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## **DEALING WITH THE PAST: SOME LESSONS FOR NORTHERN IRELAND FROM SOUTH AFRICA**

### **1. INTRODUCTION**

- 1.1 British Irish RIGHTS WATCH (BIRW) is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and the peace process, in Northern Ireland since 1990. Our vision is of a Northern Ireland in which respect for human rights is integral to all its institutions and experienced by all who live there. Our mission is to secure respect for human rights in Northern Ireland and to disseminate the human rights lessons learned from the Northern Ireland conflict in order to promote peace, reconciliation and the prevention of conflict. BIRW's services are available, free of charge, to anyone whose human rights have been violated because of the conflict, regardless of religious, political or community affiliations. BIRW take no position on the eventual constitutional outcome of the conflict.
- 1.2 At the end of January 2010, I visited Cape Town in South Africa, to attend the celebrations of the 75<sup>th</sup> birthday of one of BIRW's Sponsors, Professor Kader Asmal, a human rights right expert and former government Minister in the Mandela and Mbeki administrations, who spent many years in exile from the apartheid regime in London and Dublin.
- 1.3 I took this opportunity to conduct research on the way South Africa has dealt with its highly problematic past, in the hopes that there would be lessons that can be applied in Northern Ireland. This is my account of my findings.
- 1.4 I was in Cape Town from 28<sup>th</sup> January until 3<sup>rd</sup> February 2010. I had visited Cape Town twice before, each time for just a week, in 1993 and 1996. This report is not about South Africa. On such a slim acquaintance with just one town in that country, I cannot claim to have any expertise. However,

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**WINNER OF THE COUNCIL OF EUROPE'S PARLIAMENTARY ASSEMBLY HUMAN RIGHTS PRIZE 2009**  
**WINNER OF THE IRISH WORLD DAMIEN GAFFNEY MEMORIAL AWARD 2008**  
**WINNER OF THE BEACON PRIZE FOR NORTHERN IRELAND 2007**

I do know something about the issue of dealing with the past, and I believe that South Africa has many valuable lessons – both positive and negative – for the debate on that issue in Northern Ireland.

- 1.5 I should like to thank the Joseph Rowntree Charitable Trust for a grant of £1,000 that made my trip possible, and Juliet Prager and Rebecca Freeth of the Trust for giving me contacts in Cape Town. Louise Asmal, Gerald Kraak of The Atlantic Philanthropies, and His Excellency Colin Wrafter, Irish Ambassador to South Africa, all also gave me invaluable help. In such a short space of time, I was not able to meet everyone they suggested, but those whom I did meet were generous with their time and their insights, for which I am extremely grateful.

## 2. **METHODOLOGY**

- 2.1 I carried out many hours of internet research before leaving for Cape Town, familiarising myself with some of the key debates around dealing with the past in South Africa. I also identified some of the institutions in South Africa whose work is relevant to the issue. These included:
- 2.1.1 **The Centre for Conflict Resolution (CCR)**, in Cape Town, which aims to contribute towards a just and sustainable peace in Africa by promoting constructive, creative and co-operative approaches to the resolution of conflict through training, policy development, research, and capacity-building.
- 2.1.2 **The South African branch of the International Center for Transitional Justice (ICTJ)**, in Cape Town, works to redress and prevent the most severe violations of human rights by confronting legacies of mass abuse. ICTJ seeks holistic solutions to promote accountability and create just and peaceful societies. To fulfil that mission, ICTJ links experience from its many field programs with its research in transitional justice. ICTJ uses this knowledge to inform and advise governments, civil society and other stakeholders working on behalf of victims. It seeks to persuade those stakeholders, the media and the general public of the need for justice and accountability. ICTJ places a high priority on building capacity, and to do so the organization works to connect individuals, groups and disciplines. ICTJ believes successful capacity building creates a multiplier effect; effective justice policies require the strong partners, strong leaders and the strong technical skills that ICTJ promotes. ICTJ works in societies emerging from repressive rule or armed conflict, as well in other societies where legacies of abuse remain unresolved.
- 2.1.3 **Khulumani**, an NGO based in Johannesburg, which works directly with victims of apartheid, in the following areas:
- advocacy and lobbying post the Truth and Reconciliation Commission (TRC)
  - a reconciliation project

- a Needs Assessment Survey
- Provincial capacity building
- arts and culture
- sustainable development
- memorialisation
- disappearances and exhumations
- healing of memories.

Thus Khulumani has a holistic approach to dealing with South Africa's past, and an authoritative understanding of the needs of victims of apartheid.

2.1.4 **The Institute for Democracy in South Africa (IDASA)**, in Cape Town, which is an independent public interest organisation committed to promoting sustainable democracy based on active citizenship, democratic institutions, and social justice. It maintains international links with many similar organisations through the world movement for democracy.

2.1.5 **The Institute for Justice and Reconciliation (IJR)**, in Cape Town, which promotes reconciliation, transitional justice and democratic nation-building in Africa by means of research, analysis and selective intervention.

2.1.6 **The Desmond Tutu Peace Centre (DTPC)**, in Cape Town, which aims to promote conflict resolution, restore social justice to marginalised people and inspire leaders to be responsible and committed to the people they serve. They further the understanding that peace will flow out of justice and that there is essential good in everyone.

2.1.7 I managed to meet or talk to representatives of all these organisations, except the DTPC. Unfortunately Archbishop Desmond Tutu was on his travels while I was in Cape Town, but I have had the honour of hearing him speak and meeting him in the past.

