

Fordham International Law Journal

Volume 26, Issue 4

2002

Article 10

The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland

Angela Hegarty*

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Abstract

The purpose of this Article is to examine the exercise and the usefulness of the public inquiry model, in the Northern Ireland conflict. This Article examines its role as both an accountability mechanism and a truth process, and in doing so I consider the proposition that public inquiries are employed by governments not as a tool to find truth and establish accountability for human rights violations, but as a way of deflecting criticism and avoiding blame.

THE GOVERNMENT OF MEMORY: PUBLIC INQUIRIES AND THE LIMITS OF JUSTICE IN NORTHERN IRELAND

*Angela Hegarty**

INTRODUCTION

That States commit violations of human rights is an undeniable, if much denied, truth. These violations are often not officially acknowledged until some time after they have been carried out, and the complete account of such violations may not emerge until the regime responsible has been removed from power. The events and the acts complained of are often denied by the State responsible until it is obliged, sometimes as a result of a political settlement, to submit to an investigation. Much of the dialogue about how to address such violations has therefore been in the context of transitional justice or of societies emerging from conflict. As part of that conflict there are often competing versions of the truth: that promoted by the State which has inflicted the abuses and that preserved by those individuals and communities who have suffered the abuses. In that struggle between official and unofficial versions of the truth, law is often appropriated by the State as a tool to deny the abuse. Those who have suffered the abuses often learn from this and employ law as a tool to focus attention on the violation.

The processes by which human rights violations are addressed involves a variety of official and unofficial mechanisms. Some mechanisms are political, some community-based, some are legal, and some combine all three aspects and a number of legal models that have emerged. There are also a plethora of legal prohibitions on human rights abuses, domestic and international, and a growing number of legal mechanisms that can be used to address such violations.

* Transitional Justice Institute, School of Law, University of Ulster. I am grateful to the following for comments and suggestions made on various drafts of this Article: Prof. Fionnuala Ní Aoláin, Prof. Christine Bell, Prof. John McEldowney, and Prof. David Whippman. My thanks, also, to John Coyle BL and Eamonn McKee for the opportunity to test and refine my ideas in discussions with them. I am indebted to the Centre for the Study of Human Rights and Equality, University of Ulster and the Irish Human Rights Centre, University College Galway, for the opportunity to present early drafts of sections of this Article at symposia and seminars organized under their aegis.

The purpose of this Article is to examine the exercise and the usefulness of one such model, the public inquiry model, in the Northern Ireland conflict. I examine its role as both an accountability mechanism and a truth process, and in doing so I consider the proposition that public inquiries are employed by governments not as a tool to find truth and establish accountability for human rights violations, but as a way of deflecting criticism and avoiding blame. Through an exploration of the key issues raised thus far by the latest incarnation of the public inquiry model — the Bloody Sunday Inquiry — I consider whether a domestic public inquiry, even one with some international aspects, is capable of finding truth and establishing accountability, which, I argue, are necessary for the creation of permanent peace in Northern Ireland. From this critique, I construct a rubric by which any proposed mechanism may be judged, and offer some suggestions for such a mechanism. The themes which dominate this discussion — the meaning of truth and the importance of accountability, the use of law by the State to avoid blame for human rights violations, and victims' expectations and experiences of truth processes — draw upon the Northern Ireland experience but are common across many jurisdictions and communities emerging from conflict.

It has been cogently argued¹ that criminal trials are the best legal method to address such violations, as they permit the reclaiming of the values so wholly undermined by the abuses. There are other ways, principally that of public investigation,² by which such violations can be pursued. The processes of "trial" and "truth" as Hayner has argued,³ are not mutually exclusive. The inquiry mode is sometimes a substitute for, and sometimes a precursor to, criminal charges. Both focus on the construction of an official or agreed-upon version of the truth, as well as upon legal accountability.

In Northern Ireland, criminal trials have overwhelmingly fo-

1. See generally CARLOS NINO, *RADICAL EVIL ON TRIAL* (1996); see also MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY AND THE LAW* (1997); Payam Akhavan, *Justice in The Hague: Peace In The Former Yugoslavia? Commentary on the U.N. War Crimes Tribunal*, 20 HUM. RTS. Q. 737-816 (1998).

2. That is, a civil, rather than a criminal, inquiry into events conducted in public.

3. Pricilla Hayner, *Truth Commissions* 5 (Paper presented at the Conference on Truth, Justice, Accountability and Reconciliation in Societies Emerging from Crimes Against Humanity at the University of British Columbia, Oct. 13-14, 2000).

cused on the actions of the non-State actors, or the “paramilitaries.”⁴ There have been very few prosecutions of State actors, that is, police officers and members of the British Army,⁵ despite the fact that they have been responsible for ten percent of the deaths in the conflict.⁶ Consequently, there have been numerous calls in the past thirty years for an independent investigation of the many controversial events involving the State and the practices that gave rise to them.

At the heart of those demands has been the existence of human rights abuses and the partial breakdown in the rule of law. Calls for independent inquiries have multiplied as the failure of the existing legal processes to hold the State accountable for its role in the conflict has become apparent. Yet, the response of the State to such events and to the requirement for independent investigation has been problematic. This has compounded the pervasive sense of impunity. Coupled with this has been a growing local awareness of the “truth commission” model, largely through publicity of the South African Truth and Reconciliation Commission. This has led to calls for a local truth commission, encompassing the activities of State and non-State actors.

I. PUBLIC INVESTIGATION

There are two models of public investigation that have been

4. Between 1970 and 1980 alone, more than 8,270 people were convicted of indictable “scheduled” (i.e., terrorist-type) offenses. *Hansard*, Commons Written Answers, Mar. 6, 1998, at Col. 30032.

5. There have been twenty-four prosecutions and eight convictions of police officers and soldiers for the use of force while on duty. FIONNUALA NÍ AOLAIN, *THE POLITICS OF FORCE: CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND* 73 (2000) [hereinafter *POLITICS OF FORCE*].

6. This figure is a minimum, which would rise substantially if the allegations of collusion between the State and Loyalist paramilitaries are correct. See BRITISH IRISH RIGHTS WATCH, *DEADLY INTELLIGENCE: STATE COLLUSION WITH LOYALIST VIOLENCE IN NORTHERN IRELAND* (1999). The allegations of collusion are so serious that in May 2002, the United Kingdom (“UK”) and Irish governments appointed the retired Canadian judge, Peter Corry, to carry out an investigation into seven key cases, including those of Pat Finucane and Rosemary Nelson, human rights lawyers who were allegedly murdered by Loyalist paramilitaries in collusion with the State. See Press Release, Dep’t of Foreign Affairs, Government of Ireland, Appointment Of Judge To Investigate Allegations Of Collusion (May 29, 2002), available at <http://www.irlgov.ie/iveagh/information/display.asp?ID=966>; see also STATE DEPARTMENT, DEPARTMENT OF STATE HUMAN RIGHTS REPORTS FOR 2000, UNITED KINGDOM, U.S. DEPARTMENT OF STATE para. 1a (2001).

widely used in Northern Ireland and elsewhere. The first model, which has been extensively employed in the United Kingdom (“UK”), is the public inquiry. The other model, more common in other jurisdictions, is the truth commission, like those from South America and South Africa. A public inquiry is a highly legal model, albeit one which operates under political constraints, usually examining one particular event or occurrence. A truth commission is a much more overtly political model, with less strict rules of procedure and evidence and usually examines a broad spectrum of events and the issues arising from them. Nonetheless, the use of the law is an important element in this latter model. The success of the investigation and the choice of model will depend largely upon the intended outcome of the process. The commonly stated intention of such a process is to uncover the truth, to establish an accurate version of events, and to provide accountability. A secondary outcome of such a process can be the construction of a shared history or “memory,” and the laying to rest of deeply controversial events. It can however be argued that States institute such processes to give legal cover to governments and justify or minimize their actions, while constructing an official version or “memory” that denies the original abuse. This latter argument is one that can be made in respect of the State’s response to demands for inquiries in Northern Ireland.

