so would allow examination of patterns of activities such as ‘punishment beatings’ and arbitrary killings by members of paramilitary groups. This would allow the proposed Legacy Commission to form a view on the key questions as to whether there had been *systematic* violations of international humanitarian standards during the conflict.

It should be emphasised that common article 3 makes no provision for ‘combat immunity’ for those engaged in non-international armed conflicts (‘combat immunity’ can prevent prosecution), nor does it require a post-conflict amnesty. Common article 3 is also binding on state forces, supplementing human rights law in this regard.

*Thematic Review: Content and Analysis*

The report usefully recommends a focus in the Legacy Commission's fourth strand on thematic review of some activities by the state and NSEs. This is an especially important area, as it addresses the issue of *systematic* rather than one-off abuses. Here, however the discussion could usefully be supplemented by an importation of social science methodologies in identifying what can be considered a pattern, and when abuse should be considered systematic. In that regard, the truth recovery work in Guatemala may provide some useful precedents. More generally, if the Report is to be taken forward, careful attention will need to be given to the infrastructure required for the Legacy Commission to do its work (this will entail the construction of a database (physical and electronic) of sources; indexing and cross-referencing of same; and interrogating and analysing the material using a variety of software packages).

As regards other areas of thematic exploration, it may be useful to follow aspects of the South African Truth and Reconciliation Commission model in providing for thematic exploration of (a) the contribution of the churches, and (b) that of the judiciary and the legal profession. The latter is particularly important, given the key role that law played during the conflict and in its resolution.

*Prosecution, Amnesty and truth-recovery.*

The Report places a heavy emphasis on investigation with a view to prosecution in relation to the work of the Review and Investigation Unit. This is problematic in a number of respects: First the emphasis on the need to gather evidence to a criminal standard of proof (beyond reasonable doubt and a 50%+ likelihood of successful prosecution) is out of line with practice internationally with truth commissions (which typically employ social science or 'balance of probabilities/likelihood' tests). Secondly the number of prosecutions is likely to be very small, and the number of convictions even smaller. The system may therefore be set up to fail. Thirdly, the emphasis on prosecution may work against truth-recovery, in that individuals implicated in unlawful activities during the conflict are unlikely to engage with the Legacy Commission if prosecutions from decades-old cases were being actively considered.

This leads to the question of what values are to be prioritised in the process, since international experience is that no truth processes have successfully attained complete

truth-discovery, accountability and reconciliation. Internationally, where accountability has been achieved by truth commissions, this has largely been institutional rather than individual. Institutional accountability involves a decision on whether a particular element in the state's security forces or a particular paramilitary group is responsible for a breach of international standards, particularly a systematic breach. There are good arguments therefore for suggesting that this is the kind of accountability which a Legacy Commission should aim at.

This brings the question of whether it is possible or desirable to incentivise truth-telling by some form of mechanism that could 'trade' truth telling for amnesty (as was done with the South African Truth and Reconciliation Commission). As regards the 'possible' question, international law is clear that there can be no such trade-off in respect of the most serious international crimes (including Genocide, crimes against humanity, grave breaches of international humanitarian law, and torture). The Northern Ireland conflict did not reach the levels of barbarity found in some other contemporary conflicts (there was no genocide, and it would be difficult to make a case for crimes against humanity), but there were cases of torture and/or inhuman treatment and of arbitrary killing (breaches variously of the ECHR and common article 3). It may therefore be possible to trade amnesty for truth in relation to crimes other than torture and arbitrary killings. As regards the latter crimes, incentivisation may be possible by expanding the current arrangements under which convicted paramilitaries associated with groups on ceasefire have been released following two years incarceration, to cover members of the security forces convicted for the most serious crimes and who cooperate fully with the Legacy Commission.

#### *Definition of Victim*

The definition of victim used in the Report is taken from the Victims and Survivors (Northern Ireland) Order 2006. That Order provided what can be considered a pragmatic, service-oriented definition, which included those injured in the conflict, those providing care for such people, and those left bereaved by the conflict. It did not however, include the most important category of the conflict's victims: the dead. For that reason the definition is inadequate for use in a comprehensive truth and reconciliation process. A better definition is required, and best international practice stresses the need for a definition that does not create hierarchies.

### *Gender*

While the Report shows innovative thinking in several areas (showing at least some concern for socio-economic issues), it is notably neglectful of the question of the gendered aspects of dealing with the past. In this, it is out of line with developing international opinion in this area, which is increasingly focusing on the gendered aspects of the entire field of transitional justice (including the operation of truth commissions). In order to operate effectively a Legacy Commission will need to have a statutory mandate, and it is recommended that in that mandate there be an explicit requirement that the gendered aspects of dealing with the past be addressed.

### *Miscellaneous Issues.*

While the definition of ‘reconciliation’ employed in the Report is a sophisticated one, there is nevertheless a danger that a Legacy Commission might inadvertently or deliberately tend to subordinate truth-telling to what in its view were the requirements of reconciliation. Arguably this happened in South Africa. There needs to be clear guidance in the mandate of the Legacy Commission that it is to uncover truth, however uncomfortable that might be.

For reasons that are unclear the Report recommended that the case of Pat Finucane be dealt with under the Legacy Commission procedure rather than under the Inquiry mechanism that had previously been agreed. No compelling reason has been advanced for this recommendation, and given pre-existing commitments, it should not be followed.

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This submission is made in a personal capacity and does not purport to represent the views of the University of Ulster or of any part of it.