2.2 I carried out structured interviews with seven people while I was in Cape Town, and also conducted two telephone interviews by telephone from London. The people I spoke to were:

- **Howard Varney**, Director, Truth Seeking, at the International Center for Transitional Justice.
- **Marjorie Jobson**, National Director, Khulumani (this interview was conducted by telephone).
- **Professor Carolyn Hamilton**, South African Research Chair in Archives and Public Culture, University of Cape Town.
- **Professor Richard Calland**, Associate Professor in the Public Law Department at the University of Cape Town. He specialises in the law and practice of the right to access to information and whistleblowing protection; in administrative justice; in public ethics; and in constitutional design – largely derived from his work as programme manager of the Political Information & Monitoring Service at The

Institute for Democracy in South Africa – the leading democracy think tank in Africa – which he led from its inception in 1995 until 2003. In 2000, he founded the Open Democracy Advice Centre (ODAC), a law centre based in Cape Town, which promotes the 'right to know', advising whistleblowers, advocating law reform and taking test case litigation on access to information. He continues to play a role at IDASA as Acting Manager of the Economic Governance Programme that was initiated in January 2007, and serves as part-time Executive Director of ODAC.

- **Brian Williams**, a consultant with The Centre for Conflict Resolution, was twice imprisoned by the apartheid regime. He is now a consultant specialising in employment and equality issues, and he is also deeply involved in developing his home community.
- **Professor Kader Asmal and Dr Louise Asmal**. Kader Asmal is one of the architects of South Africa's Constitution and Bill of Rights, and was formerly Minister for Water Affairs and Forestry and Minister for Education. Louise Asmal is a Director of the South African Board of the Canon Collins Trust, which since 1981 has enabled thousands of southern Africans to pursue higher education, and partnered over 30 local organisations to increase educational access for marginalised groups and communities. By focussing on education, the Trust is helping southern Africans to develop home-grown strategies to tackle poverty and promote social justice.
- **Laurie Nathan**, who between 1992 and 2003 was Executive Director of the Centre for Conflict Resolution at the University of Cape Town. He spent 2004 and 2005 on sabbatical at the Crisis States Research Centre, London School of Economics. He then joined the Department of Environmental and Geographical Science at the University of Cape Town, where he convenes the honours module on Understanding and Managing Conflict.
- **Charles Villa-Vicencio**, the former Director of Research at the Truth and Reconciliation Commission, and the former CEO of the Institute for Justice and Reconciliation (this was a telephone interview).

I thus had the good fortune to meet with a group of very knowledgeable and talented people who are helping to build the new South Africa.

2.4 I also engaged in a number of informal discussions with a variety of people while I was in Cape Town, who also helped to develop my understanding and ideas.

2.5 I also visited the **District Six Museum**, which commemorates a racially and culturally diverse and tolerant area of Cape Town which the apartheid regime attempted to obliterate, forcibly removing its inhabitants to basic townships, flattening the buildings, and even redesigning the street grid. The museum is gradually expanding to commemorate all forced removals in South Africa and beyond. It also explores apartheid's roots in slavery. At its doorway its moving mission statement is displayed:

"Remember Dimbaza,  
Remember Botshabelo/Onverwacht,

South End, East Bank,  
Sophiatown, Makuleke, Cato Manor.  
Remember District Six.  
Remember the racism  
Which took away our homes  
And our livelihood  
And which sought  
To steal away our humanity.  
Remember also our will to live,  
To hold fast to that  
Which marks us as human beings:  
Our generosity, our love of justice  
And our care for each other.  
Remember Tramway Road,  
Modderdam, Simonstown.

In remembering we do not want  
To recreate District Six  
But to work with its memory:  
Of hurts inflicted and received,  
Of loss, achievements and of shames.  
We wish to remember  
So that we can all,  
Together and by ourselves,  
Rebuild a city  
Which belongs to all of us,  
In which all of us can live,  
Not as races but as people."

2.6 I have decided not to attribute any comments to any of those to whom I spoke. This is partly out of fairness to them, in that they may not necessarily wish to be associated with my conclusions, and partly because my thoughts on the lessons that South Africa may have for dealing with the past in Northern Ireland are a synthesis of everything I saw and heard on my short visit to Cape Town, and cannot sensibly be attributed to any one individual.

### 3. **BACKGROUND**

3.1 Since this report will be displayed on BIRW's website, and may be read by people who know little about Northern Ireland, I thought it might be useful to sketch in the background to the debate about dealing with the past in Northern Ireland.

3.2 The debate on how Northern Ireland should deal with over 40 years of conflict is highly contested. It is a debate between those who believe that the past should be allowed to rest undisturbed and those who believe that unless the past is examined and truth and justice able to prevail, then Northern Ireland will never be fully at peace with itself. This

somewhat simplistic view can also be seen through the lenses of community, age, class and gender. For instance, there are some in the Protestant/unionist/loyalist community who believe that there is no reason to examine the past and to do so is an attempt to re-write history, while many in the Catholic/nationalist/republican community want a Truth Commission. Matters are further complicated by the fact that there is no commonly-agreed version of "the past". The creation of the Consultative Group on the Past (CGP) by the Northern Ireland Office is the most recent response by the UK Government to the issue. This report briefly examines a number of the UK Government's initiatives and approaches to dealing with the past in Northern Ireland, including the CGP. BIRW's focus has been on the extent to which the various mechanisms are compliant with Article 2 (right to life) of the European Convention on Human Rights, given effect in domestic law by the Human Rights Act 1998, the procedural aspects of which demand an official, effective investigation including the principles of independence, impartiality, public scrutiny, promptness and the involvement of the next-of-kin.