A. *The Context in Northern Ireland*

The violent political conflict of the last three decades has been reflected in many areas, but perhaps most markedly in policing and in the use of force by the State. Northern Ireland has been policed in the main by the Royal Ulster Constabulary (“RUC”), which is now known as the Police Service of Northern Ireland.⁷ However, the British Army, including the locally recruited Ulster Defence Regiment (“UDR”), now known as the Royal Irish Regiment (“RIR”), has played a significant role in

7. The name change was one of the recommendations of the Independent Commission on Policing in Northern Ireland. REPORT OF THE INDEPENDENT COMMISSION ON POLICING IN NORTHERN IRELAND, A NEW BEGINNING: POLICING IN NORTHERN IRELAND para. 17.6 (1999) (otherwise known as PATTEN REPORT). The name change was implemented by Sec. 1 of the Police Act 2000 (Eng.). The Patten Commission was set up as part of the Agreement Reached in the Multi-Party Negotiations, Sec. 9, Apr. 10, 1998 [hereinafter Good Friday Agreement].

policing and in the conflict.⁸ Northern Ireland's policing arrangements are, and have been, quite different from the rest of the UK. For example, unlike the other police forces operating in the UK, RUC members are routinely armed. The violence of the conflict has had a serious impact upon the police. Many officers have been killed⁹ and maimed by paramilitary organizations, and many have seen their colleagues and friends murdered.

In examining the context of public inquiries and their use in Northern Ireland it is necessary to consider some criticisms of the way in which Northern Ireland has been policed, as a number of those inquiries which have taken place have been set up in response to criticism of many aspects of policing, including the use of lethal force, interrogation methods and the maintenance of public order. Some aspects of Northern Ireland's policing were carried out by the British Army, which was directly responsible for the deaths on Bloody Sunday, but much of it was done by the RUC. Further, the failure of the domestic accountability mechanisms, including public inquiries, has driven the conflict and has made policing and security ever more controversial in the process, a factor in the Bloody Sunday Inquiry.

There has been a long history of criticism of policing methods¹⁰ and the RUC and its members have been the subject of numerous serious allegations of human rights abuses in the past thirty years.¹¹ One U.S. State Department Human Rights report noted that "some members of the [RUC] have committed

8. The Ulster Defence Regiment was set up on April 1, 1970, in response to recommendations made in the Hunt Report. See REPORT OF THE ADVISORY COMMITTEE ON POLICE IN NORTHERN IRELAND, Cmd. 535 HMSO (1969).

9. See POLICE SERVICE OF NORTHERN IRELAND, SECURITY SITUATION AND PUBLIC ORDER, at <http://www.psni.police.uk/stats/securitysit.shtml> (providing statistics that 302 police officers have been killed since 1969).

10. To the extent that a series of government inquiries have been held, see cases cited *infra* n.33. A succession of United Nations ("U.N.") and European bodies has also criticized the policing and other security measures in Northern Ireland.

11. See COMMISSION ON THE ADMINISTRATION OF JUSTICE, SUBMISSION TO THE UN COMMITTEE AGAINST TORTURE (Nov. 1991); see also HUMAN RIGHTS WATCH, HELSINKI WATCH CHILDREN IN NORTHERN IRELAND: ABUSED BY SECURITY FORCES AND PARAMILITARIES (1992); AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL UNITED KINGDOM: ALLEGATIONS OF ILL-TREATMENT IN NORTHERN IRELAND (1991); AMNESTY INTERNATIONAL, POLITICAL KILLINGS IN NORTHERN IRELAND (1994); NORTHERN IRELAND HUMAN RIGHTS ASSEMBLY, LIBERTY BROKEN COVENANTS: VIOLATIONS OF INTERNATIONAL LAW IN NORTHERN IRELAND (1992).

human rights abuse . . . police occasionally abused detainees.”¹² It also observed “widespread antipathy in the Catholic community to the security forces.”¹³ While the antipathy is confined to the Nationalist community, there is evidence that many living in Loyalist areas experience problems with the RUC.¹⁴

Criticism of the police in Northern Ireland is often misunderstood and interpreted as hostility. While this may have been understandable given the sustained attacks on the RUC, and the deaths and injuries sustained by its members during the conflict in Northern Ireland, such an approach is both unhelpful and unprofessional. There have been many controversies surrounding the police and army activities in Northern Ireland, including iconic cases like Bloody Sunday and the murder of defense lawyers, Pat Finucane and Rosemary Nelson, both of whom were allegedly murdered by Loyalist paramilitaries acting in collusion with British Military Intelligence and the RUC.¹⁵ There are numerous other cases, less well-known but no less controversial, such as the cluster of murders carried out in the mid-Ulster area of Northern Ireland by off-duty police officers and UDR members.¹⁶ There have been numerous attempts to require the State to institute independent investigations into all of these cases as an alternative to the investigations carried out by various police forces on behalf of the State itself, but these have been largely unsuccessful. The response by the State in Northern Ireland has characteristically been to deny the existence of the abuses or to justify their occurrence. Occasionally, it has instituted what it has termed “independent judicial inquiries” in response to pressure, primarily by international human rights non-governmental organizations (“NGOs”) and interested governments. However, it may be observed that the remit and the scope of these inquiries, among other things, were so strictly drawn as to prevent any real criticism of the State. As Ellison and Smyth observe about

12. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOUR, U.S. DEP'T OF STATE, UNITED KINGDOM REPORT ON HUMAN RIGHTS PRACTICES FOR 1996 1 (1997).

13. *Id.* at 18.

14. See ROBBIE McVEIGH, COMMITTEE ON THE ADMINISTRATION OF JUSTICE, “ITS PART OF LIFE HERE,” THE SECURITY FORCES AND HARASSMENT IN NORTHERN IRELAND (1994).

15. LAWYERS' COMMITTEE FOR HUMAN RIGHTS, BEYOND COLLUSION: THE UK SECURITY FORCES AND THE MURDER OF PAT FINUCANE (2002).

16. See RAYMOND MURRAY, THE SAS IN IRELAND 1969-1989 31-44 (1990).

the Bennett Report:¹⁷

[it] was essentially an attempt to defuse the questions surrounding detention and interrogation without having to confront the more basic questions inherent in the strategy of de-politicising and de-legitimising the aspirations of large numbers of nationalists, whether supporters of the IRA or more moderate constitutional nationalists.¹⁸

Thus, those calling for any new sequence of inquiries into the events in Northern Ireland should be aware of the possibility that all such inquiries do is allow the State to insulate itself against criticism of its behaviour. Because of this, relatives of those killed by the State, as well as human rights non-governmental organizations (“NGOs”), have chosen, more recently, to use international legal mechanisms to focus attention on the violations. Specifically, they have been able to avail themselves of the right of individual complaint permitted under the European Convention on Human Rights (“European Convention”).¹⁹ A number of cases relating to the right to life have been heard by the European Court of Human Rights (“ECtHR”), most pertinently *Jordan et al. v. United Kingdom*.²⁰ These cases build upon previous jurisprudence to amplify the procedural right under Article 2 of the European Convention²¹ — the right of the relatives of those killed by the State to an independent effective investigation.²² In *Jordan*, the ECtHR found that the families’ right to such an investigation had been breached and was highly critical of the police investigations and the inquest procedures em-

17. REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND, 1979, Cmdd. 7497.

18. GRAHAM ELLISON & JIM SMYTH, *THE CROWNED HARP: POLICING NORTHERN IRELAND 97* (2000). See below for a more detailed consideration of this point.