#### **THE OVERSIGHT APPROACH: THE POLICE OMBUDSMAN**

- 3.3 The Office of the Police Ombudsman for Northern Ireland (PONI) was created by the Police (Northern Ireland) Act 1998. The Police Ombudsman is accountable to Parliament through the Secretary of State. PONI provides an independent and impartial complaints service open to all in Northern Ireland seeking to complain about the Police Service of Northern Ireland (PSNI) and its predecessor the Royal Ulster Constabulary (RUC). This mechanism has been used by families who lost loved ones in the conflict to investigate their deaths as the PONI can look at both contemporary and historical complaints. Unfortunately, the PONI can only examine the aspects of the death insofar as they relate to the conduct of police officers. However, considering the nature of the conflict, issues such as whether the police were aware of a threat against an individual, the use of informers by police and the paucity of police investigations often mean that families find out a great deal about a death. There have been two particularly significant investigations by the PONI. The first was into allegations into the 1998 Omagh bombing, which uncovered serious failings in the handling of intelligence by the police, and the second was into the role of Agent Roxy, a police informant, who was involved in over ten murders and numerous other criminal acts, which exposed widespread collusion between members of the RUC and loyalist paramilitaries. Although both these cases were controversial the PONI was seen, for the most part, to be acting in an impartial and independent manner over contentious issues. The PONI has been criticised for the length of time its investigations take to be completed, its failure to communicate with families and the diversion of resources away from historical cases. The PONI has highlighted the strain these historical cases place on the office and it is hoped a recent re-structuring in this area should enable some improvement. While the PONI enjoys a good reputation, the aforementioned issues combined with decisions by the

Public Prosecution Service not to prosecute police officers following PONI recommendations has had an impact. BIRW has consistently asked for increased funding for the PONI as it is the only current Article 2 compliant mechanism available to families.

#### **THE POLICE APPROACH: HISTORICAL ENQUIRIES TEAM (HET)**

- 3.4 The HET was created by the then Chief Constable of the Police Service of Northern Ireland, Sir Hugh Orde, in September 2005 and officially commenced work in January 2006. Its purpose is to re-examine every conflict related death from 1968 to 1998 (when the Good Friday peace accord was signed). The HET employs both former police officers from England and former PSNI and RUC officers; the unit reports directly to the Chief Constable of the PSNI. The approach taken was to examine each case in chronological order. However, where cases raised matters that engaged the public interest, were linked, or on humanitarian grounds such as the ill-health of the next-of-kin required urgency, cases could be taken out of sequence. The unit has come under criticism for a number of reasons. Some in Northern Ireland, particularly in the nationalist community, refused to engage with the HET due to suspicions about the police and the lack of independence of the unit. The HET's family contact officers, a key part of their approach, often misunderstood the Northern Ireland context or failed to communicate appropriately with families. Research by the University of Ulster highlighted the "gate-keeping" of intelligence by former RUC officers which led to concerns that the truth was being inhibited. Records from earlier cases were often limited or non-existent, leading the HET to carry out only desk-top reviews of cases. Equally, the time taken to carry out investigations was much longer than anticipated, leading to disappointment and disengagement. Finally, the HET has faced patchy and uncertain funding which has required re-structuring, staffing cuts and uncertainty about the future. While BIRW does not consider the HET to be Article 2 ECHR compliant as it reports to the Chief Constable, it is the only real opportunity for families, who receive a written report on their case from the HET, to discover what happened to their loved one. Any replacement must, in our view, be at least as good as the HET.

#### **THE GOVERNMENT APPROACH; THE CONSULTATIVE GROUP ON THE PAST (CPG)**

- 3.5 The CGP was created by the UK government to respond to a perceived need for Northern Ireland to deal with its past. Its eight members were from a variety of backgrounds, though none were lawyers or human rights experts, nor did they have any expertise in victims' issues, and were appointed directly by the government without consultation about their membership or terms of reference. The group was co-chaired by Lord (formerly Archbishop) Eames and Denis Bradley. The group's task was to consult across the community on "how Northern Ireland society can best approach the legacy of the events of the past 40 years; make recommendations, as appropriate, on any steps that might be taken to

- support Northern Ireland society in building a shared future that is not overshadowed by the events of the past". The CGP was given only one year to carry out their work; however, the public response to their work was overwhelming.
- 3.6 The CGP's key proposal was a Legacy Commission, which would examine historical cases, carry out thematic investigations and engage in a process of information recovery. The separation of the investigation of historical cases from information recovery, which would take place behind closed doors, has the potential to deprive families of vital information. The CGP was against the principle of further public inquiries, seeming to ignore their importance in promoting justice and building confidence in the rule of law. The Group proposed only five years for the Commission to complete its work, which we consider to be far too short. BIRW's concerns included the limited reference to human rights in the proposals, the lack of mention of the roles played by the American, United Kingdom and Irish governments in the conflict and peace process, and the fact that the Legacy Commission's remit appears to stop at the border with the Irish Republic, ignoring the cross-border aspects of the conflict.
- 3.7 The launch of the CGP report in January 2009 highlighted the controversial nature of one of the proposals, namely a £12,000 "recognition payment" to victims, which partially overshadowed the other recommendations. However, importantly, it engaged the public in the debate about how to deal with past, including many who had not previously expressed an opinion on the issue. The current status of the CGP proposals is unclear. After a six month wait, the government launched a consultation on the process. This was problematic. First, there were a limited number of submissions, despite the fact that many NGOs in Northern Ireland held events on the issue to raise awareness and encourage engagement. Secondly, there was confusion over the status of the £12,000 payment, which the government repudiated before the Secretary of State said that he would hear submissions on the issue. Thirdly, the government has yet to publish its response to the consultation process. Finally, with the economic crisis, the forthcoming General Election and no clear consensus emerging from the responses to the consultation, it is not clear what will happen to the CGP proposals.

#### **THE BILL OF RIGHTS DEBACLE**

- 3.8 The 1998 Northern Ireland peace accord included the promise of a Bill of Rights for Northern Ireland. Under the same agreement a Northern Ireland Commission on Human Rights (NIHRC) was established, to promote human rights generally, and also to advise the government on the content of the Bill of Rights. The NIHRC consulted widely over its advice, and civil society responded by establishing a Human Rights Consortium,



which also engaged a very broad constituency in the debate. A combination of internal problems within the NIHRC and lack of support for its work by the government led to the Bill of Rights becoming a political football, and it was not until 2008, a decade after the Good Friday/Belfast Agreement, that the NIHRC was able to deliver its advice to the government.

- 3.9 In the meantime, the Brown administration of the government had proposed a Bill of Rights and Responsibilities for the whole of the UK, thus undermining the concept of a Northern Ireland Bill of Rights, and the devolved Northern Ireland Assembly was heading for a deepening political crisis from which it has only very recently, we hope, emerged.
- 3.10 It took the government a full year to publish its consultation paper "A Bill of Rights for Northern Ireland: Next Steps". The closing date for responding to this document is 1 March 2010, which precludes any legislation before the General Election. The NIHRC's advice had been wide-ranging and included economic and social rights and well as civil and political rights, but the government has boiled the advice down to just two substantive rights: the right to vote and the right to identify oneself as British or Irish, or both. Most NGOs are boycotting the consultation process in protest.

#### **THE WAY FORWARD ON DEALING WITH THE PAST**

- 3.11 It is clear from monitoring the debate in Northern Ireland and from our own experience working with victims and survivors that the past remains an important, current and often contentious issue. To ignore it would threaten Northern Ireland's ability to become a peaceful, equal and reconciled society. Consensus, widespread engagement and appropriate resources, as well as the centrality of human rights to any initiative, are key. If, as seems likely, the government is not going to lead the way on dealing with the past, then it will fall to the NGOs, community activists and other persons of good will to find alternative strategies.

#### **4. LESSONS FROM SOUTH AFRICA**

- 4.1 The Centre for Conflict Resolution held a policy meeting in Cape Town on 17 and 18 May 2007 on the theme, "Peace versus Justice? Truth and Reconciliation Commissions and War Crimes Tribunals in Africa". The following is a brief extract from the executive summary of the report on this seminar:

"The development of peacebuilding initiatives in Africa in the last decade is reflected in the proliferation of numerous models of transitional justice. Recent experiments on the continent range from judicial to nonjudicial approaches, including United Nations (UN) tribunals, "hybrid" criminal courts, domestic trials, and truth and reconciliation commissions (TRCs). War crimes tribunals and TRCs have been in operation in Africa since 1974, with varying degrees of

success. At an international level, the Hague-based International Criminal Court (ICC), which came into existence in 2002, was established as a court of last resort to prosecute offences where national courts failed or were unable to respond. An analysis of the variety and relative success or failure of these approaches can add much to our current and future understandings of peacebuilding in Africa. A key concern for the Cape Town seminar was to analyse the dilemmas posed by peace without justice, as opposed to justice without peace."

The seminar came up with a set of nine recommendations:

1. If there is to be lasting peace in a society emerging from conflict, justice for victims must be incorporated into any peace and justice mechanisms, and this requires that instruments established ensure that the voices of victims are heard.
2. The decision about the kind of transitional justice approach must be made taking local needs into account, while learning from other experiences. Each country's post-conflict needs are distinct, and transitional justice mechanisms such as truth commissions should respond to each country's specific set of circumstances.
3. It is important to have a clear idea of what the injustice was, who the victim was, and who the perpetrator was in order to implement the appropriate transitional justice mechanism.
4. Peace and justice initiatives need to address the democratic deficit in a way that restores civic trust. Citizens must be able to have civic trust in their institutions of government. They must also believe that justice works for them irrespective of political affiliation, ethnic persuasion or other differences.
5. Agreements and undertakings made to victims and perpetrators by truth commissions must be fulfilled. This should also involve a more developed understanding of the various forms that reparations and healing can take, be it through financial, symbolic, individual or collective means.
6. The United Nations needs to pay attention to future Disarmament, Demobilisation and Reintegration (DDR) programmes, and recognise the multiple roles that women play during conflicts. Post-conflict power relations must also be considered so that women are fully integrated into these programmes.
7. There is a need to broaden the ambit of peace, justice and reconciliation strategies from legal instruments to be sensitive to wider considerations such as symbolic gestures, memorials, monuments, heritage, and indigenous forms of reconciliation and justice.
8. In the African context, the cultural constructions and format of Commissions need to be considered. This involves the physical arrangements of hearings as well as a recognition of indigenous forms of communication, dialogue, and customary practices.
9. In order to achieve sustainable peace, peace processes must address the root causes of conflicts as well as the injustice which victims suffered. This requires a more complete assessment of the political

economy and socio-economic factors that have fuelled these conflicts.

- 4.2 Although these are African solutions to African problems, they are all applicable to Northern Ireland, and, indeed to any country emerging from conflict, despite what I say at 4.4. below.
- 4.3 The following propositions are drawn partly from my own knowledge of the issues around dealing with the past in Northern Ireland, and partly from my many illuminating discussions in South Africa. Some are self-evident; others will undoubtedly be controversial, at least for some audiences. I hope, though, that they will re-ignite the debate about dealing with the past in Northern Ireland, which has apparently, although I hope only temporarily, run into the sand.

### **Lesson 1: There is no one-size-fits-all solution**

- 4.4 The only solution to dealing with the past in Northern Ireland will be made by the people of Northern Ireland, and no-one else.
- 4.5 South Africa is not Northern Ireland. Although there are many resonances between the two places, the situation in South Africa is both simpler and more complex than that in Northern Ireland. South Africa has had a radical change of regime, with a new Constitution, a Bill of Rights and a Constitutional Court. There has been (albeit imperfectly realised, particularly among many white members of the community) an acknowledgement, both domestically and internationally, that apartheid was a crime against humanity. There has been a Truth and Reconciliation Commission (although some say that it delivered neither truth nor reconciliation). There is an all-too-visible, immensely wide, and ever-increasing gap between the rich and the poor. South Africa reached the point of a virtually complete breakdown in the rule of law before it entered transition.
- 4.6 The only factor that Northern Ireland has in common with these South African features is the gap between rich and poor, but the scale is so much smaller in Northern Ireland that comparisons are invidious. In Northern Ireland, the Protestant/unionist/loyalist community and the Catholic/nationalist/republican community (the two communities, in shorthand) share a common religion, a common language, and, in terms of the socio-economic essentials – housing, food, clothing, etc – a largely common culture. In many ways the people of Northern Ireland have more in common with one another than there are differences. Indeed, both communities can, and to some extent do, regard themselves as belonging to both minorities and majorities: the Protestant/unionist/loyalist community is in a small majority in Northern Ireland but a minority on the island of Ireland, and, by virtue of their Irishness, within the UK; while the Catholic/nationalist/republican community is in a large minority in Northern Ireland, and a smaller minority in the UK, but is in the majority on