19. The UK signed the European Convention on Human Rights (“European Convention”) in 1951. It signed the First Protocol to the Convention, allowing individuals to petition the Court, in 1966.

20. Judgment in five associated cases was given in May 2001. The cases were *Jordan v. UK*, Appl. no. 24746/94; [2001] EUR.CT.HUM.R. 247; *Kelly v. UK*, Appl. no. 300054/96; *McKerr v. UK*, Appl. no. 28883/94, reported in 34 EUR. HUM. R. REP. 553 (2002); *Shanaghan v. UK*, Appl. no. 37715/97.

21. European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 2, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). Article 2 states: “[e]veryone’s right to life shall be protected by law. No one shall be deprived of his life intentionally.” *Id.*

22. Fionnuala Ní Aoláin, *Truth Telling, Accountability and the Right to Life in Northern Ireland*, 5 EUR. HUM. R. L. REV. 572-90 (2002).

ployed by the State to investigate the deaths. After this case, many other families who have had relatives killed by the State have initiated legal proceedings.²³

Essentially, demands for public inquiries are driven by a need for an accounting for the events and a desire to see the rule of law restored. Thus, any response to these demands must be one that will facilitate an independent investigation, an important side-effect of which may be the bolstering of the confidence of the general public in the legal and judicial process. A failure to carry out an independent investigation may well have a catastrophic event on the rule of law. An independent investigation is one that is not, either in fact or perception, a concession to State objections or to denials that abuses took place. Any mechanism must treat those who are most affected by the events as the key stakeholders in the outcome of the investigation: its key concerns must not be the position of the State, which has carried out the dubious acts. The responsibility of the investigation is to those to whom the acts were done, and who have the most to complain about if a proper investigation is not carried out. This is something that is at the heart of the ECHR recent jurisprudence on the matter. As the Court observed:

. . . the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events.²⁴

This important principle seems to have been grasped by UK Prime Minister Tony Blair in advance of the ECtHR judgements in May 2001. When he announced the setting up of the Bloody Sunday Inquiry, he said:

I am setting up the inquiry because the relatives of those who died that day have the right to expect us, their Government — the British Government — to try to establish the truth of the events of that day. I am interested in their interests, their concerns and their sense of grievance, not in the sense of grievance of people who have engaged in terrorist acts.²⁵

23. Press Release, Derry families mount legal action against DPP, Pat Finucane Centre (Feb. 20, 2002), available at <http://www.serve.com/pfc/euro/euro15032002b.html>.

24. McKerr, Appl. no. 28883/94, at para. 148.

25. *Hansard*, Commons Debates, Jan. 29, 1998, at Col 517.

This is the standard by which any proposed public inquiry must be judged. The problem is that despite Mr. Blair's remarks, the government of the UK has thus far not met this standard. Yet, the rule of law and international human rights norms require it. The concerns raised about the behaviour and disposition of the State during the conflict in Northern Ireland are so serious that they will not simply vanish with time. It is therefore necessary to establish some form of independent investigatory process that is capable of uncovering and reporting the truth and allocating responsibility for the events complained of. This is the inevitable conclusion of the process opened up by the findings of the ECtHR in *Jordan et al.* The difficulty may be that no inquiry, public or otherwise, which is set up by the UK, is capable of satisfying this standard, because any such inquiry is likely to be controlled in its material aspects by the sections of the State who have most to lose from the reporting of the truth.

B. *Public Inquiries in the UK Constitutional Framework*

There are two principal sorts of inquiries in the UK, statutory and non-statutory.²⁶ Both types of inquiries have been employed in the past in Northern Ireland. All inquiries are governed by two well-established principles. First, witnesses must be treated fairly.²⁷ The definition of "fairness" is to be found in the six Salmon Principles, which laid down how witnesses before tribunals of inquiry were to be treated. These principles emerged from the Report of the Royal Commission on Tribunals of Inquiry,²⁸ set up after a political scandal involving a cabinet

26. See JOHN McELDOWNEY, *PUBLIC LAW* ch. 14 (2d ed. 1997).

27. See Blom Cooper, *Witnesses and the Scott Inquiry*, 1 *PUB. L.* 1-3 (1994); Blom Cooper, *Witnesses before public inquiries: an example of unfairness*, 1 *PUB. L.* 11-12 (1996); Howe, G., *Procedure at the Scott Inquiry*, 3 *PUB. L.* 445-60 (1996); Scott, R., *Procedures at Inquiries: The Duty to Be Fair*, 11 *L. Q. REV.* 596 (1995).

28. See REPORT OF THE ROYAL COMMISSION ON TRIBUNALS OF INQUIRY, 1966, Cmnd. 3121. The Royal Commission, chaired by Lord Salmon, listed six principles:

1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
2. Before any person who is involved in an inquiry is called as a witness, he should be informed of any allegations which are made against him and of the substance of the evidence in support of them
3. He should be given adequate opportunity of preparing his case and of being advised by legal advisers; his legal expenses should normally be met out of public funds

minster, John Profumo, was investigated by way of a public inquiry. Disquiet at how aspects of that inquiry had been handled and in particular comments from Lord Denning, the judge carrying out the inquiry, complaining that he had been required to act as investigator and adjudicator led to the establishment of the Royal Commission.²⁹

The second principle governing inquiries is that “the [i]nquiry’s work [should] be conducted with efficiency and as much expedition as is practicable.”³⁰ Inquiries are also now governed by the Human Rights Act 1998.³¹ Additionally, they must comply with international human rights standards.

There has been a marked increase in England and Wales of the use of the public inquiry model as a mode of legal process. This is partly a consequence of the phenomenal growth of administrative law and of the “quango-isation” of public power in the UK. It is also a product of the legal and political cultures engendered by decades of judicial review and the increasing supervision of public power by the courts. Public inquiries were sought by, for example, victims of rail crashes, defendants in arms export trials, and families of patients murdered by their doctors, and they were granted by successive UK governments, keen to demonstrate that they had nothing to hide and much to learn.

Their use has been significantly more limited in Northern Ireland and it is therefore worth reflecting upon some key questions about the nature of public inquiries, how they operate, and what ends they serve.

4. He should be given the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the Inquiry.

5. Any material witnesses he wishes called at the Inquiry should, if reasonably practicable, be heard.

6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.

Id. [hereinafter Salmon Principles].

29. See Winetrobe, B. *Inquiries After Scott: The Return Of The Tribunal Of Inquiry*, 1 PUB. L. 18-31, at 19-21 (1997).

30. SCOTT REPORT, RECOMMENDATIONS ABOUT INQUIRY PROCEDURES, Pt. 4, Sec. K, ch.1, para. K1.2.

31. *R v. Right Honourable Lord Saville Of Newdigate et al. (EX PARTE A; B; D; H; J; K; M; O; Q; R; S; U; V; Z And AC And AD)*, [2001] EWCA Civ. 2048 (Ct. Of Appeal Of England & Wales, Civ. Div.), July 28, 1999, at para. 31 (sitting As Bloody Sunday Inquiry); *Lord Saville of Newdigate & Ors v. Widgery Soldiers & Ors* [2001] EWCA Civ. 2048 (Ct. of Appeal of England & Wales, Civ. Div.) (Dec. 19, 2001), at paras. 5-6.

1. What Are Inquiries For?

Inquiries are held in one or other of three sets of circumstances. First, when the facts of a situation require public investigation. Here, the facts are not known and public concern is such that the investigation needs to be conducted publicly (e.g., judicial inquiries into rail crashes). Second, when the facts of a situation are contested, that is there are at least two, perhaps more, competing versions of events, and those versions need to be either reconciled or the official record settled in favor of one (e.g., the events of Bloody Sunday; the police investigation of the Stephen Lawrence murder,³² etc.). The third type of circumstance is when the facts of a situation are known, have been officially denied or contested in the past, but have come to be generally accepted. Thus, an official mechanism is required to acknowledge that the denial was wrong and the unofficial version was the correct one. Many truth commissions fulfill similar functions as this third category.