the island of Ireland. Despite the catalogue of violence and inhumanity that characterised the conflict, which had a disproportionate impact on Northern Ireland's tiny population, daily life and the machinery of democracy continued almost unimpaired, with children still being educated, the courts functioning, and people voting freely in elections. The role of the state in the Northern Ireland conflict remains for the most part unacknowledged. There is not even an official, never mind an unofficial, consensus about what has happened and what should happen in Northern Ireland.

- 4.7 It is thus obvious that Northern Ireland will need to find its own way of dealing with the past, which is not to say that the broad principles drawn up by the CCR seminar mentioned above do not provide some valuable guidance.

### **Lesson 2: The past cannot be dealt with while the war is going on**

- 4.8 Ideally, all hostilities must have ceased before it is possible to consider dealing with the past. If there are sporadic outbreaks of violence, there must be consensus that they must be halted.
- 4.9 Fortunately, Northern Ireland has reached this point. All major paramilitary groups have disarmed, the International Decommissioning Body's mandate had come to an end, and the army is for the most part no longer deployed in Northern Ireland. Dissident violence is small-scale and attracts no significant support, while inflicting very unwelcome casualties and damage. Most importantly, there is consensus that a return to violence would be disastrous, and the first generation for many decades has grown up without knowing violence.

### **Lesson 3: It is not possible to draw a line under a problematic past**

- 4.10 Almost everyone was emphatic about this. Those who want to draw a line under the past are usually those who have something to hide. Any attempt to obliterate the past precludes the possibility of learning the lessons of the past, and, as the philosopher and poet George Santayana said, "Those who cannot remember the past are condemned to repeat it."
- 4.11 Dialogue and discourse about the past is an important aspect of the transition from conflict. Someone in South Africa said to me, "You can inhabit a dialogue; you cannot inhabit silence." Someone else said, "If you don't talk about the past, you become trapped in it."
- 4.12 Even at the pragmatic level, it is not possible to ignore the past. It leaves its traces and scars not only in the minds and bodies of people, but in society itself, even after the last person who can remember the past is gone. The past does not go away, and if it is not dealt with, it can erupt in unpredictable and extremely negative ways.

#### **Lesson 4: It is not possible or desirable to try to achieve consensus about what happened in the past**

- 4.13 The was unanimity among those I spoke to in South Africa on this point. As some of them pointed out, a single agreed version of the past is a recipe for totalitarianism, and for the airbrushing out of inconvenient or uncomfortable truths.
- 4.14 Any attempt to achieve an agreed history would run contrary to the principle of diversity. There is and should be room for many versions of the past. There are some matters of historical fact which are indisputable. Some of these are easy to agree, such as the date of the Belfast/Good Friday Agreement. Others, such as the existence of sectarianism and collusion, are more liable to be the subject of denial on the part of some people. However, beyond those core facts, there is plenty of room for interpretation. An RUC officer's history of the conflict will be very different from that of a member of the IRA, say, but both their stories deserve to be heard, and we suppress their stories at our peril.
- 4.15 However, versions of history that steam along on parallel lines are not necessarily illuminating. When the diversity of histories is creative, is where they intersect; as one person put it, "What matters is when my story touches your story."
- 4.16 Some people may think that an agreed version of history is important from the point of view of the education of our children. However, what I have learned from my South African trip is that it is dangerous to teach children a single version of history, without acknowledging that other versions exist. To do so maintains divisions in society and promotes bigotry and sectarianism. Therefore, the way that the history of the conflict is taught in Northern Ireland schools needs careful examination and may need to be radically transformed. On 21 September 2004 President Nelson Mandela opened the Nelson Mandela Centre of Memory and Commemoration, an archive of his papers and records. The centre is located at the offices of the Nelson Mandela Foundation in Johannesburg. In his opening speech, he said:  
"The history of our country is characterised by too much forgetting. One of our challenges as we build and extend democracy is the need to ensure that our youth know where we come from, what we have done to break the shackles of our oppression, and how we have pursued the journey to freedom and dignity for all."

#### **Lesson 5: It is vital to develop an agreed set of values for going forward into the future**

- 4.17 One person said to me, "We cannot control the past. We can control the present, and that means that we can make both the future and our own history."

- 4.18 The new South African Constitution and the Bill of Rights are what embody South Africa's set of agreed values. They create rights that are enforceable, that belong equally to everyone, and they allow for new rights to be developed over time.
- 4.19 Northern Ireland is currently without such a platform, as the South Africans like to call it. The Good Friday/Belfast Agreement is not such a launch pad. Brendan O'Leary has described it as "cosociational", by which he means it is not so much an agreement as a bundle of matters which all those who were party to the Agreement are prepared to concede on condition that their particular aims are reflected in the package. Furthermore, the Agreement has been undermined by government, who have backtracked on the Bill of Rights and have failed to implement the safeguards envisaged in the Agreement for the Irish language. Lastly, the Agreement protects only a limited and selective list of human rights.
- 4.20 The obvious vehicle for achieving an agreed set of values which confer equal rights on all members of society is a Bill of Rights, especially since the UK has no written constitution. A UK-wide Bill of Rights and Responsibilities – in itself a flawed concept, because rights should not be dependent on or confused with responsibilities – will not be specific enough to provide the shared set of values that Northern Ireland needs if it is to move forward. A key objective for those who want to see peace, stability and progress in Northern Ireland must be the creation of a Northern Ireland-specific Bill of Rights that can command the support of the majority of people in Northern Ireland, and to convince the next government that it must implement it.

#### **Lesson 6: Inclusivity is the key to success; exclusivity is doomed to failure**

- 4.21 It may not be possible to come up with a solution which suits absolutely everyone, but it is imperative to find a model that includes as many members of Northern Ireland society as possible, especially those who have been marginalised, such as Travellers, people with disabilities, and members of ethnic and other minorities. One group whom the CGP rightly identified as being badly served at the moment are former members of the security services; I would expand that category to include all former combatants, including former paramilitaries, many of whom have severe medical, social and/or economic problems, which can adversely impact on society as a whole.
- 4.22 The other side of this coin is that the more people who are excluded from the process of dealing with the past, the more trouble will be stored up for the future. A process brokered solely between the two communities, for example, simply would not work.

#### **Lesson 7: The state must acknowledge any wrong-doing on its part**

- 4.23 If the state does not acknowledge its responsibility, there is little hope that anyone else will do so. State acknowledgment is very powerful symbolically, and is a prerequisite for the institutional reforms that are necessary in order to achieve the transition from conflict to peace. However, it is hard to achieve, and usually only happens in response to considerable pressure, whether domestically or internationally (or both). It is also more difficult to get those with real power and authority to acknowledge wrong-doing than it is to persuade less powerful officials to do so.
- 4.24 In Northern Ireland, there has been some degree of acknowledgement by the state, but it has mainly taken the form of recognising the need for change, for example in the reform of policing. The government has side-stepped its responsibility for some of the most contentious issues, such as collusion, by hiving it off to quasi-independent (in that they are either emanations of the state or are state-facilitated) investigations by establishment figures, such as Lord Stevens<sup>1</sup>, Baroness O'Loan<sup>2</sup>, and Judge Cory<sup>3</sup>. Landmark contentious killings, such as those that occurred on Bloody Sunday<sup>4</sup>, and the murders of Rosemary Nelson<sup>5</sup>, Robert Hamill<sup>6</sup> and Billy Wright<sup>7</sup>, have been dealt with by public inquiries, all of which have yet to report. The government is, however, resisting an independent inquiry into the most contentious of these deaths, that of Patrick Finucane<sup>8</sup>. Although the HET is charged with investigating all deaths arising out of the conflict, it has yet to grapple with collusion thematically.
- 4.25 There has been no public acknowledgment of responsibility for any aspect of the conflict in Northern Ireland by any government to date. It has effectively buried the CGP's proposal for a Legacy Commission, despite the overwhelming public demand for a mechanism for dealing with the past. Until a government is prepared to acknowledge its responsibilities, non-state actors will have no incentive to acknowledge theirs.

### **Lesson 8: Non-state actors must also acknowledge their part in any wrong-doing**

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- <sup>1</sup> England's former most senior police officer, who conducted three investigations into collusion in Northern Ireland
- <sup>2</sup> The former Police Ombudsman who conducted a ground-breaking investigation into collusion between RUC officers and loyalist paramilitaries
- <sup>3</sup> A former member of the Canadian Supreme Court, who investigated the Nelson, Hamill, Wright and Finucane cases mentioned below and found a prima facie case for collusion in all four cases
- <sup>4</sup> See [www.bloody-sunday-inquiry.org](http://www.bloody-sunday-inquiry.org)
- <sup>5</sup> See [www.rosemarynelsoninquiry.org](http://www.rosemarynelsoninquiry.org)
- <sup>6</sup> See [www.roberthamillinquiry.org](http://www.roberthamillinquiry.org)
- <sup>7</sup> See [www.billywrightinquiry.org](http://www.billywrightinquiry.org)
- <sup>8</sup> A Belfast lawyer murdered in 1989 with the alleged involvement of the police the army, and the intelligence service

- 4.26 Everyone is responsible for his or her own actions. A criminal act remains a crime, even if it was state-sanctioned.
- 4.27 It is important that non-state actors also acknowledge their responsibilities, although they have a poor record of doing so. Most paramilitary groups in Northern Ireland have in fact apologised for the harm they have done, although some people will have difficulty accepting those apologies or their sincerity, especially in view of their reluctance to get down to specifics. Another outstanding issue is the whereabouts of the bodies of the Disappeared.
- 4.28 However, there are many others who have not acknowledged their actions, or in some cases, inaction. Two of the abiding and most negative legacies of the Northern Ireland conflict are sectarianism and discrimination, yet there are many institutions and employers who are unwilling to address these issues.
- 4.29 Although victims and society are entitled to demand acknowledgment from non-state actors, the making of such a demand creates an obligation to try to understand why, for example, paramilitaries acted as they did. This can feed back into state responsibility. For example, in Northern Ireland, many young men joined the IRA after Bloody Sunday because they felt that, if the state was prepared to kill unarmed demonstrators, they needed to defend their community against the state. Such an attempt at understanding can also help to bring about reconciliation, which is discussed in greater detail below.