2. Why Are Inquiries Demanded?

Demands for inquiries are often made on the basis that people wish to “know the truth.” A deeper examination of these demands reveals that people sometimes say: “I want the truth,” when generally they mean: “I want *my truth* acknowledged.” There are some cases where the truth is buried and must be excavated, or where the finer details of the events complained of are not known and the purpose of the public investigation or inquiry is to uncover that truth or those facts. However, it is sometimes the case that people call for public inquiries because they believe that *they* know the essential truth about a situation and simply want the state to “own up.” Long campaigns for “the truth” or for new public inquiries to be set up also heighten this expectation.

3. Why Do Governments Agree To Inquiries?

More interesting still, is the matter of why governments

32. See generally BRIAN CATHCART, *THE CASE OF STEPHEN LAWRENCE* (2000). Stephen Lawrence was a black teenager who was killed in a racist knife attack in Eltham, South London, on April 22, 1993. His murder was unsatisfactorily investigated by the London Metropolitan Police and became a *cause célèbre* and a defining moment in the public discourse about racism in Britain. *Id.*

agree to hold public inquiries. Those who represent the State argue that it is because they are interested in upholding democratic values and practices, but many observers are not convinced. It is more likely that inquiries are often set up when public concern is such, that the relevant authority has to be seen to be doing something to address the public controversy. It seems that on many occasions, public inquiries are employed by governments not as a tool to find truth and establish accountability for human rights violations, but as a way of deflecting criticism and avoiding blame. A government can point to the findings of a public inquiry as verification of its claim that no wrong was committed and thus avoid both the blame for the wrong itself and the failure to do anything about it. Public inquiries thus serve a dual purpose – denying the harm done and providing a shield against claims that the state permits impunity. This point is explored in more detail below in relation to a number of public inquiries held in Northern Ireland.

II. PUBLIC INQUIRIES AND THE CONFLICT IN NORTHERN IRELAND

There have been numerous official reports into security practices and policies in Northern Ireland,³³ but there have been only six judicial inquiries related to the conflict.³⁴ These are, in chronological order of their reports: the Cameron Inquiry into the civil disturbances in 1968;³⁵ the Compton Inquiry into allegations of State brutality associated with internment;³⁶

33. A number of these were chaired by judges, such as REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185; REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND, 1975, Cmnd. 5847. These, specifically, did not investigate allegations of human rights violations although they were generally set up to address public concern. Compare REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND, 1979, Cmnd. 7497 (creating the Bennett Inquiry into police interrogation practices in direct response to such concerns, and specifically, the public fury after the publication of an Amnesty International Report). See AMNESTY INTERNATIONAL REPORT, *infra* n.45 and accompanying text.

34. There were other bodies, set up to review policies and practices, which published reports and made recommendations, such as REVIEW BODY ON LOCAL GOVERNMENT IN NORTHERN IRELAND, 1970, Cmnd. 546, which examined the structure and powers of local government, but these were not judicial "public inquiries".

35. REPORT OF THE COMMISSION APPOINTED BY THE GOVERNOR OF NORTHERN IRELAND, 1969, Cmnd. 532 [hereinafter DISTURBANCES IN NORTHERN IRELAND].

36. REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF

the Parker Inquiry, set up to examine the procedures for the interrogation of terrorist suspects;³⁷ the Widgery Inquiry, which was the first inquiry into Bloody Sunday;³⁸ the Scarman Inquiry into the government of Northern Ireland and the civil disturbances in 1969,³⁹ and the Bloody Sunday Inquiry, under Lord Saville and others, which is the second inquiry into the events of Bloody Sunday.⁴⁰ Three of these inquiries — Scarman, Widgery and the Bloody Sunday Inquiry — were or are Tribunals of Inquiry, set up under the Tribunals of Inquiry (Evidence) Act 1921. The others were either ad hoc or statutory. They were all set up in response to public and international concern about activities by the State and allegations of human rights violations arising from those activities. With the exception of the Tribunals of Inquiry, which are required by statute to sit in public, all of the inquiries sat in private. One inquiry chair gave the reason for this in his report:

The Secretary of State also informed us that in order to ensure the personal safety of members of the security forces against whom allegations might be made, it was necessary that our Enquiry should be undertaken in private and that *there should be no opportunity for a confrontation between complainants and members of the security forces against whom complaints were made.*⁴¹

One might wonder why it was necessary to prevent such a confrontation. One established way to test the validity of such allegations is to have those who made the allegations confront those who denied them. It can be speculated that it was because such a confrontation might generate further publicity for the complainants' case, something the State perhaps wished to pre-

PHYSICAL BRUTALITY IN NORTHERN IRELAND ARISING OUT OF EVENTS ON THE 9TH AUGUST, 1971, CMND. 4832 [HEREINAFTER BRUTALITY IN NORTHERN IRELAND].

37. REPORT OF THE COMMITTEE OF PRIVY COUNSELLORS APPOINTED TO CONSIDER AUTHORISED PROCEDURES FOR THE INTERROGATION OF PERSONS SUSPECTED OF TERRORISM, 1972, Cmnd. 4901.

38. REPORT OF THE TRIBUNAL APPOINTED TO INQUIRE INTO THE EVENTS ON SUNDAY, 30 JANUARY 1972, WHICH LED TO LOSS OF LIFE IN CONNECTION WITH THE PROCESSION IN LONDONDERRY ON THAT DAY, 1972, H.L. 101, H.C. 220.

39. REPORT OF TRIBUNAL OF INQUIRY INTO THE GOVERNMENT OF NORTHERN IRELAND AND THE VIOLENCE AND CIVIL DISTURBANCES IN NORTHERN IRELAND IN 1969, 1972, CMND. 566.

40. The Bloody Sunday Inquiry, set up on January 30, 1998, has not yet finished taking oral evidence. See *infra* n.96 and accompanying text (emphasis added).

41. BRUTALITY IN NORTHERN IRELAND, *supra* n.36, at para. 3 (emphasis added).

vent. Cameron, the first inquiry of the modern era in Northern Ireland, was set up to investigate the early disturbances of the conflict. It was less oblique about its reasons for taking evidence in private:

[A]fter very careful deliberation we decided that it was in the interest of the elucidation of the truth that our proceedings should take place in private. By so doing we were of opinion that witnesses would feel themselves able to speak with full freedom and complete sincerity, and at the same time *we would avoid providing a propaganda platform for those who might wish to make use of the Enquiry for such purposes*. As the Enquiry progressed we have been convinced that our initial decision on this difficult point was well founded.⁴²

Those who might make use of such “a propaganda platform” were those who had most to complain about, that is, those who had been victimized by the State. The language and sentiment of this passage is echoed in Prime Minister Heath’s now infamous exhortation to Lord Widgery at the outset of his inquiry into Bloody Sunday, to “never forget it is a *propaganda* war we are fighting.”⁴³ At this early stage of the conflict, therefore, those conducting inquiries were aware of the dangers of the competing narratives of the events and were keen to minimize the opportunities for the opposing narrative to be heard. The opposing narrative was that of those who opposed the State. That it was seen as propaganda demonstrates the attitude of the State and those appointed by it to investigate its actions. For them, human rights violations were a political battleground and the refutation of the claims of those who had been subject to those violations was a key aim. One way in which those claims might be refuted was to hold an ostensibly independent inquiry that exonerated the State.

By the time of the Bennett Inquiry (“Bennett”) in 1979,⁴⁴ this approach had lost its lustre. Bennett was set up as a direct response to the damning report produced by an Amnesty International mission sent to Northern Ireland to examine claims of

42. DISTURBANCES IN NORTHERN IRELAND, *supra* n.35, at para. 3 (emphasis added.)

43. See generally DON MULLAN, EYEWITNESS BLOODY SUNDAY 270 (1997).

44. REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND, 1979, Cmnd. 7497.

ill treatment and brutality during police interrogations.⁴⁵ The UK government barred Bennett from investigating individual claims — “it was made clear that it was no part of [the] Committee’s duty to inquire into individual allegations of maltreatment.”⁴⁶ Like its predecessors, the Bennett Committee sat in private. The effect of this was to allow it to hear from the State, but to discourage those who were the subject of the alleged ill treatment from appearing before it. As the report remarks:

It was brought to our notice that other persons and organisations who might have had relevant information had refrained from putting it forward because of the private character of this inquiry and, as they saw it, its likely outcome. This was, for us, a matter of regret.⁴⁷

By this stage and especially after the debacle of Widgery, many people in Northern Ireland, particularly in the Nationalist community, were quite cynical about inquiries set up by the UK government. The perception was that such inquiries were not independent and always prioritized the interests of the State and its agents. There were no further judicial inquiries into claims of human rights violations, despite the continuing and serious nature of the conflict, until the Bloody Sunday Inquiry was created in 1998, almost twenty years later.

A. A Brief History of Bloody Sunday

On January 30, 1972, in the city of Derry⁴⁸ in Northern Ireland, the British Army shot and killed thirteen men who were taking part in a civil rights protest against internment,⁴⁹ the demonstration had been banned by the Northern Ireland gov-

45. AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO NORTHERN IRELAND (28 NOVEMBER-6 DECEMBER 1977) (1978).

46. *Id.* at ch. 1, para. 2.

47. *Id.* at para. 11.

48. The city is officially named Londonderry, but the addition of the prefix “London” in 1613 has never been accepted by the majority Nationalist population of the city. Throughout this Article, the city is referred to as Derry. An alternative employed by other commentators is “Derry/Londonderry.” See BRIAN LACEY, SIEGE CITY: THE STORY OF DERRY & LONDONDERRY (1991) (providing a brief history of the vexed history of the city’s name).

49. On August 9, 1971 the Northern Ireland government had invoked Section 23 of the Civil Authorities (Special Powers) Act of 1922, which permitted internment — that is arrest and detention without charge or trial.

ernment.⁵⁰ Thirteen other men and one woman were wounded by army gunfire and one of those died later as a result of his wounds. Many other civilians were injured, alleging ill treatment by the army.⁵¹ No soldiers were injured by civilians, although the army alleged that soldiers had been injured by stones and acid bombs.⁵² There were hundreds of eyewitnesses to the events, which took place in a small section of the Bogside, a working class Nationalist⁵³ area in the center of Derry. The British military authorities have always maintained⁵⁴ that the intent of the military operation was to arrest rioters and that firing by the army was in response to a sustained attack upon them by the Irish Republican Army ("IRA"), the illegal republican paramilitary organization.⁵⁵ They said that they had shot gunmen and

50. At the time, Northern Ireland had its own provincial government. This government was suspended, partly as a result of the aftermath of Bloody Sunday in March 1972. See BRENDAN O'LEARY & JOHN MCGARRY, *THE POLITICS OF ANTAGONISM: UNDERSTANDING NORTHERN IRELAND 175-77* (1993).

51. Statements taken by Northern Ireland Civil Rights Association, Jan. 31- Feb. 3, 1972. See MULLAN, *supra* n.43, at 240-56. Many similar statements have been made to the new Bloody Sunday Inquiry.

52. A press statement from the British Army Press Office was issued at around 7:30 p.m. on the evening of January 30. *Bloody Sunday Inquiry, Transcript, Main Hearings*, Day 41, at 68 (6-25), 70(1-3) available at <http://www.bloody-sunday-inquiry.org.uk> [hereinafter *Bloody Sunday Inquiry Transcript*]. The allegations are apparently untrue: no such victims were ever produced and no other evidence was ever presented to support the claim.

53. The nomenclature of Northern Ireland's political identities is complex. The following is a useful explanation:

Protestants are largely Unionists — people who want to maintain the union with the United Kingdom. Most Catholics, on the other hand, are Nationalists, who wish to reunite with the Republic of Ireland, which has a population of about 3.5 million, of whom 95 percent are Catholic. Some Unionists call themselves "Loyalists," some of whom support the use of violence for political ends. Some Nationalists call themselves "Republicans," some of whom support the use of violence for political ends.

Human Rights in Northern Ireland, in HELSINKI WATCH 1 (1991).

54. The British Army issued a number of press statements and briefings, as did the UK government in the wake of the killings. See e.g., Philip Howard, *Press Given Detailed Account of Arrest Force's Actions*, TIMES, Feb. 1, 1972, at 4; see also, Dick Grogan & Martin Cowley, *Army Commander Describes Shooting as Defence Action*, IR. TIMES, Jan. 31, 1972, at 1.

55. There are numerous histories of the IRA. See, e.g., J. BOWYER BELL, *THE SECRET ARMY: THE IRA 1916-1979* (1989); TIM PAT COOGAN, *THE IRA* (1987); BRENDAN O'BRIEN, *THE LONG WAR: THE IRA AND SINN FEIN FROM ARMED STRUGGLE TO THE PEACE PROCESS* (1995); PATRICK BISHOP & EAMONN MALLIE, *THE PROVISIONAL IRA* (1987); ED MALONEY, *THE SECRET HISTORY OF THE IRA* (2002).

bombers, a claim that outraged the civilian population.⁵⁶ From the outset, the State's version of events was promulgated to the media.⁵⁷ The vast majority of civilian and press eyewitnesses supported the view that the army had opened fire on unarmed demonstrators, some of whom had been engaged in stone-throwing.⁵⁸ A number of witnesses spoke of seeing two civilian gunmen fire back at the army, after they had opened fire on the demonstrators. Those witnesses were adamant that the firing was in retaliation to the army and that it was brief and ineffective.⁵⁹ All civilian witnesses were certain that none of the dead or wounded had been in possession of a gun or bomb, as the army alleged.

There was shock and outrage at the events throughout Ireland.⁶⁰ The Irish government recalled its London Ambassador and demanded, among other things, the withdrawal of British troops from Derry and an end to internment.⁶¹ A group of local Catholic priests, who had been present at the events and some of whom had been arrested, accused the British of "wilful murder."⁶² In the meantime, the local community organized a number of responses, including a mass statement taking exercise, carried out at local venues.⁶³ Many people also gave statements to the Irish government.⁶⁴ Schools and workplaces throughout the city closed for the three days between the killings and the mass funeral three days later.⁶⁵ There were widespread demonstrations throughout Ireland, in solidarity with the relatives of those killed.⁶⁶ As Michael Farrell observes, "the whole nationalist com-

56. Simon Winchester, *Bogside's Bitter in Condemnation*, GUARDIAN, Feb. 1, 1972, at 1; *It Was Wilful Murder, Say Priests*, DERRY J., Feb. 1, 1972, at 1.

57. See PETER PRINGLE & PHILIP JACOBSON, *THOSE ARE REAL BULLETS, AREN'T THEY?* 285-92 (2000).

58. This remains the case in the statements made to the new Bloody Sunday Inquiry.

59. PRINGLE & JACOBSON, *supra* n.58, at 183-84.

60. *13 Shot Dead At Derry March*, IR. TIMES, Jan. 31, 1972, at 1.

61. Alan Smith, *Irish Envoy Recalled in Protest*, GUARDIAN, Feb. 1 1972, at 1.

62. *It Was Wilful Murder, Say Priests*, DERRY J., Feb. 1 1972, at 1.