#### **Lesson 9: It is not acceptable to deprive individuals of their rights to truth and justice**

- 4.30 The South Africans I interviewed mostly felt that the rights to truth and justice were human rights that could not be withheld without compounding the original human rights violations involved. They also rejected the idea that “dragging up the past” by insisting on truth and/or justice holds society back from progress towards peace. They felt that assisting seekers after truth and justice was a vital element in making that transition. One South African pointed out that society is made up of individuals, and if individuals cannot move on because their quest for truth and justice is thwarted, then society cannot move on either. Someone else made the important point that truth-recovery mechanisms are not a substitute for conflict resolution.
- 4.31 However, they were more divided when it came to the questions of amnesties and impunity. One person thought that in a conflict compromises had to be made to achieve peace, and that peace was a greater prize than redressing human rights violations. Others thought that the amnesty offered by the TRC was vital, not because it was the only way of finding out the truth, but because the offer of amnesty persuaded perpetrators to lay down their arms. However, some people thought that



the TRC was perpetrator-friendly, that the amnesty had been a mistake, and that victims had received neither truth nor reconciliation from the TRC. They were also concerned that perpetrators only confessed to acts which were already known to the authorities, and that there had been no follow-up on those perpetrators who had been shown to have lied despite claiming amnesty, or those who were refused amnesty.

#### **Lesson 10: The needs of all victims must be addressed**

- 4.32 There was unanimous rejection of the notion of a hierarchy of victims. In South Africa, as in Northern Ireland, some victims' groups have been divisive, seeking to assert their rights over the rights of other victims. Every victim has the right to be heard, and the right to a safe place to speak about what has been done to them, which can be very hard for them to voice.
- 4.33 It is important that the specific needs of individual victims are addressed. One person made the very important distinction between the need for recuperation and the right to reparation.
- 4.34 If there is one need that victims have in common, it is the need for acknowledgement of their status as a victim. As we have found with the HET and Judge Cory's inquiries in Northern Ireland, official recognition that wrong has been done to someone, especially but not exclusively where the perpetrator is the state, has huge symbolic importance, because it validates the victim's experience publicly and officially. Official apologies to groups of victims are also helpful.

#### **Lesson 11: Reparations are vital on several levels and can take many forms**

- 4.35 Reparation is the tangible evidence of acknowledgment and the willingness to change and to make amends. It is therefore a vital element in transition.
- 4.36 Reparation can be made to individuals, to communities, and it can be symbolic. It need not take the form of financial compensation, although that can be useful. However, blanket payments which make no distinctions in terms of the degree of suffering or sacrifice experienced by each victim do not work. Also, in third world countries like South Africa (and perhaps also first world countries in recession), financial compensation can be a real drain on the economy.

- 4.37 Reparations to individuals must take account of what they have lost and, so far as possible, be restorative. Many victims will need medical and/or psychiatric care, and those needs may be life-long. Others may have lost their home, or their job, or their education, or the family breadwinner. Ways can be found to substitute for those losses. The UK is particularly well-placed to make such reparations because of its welfare state: for example, its National Health Service, its social housing, its social security benefits system, and its Criminal Injuries Compensation Scheme.
- 4.38 Although reparations to individuals are important, community and social reparations are also crucial. For example, former combatants often suffer from post-traumatic stress, leading to problems with alcohol and drugs, which in turn lead to anti-social behaviour. Meeting their needs not only helps those individuals, but rids society of a number of ills.
- 4.39 Community and social reparations can be very powerful, because they meet the needs of large numbers of people and make society as a whole better-off. Ideally, such reparations should be part of the programme that springs from the agreed set of values which forms the framework for transition. Such reparations can be more than changes which are necessary to enable transition, they can be transformational. Thus, for instance, the teaching of human rights values to every school student in Northern Ireland, not in isolation, but backed up by a Bill of Rights for Northern Ireland, and delivered within a reformed education system, has the capacity to bring an end to sectarianism.
- 4.40 Symbolic acts of reparation are also important. These can take the form of, for instance, apologies, memorials, and acts of commemoration. Documentation is also very important. District Six may have been bulldozed, but the District Six Museum tells the stories of its people, and puts what happened into the wider context of forced removals and broken communities. Those working on the Archival Platform at Cape Town University advocate a very broad approach to what should be included in an archive, or even constitutes an archive, arguing, for example, that a landscape can be seen as an archive.

**Lesson 12: Those who have been the beneficiaries of wrong-doing must acknowledge that fact and must be prepared to make amends**

- 4.41 This is possibly the hardest of all the lessons. There cannot be any question that there are winners and losers in every conflict. In Northern Ireland, for example, the army has been able to try out counter-insurgency measures and keep its soldiers battle-ready. For every person who has been discriminated against, there is someone who has enjoyed the benefits of that discrimination. Dennis Bradley put this well at the launch of the CGP's report in January 2009:
- “We are each and every one of us involved in this story. None of us stands outside. We all make up a part of the tapestry. Robin [Eames] and I have never killed anyone and I don't think we ever could or

would have under any circumstances. This probably applies to most people in this society. But that does not mean we can wash our hands and say we were not part of the problem. Our attitude, our prejudice, our defence and justification of our own community to the detriment of the other community has played its part. Our empathy to our own history to the detriment of other histories has played its part."

However, just as in South Africa those who will admit to supporting apartheid are now thin on the ground, the silence from those who gained in the Northern Ireland conflict is deafening.

- 4.42 Acknowledgement that some gained and some lost as a result of the conflict is a necessary precursor to making amends, but amendment is necessary if society is to heal. For example, one of the more obvious areas where this issue is in play is in the differential rates of unemployment between Protestants and Catholics. This is an issue which has many nuances, but it remains the case that Catholics of working age are more likely to be unemployed than Protestants in Northern Ireland. Years of fair employment laws has not remedied this inequality, so more is needed. It would not be right or practical to take jobs away from Protestants and give them to Catholics, but amendment could be achieved by affirmative action in favour of Catholics, especially in the public sector, and it would not be unreasonable to expect Protestants to accept a similar rate of unemployment among their community to that experienced by the Catholic community.