63. Over 500 statements were taken. These statements were taken under the aegis of the Northern Ireland Civil Rights Association ("NICRA"), which had organized the march. They became known, therefore, as "the NICRA statements."

64. GOVERNMENT OF IRELAND, *THE IRISH GOVERNMENT'S ASSESSMENT OF THE WIDGERY REPORT AND THE NEW MATERIAL PRESENTED TO THE BRITISH GOVERNMENT IN JUNE 1997* 5 (1998) [hereinafter GOVERNMENT OF IRELAND].

65. *Shut-Down As Derry Mourns Its Dead*, DERRY J., Feb. 1, 1972, at 1.

66. MICHAEL FARRELL, *THE ORANGE STATE* 289 (2d ed. 1980).

munity was in revolt."⁶⁷

There were numerous protests abroad, including boycotts of British products⁶⁸ and calls for the withdrawal of the British army.⁶⁹ Hundreds of people died in the aftermath of Bloody Sunday.⁷⁰ Many commentators and historians have described it as a "watershed" that triggered an upsurge in violence in Northern Ireland. It was clear that the situation in Northern Ireland had become unmanageable and the regional parliament and administration, which had governed Northern Ireland since partition in 1922, were prorogued on March 24, 1972.

B. *The Widgery Tribunal and The Impact On The Rule Of Law*

The UK government reacted to the events of Bloody Sunday by supporting the army's version of the events. It also set up a Tribunal of Inquiry, in the form of Lord Widgery, then the Lord Chief Justice of England and Wales to investigate the killings.⁷¹ His terms of reference were very narrowly drawn by Parliament⁷² and interpreted by Widgery himself, who "emphasised the narrowness of the confines of the [i]nquiry."⁷³ The establishment of the Inquiry effectively silenced public debate in the UK. The laws of contempt were so stringently interpreted "that until the Lord Chief Justice completes his inquiry, nobody may offer to the British public any consecutive account of the events in Derry."⁷⁴

67. Michael Farrell, *Long March to Freedom*, in *TWENTY YEARS ON* 63 (Michael Farrell ed., 1988).

68. Michael Leapman, *Two US Unions to Boycott British Exports*, *TIMES*, Feb. 7 1972, at 1.

69. William Millinship, *Kennedy Calls for Direct Rule and Withdrawal of Troops*, *OBSERVER*, Feb. 6, 1972, at 6.

70. 474 people died as a result of the unrest in 1972. The figure for the previous year was 173.

71. The Tribunal of Inquiry is regarded as the most formal of public inquiries and is set up to "inquire into a matter of urgent public importance." *Tribunals of Inquiry Act (Evidence) (Amendment)*, 1998, Sec. 1 (Eng.).

72. The terms of reference were: "[t]hat it is expedient that a Tribunal be established for inquiring into a definite matter of urgent public importance, namely the events on Sunday, 30 January which led to loss of life in connection with the procession in Londonderry on that day." *Report Of The Tribunal Appointed Under The Tribunals Of Inquiry (Evidence) Act 1921, 1972, INQUIRY INTO THE EVENTS ON 30 JANUARY 1972 WHICH LED TO LOSS OF LIFE IN CONNECTION WITH THE PROCESSION IN LONDONDERRY ON THAT DAY*, H.L. 101, H.C. 220, at para. 1 [hereinafter *WIDGERY REPORT*].

73. *Id.* at para. 3.

74. *The Problems Facing Widgery: Can He Get the Facts?* *SUNDAY TIMES*, Feb. 6, 1972, at

There was much controversy about the Widgery Inquiry. Some people in Northern Ireland argued for reluctant participation in the inquiry,⁷⁵ while others took the view that it was simply a “whitewash” and that taking part was a pointless exercise.⁷⁶ Widgery sat in Coleraine, a Unionist market town forty miles away from Derry⁷⁷ and refused to hear evidence from many of the civilian eyewitnesses. He allowed soldiers to give evidence anonymously and while disguised. Further, he refused to call as witnesses all of those who had been wounded on the day.⁷⁸ In the end, his report, published in March 1972, surprised few but offended many. It supported the State’s version of events, finding no substantive fault on the part of the Army and no “general breakdown in discipline,”⁷⁹ although Widgery did speculate that at one point, the army firing “bordered on the reckless.”⁸⁰ He also found that while “[n]one of the dead or wounded is proved to have been shot whilst handling a firearm or bomb . . . there is a strong suspicion that some . . . had been firing weapons or handling bombs . . . and that yet others had been closely supporting them.”⁸¹ This last finding caused particular offense to the families of the dead and to the wounded.⁸²

13. THE SUNDAY TIMES Insight investigation was apparently ‘spiked’ when Lord Widgery himself phoned its then editor, Harold Evans. See Cal McCrystal, *In Cold Blood*, INDEPENDENT, Jan. 18, 1992, at 20.

75. EDWARD DALY, MISTER ARE YOU A PRIEST? 207-08 (2000).

76. Cardinal, *Bishop Demand Inquiry*, IR. NEWS, Jan. 31, 1972, at 1; *SDLP and Nationalists Will Boycott Inquiry*, DERRY J., Feb. 4 1972, at 16; *Widgery Unacceptable for Inquiry – SDLP*, IR. TIMES, Feb. 3, 1972, at 9; Eamonn McCann, Statement to the Bloody Sunday Inquiry (Inq. Statement no. AM 77), at para. 2.

77. A memo uncovered years later in the Public Records Office, documenting the meeting between the then Prime Minister, Edward Heath, the Lord Chancellor Hailsham, and Lord Widgery records that there were objections to the Tribunal sitting in Derry. See Memorandum of a meeting at 10 Downing Street on 31 January 1972, reproduced in MULLAN, *supra* n.43, at 269-73 [hereinafter Downing Street Memorandum]. The Guildhall in Derry, where the current Inquiry sat until September 2002, is described in the memo as “on the wrong side of the [River] Foyle,” meaning located in a Nationalist area. There was a history of the State preferring Coleraine over Derry; a few years earlier, Coleraine had been controversially chosen as the site for Northern Ireland’s second University, a decision which was viewed as politically discriminatory and which led, in part, to the outbreak of the modern phase of the conflict in 1969.

78. He took evidence from seven of the thirteen wounded.

79. See WIDGERY REPORT, *supra* n.72, Summary of Conclusions, at 11.

80. *Id.* at 8.

81. *Id.* at 10.

82. Criticism of the Widgery Report has endured over the years. See British Irish Rights Watch, *Submission to the United Nations’ Special Rapporteur on Summary and Arbitrary Executions: The Murder of 13 Civilians by Soldiers of the British Army on “Bloody Sunday”* (Jan.

The events of Bloody Sunday and the investigation of those events by the Widgery Tribunal left an indelible mark on Northern Ireland.⁸³ For many, they demonstrated that the rule of law had been completely abandoned by Britain in its attempts to shore up unionist power in the State and that consequently, a State of war existed. For some, the killings on Bloody Sunday justified the use of violence against the State. For others, they indicated that peaceful protest was impossible and eventually the non-violent street protest of the civil rights movement withered away. The immense sense of injustice and resentment that Bloody Sunday and the Widgery Tribunal engendered, resulted in deep distrust and further alienation from the State. As Widgery's verdict became increasingly discredited, that sense of injustice deepened, and "*Bloody Sunday*" became a by-word for the perceived injustices visited by the State upon the Nationalist community. For the State and its supporters, the matter was closed. No soldier was prosecuted or disciplined for his actions on Bloody Sunday. Indeed, the officer in charge of the paratroopers was decorated by Queen Elizabeth II. For the general population and the bulk of the British media, the Widgery Inquiry's version of the facts was the truth.

Yet, Bloody Sunday could not be buried. It resulted in the breakdown of trust by the Nationalist community in democratic procedures, policing, and the judiciary, with serious consequences for the people of Ireland and of Britain. The impact of Bloody Sunday on the rule of law was unique and fundamental, but it was also part of a process or continuum, beginning with the introduction of the Falls "curfew"⁸⁴ and internment the year before. There had been a clear policy change on the part of the authorities: a much harder "security" line was being taken⁸⁵ and

30, 1972); see also Dermot Walsh, *The Bloody Sunday Tribunal of Inquiry: A Resounding Defeat for Truth, Justice and the Rule of Law*, in BLOODY SUNDAY TRUST (1997); the Irish Government's Assessment of the WIDGERY REPORT and the New Material Presented to the British Government in June 1997, 1998, in GOVERNMENT OF IRELAND, *supra* n.64.

83. See generally PRINGLE & JACOBSON, *supra* n.57.

84. In July 1971, the British army imposed a thirty-six hour curfew on the Falls Road in the Nationalist West Belfast. Four people died in the violence that followed. It was regarded as a draconian measure by those who were subjected to it. See BISHOP & MALLIE, *supra* n.55, at 159-61.

85. For the Nationalist population of Derry, it went further back to the death of Samuel Devenney, who was assaulted by members of the RUC in 1969. See NIALL Ó DOCHARTAIGH, *FROM CIVIL RIGHTS TO ARMALITES: DERRY AND THE BIRTH OF THE IRISH TROUBLES* 51-53 (1997).

Bloody Sunday was a culmination of that policy. The shooting dead of so many unarmed civilians, combined with the problematic legal response that was Widgery, provided a graphic illustration that the State could act with impunity when committing human rights abuses. As Fionnuala Ní Aoláin points out:

The repercussions of Bloody Sunday have become embedded in the cultural and political consciousness of Northern Ireland's nationalist community. It represents a watershed in the relationship between minority community and [S]tate, cementing a history of coercion and disaffection, compounded by the [S]tate's willingness to exonerate the agents responsible for any acts which caused loss of life. The combination of this incident and the ongoing internment process indicated that due process had been entirely abandoned and that the military approach now dominated the political agenda.⁸⁶

The partisan legal approach of the State was a defining feature of this period of the Northern Irish conflict. It was also a catalyst for further deterioration in the relationship between the Nationalist community and the State. The case can be made that the aim of the Widgery Inquiry was not to find out the truth, nor to provide accountability for the deaths, but to allow the state to validate its behaviour. The Widgery Inquiry facilitated the State's fielding any criticism of its actions by providing the shield of a putative public independent investigation into the events. It may be argued that this was understood by a number of those associated with the Widgery Inquiry to be its aim, although this was publicly denied when politicians and community leaders aired such suspicions.⁸⁷ Thus, the law was used to protect the State and the process of public inquiry used to insulate it against domestic and international criticism. Lord Widgery, who should have acted as "the pivotal trustee of the rule of law,"⁸⁸ instead chose to behave as a participant in a "propaganda war."⁸⁹ Instead of being an independent public investigation, his tribunal was a partisan defence of State action. The State realized

86. *POLITICS OF FORCE*, *supra* n.5, at 42-43.

87. Documents released by the UK Public Records Office in 1996 to legal representatives of the families of the dead support this. One memo, from the Secretary of the Inquiry records Lord Widgery as agreeing to the "piling up the evidence against the deceased." See Walsh, *supra* n.82 at 57-58.

88. *GOVERNMENT OF IRELAND*, *supra* n.64, at 177.

89. Downing Street Memorandum, *supra* n.77, at 270.

that some official response was necessary to Bloody Sunday: establishing an inquiry but ensuring that it concluded in favour of the "official version" allowed for the deflection of much public criticism without disclosing the truth of the events. It was a sham of accountability.

Great damage was done by this sham: those who had co-operated with Widgery lost confidence in the rule of law in Northern Ireland and were themselves undermined;⁹⁰ those who had argued against co-operation felt vindicated.⁹¹ Widgery, itself was a factor in the acceleration of the conflict throughout 1972 and beyond. Those who were most critical took the view that if the Lord Chief Justice of England, one of the most senior law officials in the State would preside over such a travesty of justice, how could any faith be maintained in the State to provide justice?⁹² It appeared to many that the legal process, which was supposed to provide an alternative to violence and anarchy, had assisted the State in covering up the killings of unarmed citizens. Thus, law was appropriated to further the political will of the State and in that process led to an almost complete alienation from the State of a substantial section of its citizenry. That alienated citizenry chose to make its objection to the state in the form of civil strife and increasing support for violent acts against the State. One of the factors in that increased support for such violence was the widespread feeling that there was no other option, given the behaviour of the State, which had used the law to deny the truth. Nonetheless, support for violence against the State was by no means widespread or endemic: there were many who opposed it.⁹³

The impact of the law is sometimes left out of an analysis of history: the use of law in a response by States to events, and the effect of that response upon communities, are sometimes underestimated, perhaps because the effect is not always directly observable. In the case of Bloody Sunday and of the conflict in Northern Ireland in general, the role of law has been a pivotal one. Law has been used by the State as a tool to further its politi-

90. See DALY, *supra* n.75, at 211.

91. See BARRY WHITE, JOHN HUME: STATESMAN OF THE TROUBLES 122, 126 (1984).

92. See EAMON McCann, *The Civil Rights Campaigner*, in HIDDEN TRUTHS: BLOODY SUNDAY 1972 51 (Trisha Ziff ed., 1998).

93. Such as John Hume, later MP for the area, and the party he co-founded, the SDLP. See WHITE, *supra* n.91, at 121-32.

cal aims and to implement its chosen policies in dealing with an insurgent minority. Despite its claims, the State has not been neutral in the conflict and has engaged law in an attempt to deny its partisanship. One problem with the public inquiry model typical in the UK is that its limited focus neglects this, probably because the model is not designed to work in a context like Northern Ireland, where the very nature of the State and its existence are at issue. It may be that truth-finding processes have been capable of examining the use of law by repressive regimes because they usually occur when new political arrangements replace an old regime.⁹⁴ It is easier, politically, to find fault with and apportion blame for the atrocities carried out by a deposed regime than to admit that the existing administration has been responsible for such serious human rights transgressions. It may also be that the very formal nature of legal processes prevents a coherent narrative emerging. By disallowing elements of a witnesses' experience that are not directly evidentially relevant, the monochrome of the legal process prevents the details of such experiences that provide the colour in the vivid picture of abuse and violation that narrative allows. Further, legal processes tend to prosecute or investigate individuals, not groups or governments and in focussing primarily on the individual responsibility the law tends to obscure the pattern created by abuses and its part in an overall programme of political repression employed by governments. Thus truth is partly obscured and the less rigid and formal form of truth processes may facilitate a wider focus, a perspective which traditional legal models are not capable of achieving.⁹⁵

The report of the Widgery Tribunal had another important impact, this one less catastrophic. Its purported version of the truth led to the community most affected by Bloody Sunday finding alternative ways to remember it and to tell its version of the truth. That, in turn, led to a campaign that culminated in the institution by the Blair government of a second, unprecedented Tribunal of Inquiry. What may be learned from this is that despite the appropriation of law and legal processes, concerns

94. See Priscilla B. Hayner, *Fifteen Truth Commissions-1974 to 1994: A Comparative Study*, 16 *HUM. RTS. Q.* 597, 607 (1994).