### **Lesson 13: Reconciliation is also important, but cannot be forced**

- 4.43 Reconciliation takes place on both the individual and the societal level. For individuals, although it can be very hard to achieve reconciliation, it is very liberating because it frees people from the past and from negative feelings that can hold them back. Reconciliation is different for victims and perpetrators. Victims have to learn to forgive, and, in some cases, to give up blaming society for what happened to them. This does not mean that they have to condone what was done to them. Perpetrators have to acknowledge that what they did was wrong and harmful to others, to themselves, and to society, and to take personal responsibility for their actions, rather than blaming those who gave the orders. For all individuals, reconciliation is personal, and no-one can be coerced into achieving reconciliation.
- 4.44 In the transition from conflict, the state is under an obligation to create a society in which former enemies can come together democratically and deal with the past, the present, and the future in a non-violent way. None of this will happen without civil society continuing to mobilise, agitate and struggle in a constructive way. Even at the national level, reconciliation cannot be forced, but the establishment of a fully functioning democracy, which consciously aims to reject violence, is a necessary prerequisite for achieving national reconciliation.

- 4.45 Someone suggested to me that the term “reconciliation” encompasses the political (belligerents stop killing each other and coexist even if they disagree); the personal (between torturers/killers and victims); the social (at governmental level between groups previously divided); and the community (at the local level). By looking at reconciliation in these categories one can begin to measure progress.

#### **Lesson 14: Healing hurts**

- 4.46 Dealing with the past is not easy. It is painful for victims, for perpetrators, for those who facilitate the process, and for society as a whole. Difficult truths have to be told and acknowledged. It also has to be recognised that some people are both victims and perpetrators. The point was made to me that labelling can be unhelpful, and can make it difficult for people to change, or have the fact that they have changed recognised.

- 4.47 Archbishop Desmond Tutu has described how he and his fellow Commissioners were affected by the TRC in his book, *No Future Without Forgiveness*:

“At the beginning of our work in the Commission our mental health worker on the staff gave us a briefing about coping with what was to be a gruelling and demanding task. We were advised to make sure that we had a soul mate or some such friend or counsellor to whom we could unburden ourselves. We were urged to maintain a well-disciplined existence, otherwise we would be shocked by how easy it was to disintegrate, to become stressed, and even to suffer ourselves from post-traumatic stress disorder as we experience by proxy the anguish and agony of those who came to testify before the Commission. It was emphasised that that we should have quality time with our spouses and families, to be sure to take recreational breaks and regular exercise and, if possible, to have a regular spiritual routine as well. We thought we had been reasonably well prepared for the traumatic experience.

Despite all this we were shattered by what we heard and we did frequently break down or were on the verge of it.”

That description will be familiar to many who have worked with victims, for whom the effects of their trauma is bound to be even worse.

#### **Lesson 15: Dealing with the past requires leadership, honest commitment, and vision**

- 4.48 Dealing with the past requires an honest commitment to doing just that. It is a serious endeavour which cannot be embarked upon lightly, or in a spirit of pure pragmatism (although there is bound to be some element of pragmatism and compromise involved).
- 4.49 The members of the GCP, and in particular their co-leaders, Lord Eames and Denis Bradley, demonstrated genuine leadership in presenting their

report. They had clearly found their work to be life-changing. It is greatly to be regretted that the CPG was disbanded as soon as its report was published, and that there was no-one in government or outside it to champion their work.

- 4.50 The present government has shown a marked lack of leadership in allowing the CGP's proposals to run into the sand.

#### **Lesson 16: There must be room for dissent**

- 4.51 Several people expressed disquiet about the lack of any effective Official Opposition in South Africa. There will always be disagreements about what happened in the past, and about how to deal with the past, and these must have a voice. However, that voice should not be allowed to drown out the democratically-expressed will of the majority. It must, though, be heard, and its value in forcing the majority to explain themselves and be held to account must be recognised.

#### **Lesson 17: Dealing with the past cannot be left to governments**

- 4.52 This is perhaps the strongest lesson I drew from South Africa. The fact that there are so many strong civil society institutions in South Africa, working for the future of their nation, but inevitably doing so under the shadow of the past, is vital to coming to terms with the past. It is also instructive that an NGO, Khulumani, has been established to work on every aspect of the legacy of apartheid.
- 4.53 There is, unfortunately, widespread disillusion with the government in South Africa, and frustration that, despite all the near-miraculous changes that have taken place, economic power remains with the minority white population, and the gap between the rich and the poor, in many cases the destitute, is widening. However, despite these problems, civil society is strong and brimming-over with inspirational plans and projects to overcome the hateful legacy of apartheid.
- 4.54 For example, the University of the Western Cape has decided that every one of its students will be required, and will earn credits towards their degree by doing so, to engage in a research project, preferably within their own community, which will benefit that community in some positive way. Thus the more privileged members of South African society, whatever their race, will at an early age give something back to their communities and learn the value of community activism. Community activists in one community are undertaking an education programme centred round the Constitution, to enable their community to realise their rights and to deal, using their own resources, with serious problems such as poverty, marginalisation, and the power of the local drug barons. As part of this programme, this community intends to force its political representatives at local, regional, and national level to become accountable and engaged.

4.55 On 28 January 2009, Lord Eames and Denis Bradley said, when launching the report of the CPG:

"This work is however too important to leave simply in the hands of those who are tasked with political leadership. These uncertain times have demonstrated that normative political arrangements are constantly subject to change. High politics should and must accept its own limitations. Politicians must not be allowed to easily and quickly interpret all of our personally held perceptions on the past. They must not be allowed to fashion our hurt. We must instead invest and work on the stability that can only come from the heart of our communities. A political settlement on the hill is not enough."

4.56 It is clear that if Northern Ireland waits for the politicians to deal with the past, it will never happen. This paper will form the basis for a discussion among civil society in Northern Ireland about how we can do it for ourselves. One idea that was suggested to me is that civil society could set up its own, informal event, perhaps with international input, as a way of demonstrating the need for a state-sponsored mechanism for dealing with the past. We may also need to consider whether there is some benefit in having a single NGO whose sole focus is dealing with the past.

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February 2010.