95. See e.g., Julie Mertus, *Truth in a Box: The Limits of Justice through Judicial Mechanisms*, in *THE POLITICS OF MEMORY: TRUTH HEALING AND SOCIAL JUSTICE* 150 (Ifi Amadiume & Abdullahi An-Na'im eds., 2000).

about human rights abuses will not simply disappear after they have been declared irrelevant or baseless by the State. Human rights abuses are visited upon human beings with families, communities and voices. Those voices, particularly in Northern Ireland, where communities and families remain tightly knit and are often highly politicized by the experience of the conflict, are not silenced by official verdicts, which decree their experiences invalid. Thus, the creation of the new Bloody Sunday Inquiry has been seen as a victory for the Bloody Sunday families and their supporters. Notwithstanding that victory, the progress of the inquiry, to date, has been a difficult experience for the families.

C. *The Bloody Sunday Inquiry*

The Bloody Sunday Inquiry is chaired by Lord Saville of Newdigate. Creating a precedent in the UK law, the three-member panel was completed by judges from outside the UK: Chief Justice William Hoyt from New Brunswick, Canada, and Sir Edward Sommers, a retired New Zealand High Court judge. In late 2000, Sir Edward retired for health reasons and was replaced by a retired Australian judge, John Tuohy. The Inquiry first sat in public in the Guildhall in Derry on April 3, 1998, and began oral hearings on March 27, 2000. It moved to London to hear the evidence of the military witnesses in September 2002, despite strong protests from the relatives of the dead. The Inquiry is not expected to conclude before late 2003 at the earliest and is unlikely to report before 2004.

It is already the largest public inquiry in UK legal history.⁹⁶ It has cost, so far, £60.28 million and its final cost is estimated at £120 million.⁹⁷ Over 1,700 civilians, clergy, journalists, photographers, and current and former military personnel have been interviewed, and have given statements, and it is expected that

96. There are over 129 volumes of evidence, including twelve volumes of photographs, thirty audiotapes and sixty-one videotapes having been circulated to interested parties. The Bloody Sunday Inquiry, *Frequently Asked Questions*, at para. 24, available at <http://www.bloody-sunday-inquiry.org.uk/index2.asp?p=7>. The Inquiry has set up a website, <http://www.bloody-sunday-inquiry.org>, and many relevant documents, including daily transcripts of the oral proceedings, rulings, judgements, press notices, and other information is available from that website.

97. See, *id.* at para. 25; see also *Bloody Sunday inquiry set to cost £100m*, IR. TIMES, Dec. 17, 2001, at 5.

the bulk of these witnesses will be called to give oral evidence.⁹⁸ As a Tribunal of Inquiry set up under the Tribunals of Inquiry (Evidence) Act 1921, it is subject to the relevant domestic administrative law and practice, such as the Salmon Principles.⁹⁹ It is subject to judicial review by the English High Court and has already had a number of its rulings overturned by both the English Divisional Court and Court of Appeal.¹⁰⁰

The purpose of a Tribunal of Inquiry is to “inquire into a definite matter of urgent public importance.”¹⁰¹ It is charged with finding out the truth and with carrying out a public investigation. The creation of the new inquiry suggested that public confidence in Widgery, where it had existed, had eroded. This suggests that the State has accepted that public confidence in respect of the matter is still at issue. As the Prime Minister carefully put it in his statement to the House of Commons: “a new inquiry can be justified only if an objective examination of the material now available gives grounds for believing that the events of that day should be looked at afresh, and the conclusions of Lord Widgery re-examined.”¹⁰²

While the Bloody Sunday Inquiry is a public inquiry in the UK public law tradition, its subject matter is more akin to that addressed by the various kinds of truth commission that have developed in the last three decades across the world. Truth commissions are often seen as a way to reckon with the past human rights abuses committed during liberation conflicts (e.g., South Africa), or by ousted military regimes (e.g., Argentina). They are more about recording and acknowledging past human rights abuses than about providing precise public accountability and thus, are often quasi-legal.

The task of the Inquiry may be described as being to examine afresh the evidence of what happened on Bloody Sunday, to come to a reasoned set of findings, and to do so in a manner that secures public confidence in the rule of law. Clearly, the Inquiry’s findings are important, but the process by which it arrives at those findings is also vital. The Inquiry is taking place amid allegations that the State covered up the truth about

98. See *Bloody Sunday inquiry set to cost £100m*, *supra* n.97, at 5.

99. Salmon Principles, *supra* n.28.

100. See *infra* nn.111-114 and accompanying text.

101. Tribunals of Inquiry Act, *supra* n.71, Sec. 1(1).

102. *Hansard*, *supra* n.25, at Col. 502.

Bloody Sunday. It is investigating an iconic event in a long history of contested activities by the State. It exists because the first inquiry failed to secure confidence in the rule of law. Its task, therefore, is to achieve “not only a sense of justice, but the elimination of a sense of injustice.”¹⁰³ That is an extraordinarily difficult and complex task. The Inquiry has a client group that has reason not to trust the UK government and the State. It has a large group of former and serving military witnesses who are opposed to the Inquiry and whose legal representatives have successfully challenged decisions taken by the Inquiry in the interests of the human rights of those who were killed on the grounds that their human rights were at risk. It also has a British establishment that is largely hostile to it. Indeed, one newspaper went so far as to describe the Inquiry as “a gesture of appeasement to the IRA.”¹⁰⁴

There is no doubt that the straitjacket of the Tribunal of Inquiry model and the restraints of the UK Constitution have led to an overly legal inquiry. While inquiries are legal processes, they are intended to be a different kind of legal process than trials — inquisitorial rather than adversarial. Yet, the oral hearings of the Inquiry have frequently been highly adversarial. This may be an inevitable consequence of the complex and controversial nature of the material the Inquiry is investigating, compounded by the deep mistrust between the parties, which has led to a plethora of legal teams. However, more general conclusions may be drawn from the manner in which the Inquiry has been driven by law, practice, and court-rulings to become a very formal, complicated process. In particular, such conclusions may persuade those seeking a legal model for a truth commission in Northern Ireland to look elsewhere than the Tribunals of Inquiry (Evidence) Act 1921.

There are a number of causes of the ongoing difficulties that face the Inquiry. While the Inquiry has made some unfortunate errors and poor choices, many of the problems that have arisen are either the fault of the model itself, or arise out of factors beyond its control. There are contrary expectations of the

103. M. Cherif Bassouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59(4) L. & CONTEMP. PROBS. 9, 23 (1996).

104. See Mary Holland, *Demand for Anonymity Threatens Peace Hopes*, IR. TIMES, June 10, 1999, at 11 (reporting editorials from THE DAILY TELEGRAPH).

Inquiry, which has led to strains between the Inquiry and its “client” group, the families, their lawyers and civilian witnesses. The circumstances that led to the second inquiry created specific expectations amongst that “client group.” The long campaign that had been waged to achieve the second inquiry, the nature of the community “remembering” of the events, and the background of the Northern Ireland peace process led to expectations among the families and their supporters that the Inquiry would operate like a form of a truth commission. However, this was not the expectation, nor indeed the intention of the Inquiry.

III. *DEFINING TRUTH FINDING*

The notion of “truth” is a difficult one both philosophically and practically. The concept is particularly difficult in the context of a conflict where even the nature of the conflict, that is what the conflict was about, is contested. This is complicated further by the elapse of thirty years and a conflict where law was employed by the State to further its political ends. “Truth” is, therefore, a particularly thorny concept. This is because what people often mean when they use the term “truth” is acknowledgement. What people frequently want from a truth process is an acknowledgement of the violation of their rights, an admission that what was done was wrong. This is also important for the purposes of accountability and reconstruction. Without admitting the wrong done, one may not prevent the future from replicating the abuses of the past. In consequence, deciding what is meant by “truth” should be the first task of any truth process. This raises some difficult questions. For example, how much information does one need to have in order to be satisfied that one has the truth? In Northern Ireland, for example, is it sufficient to know that the British army shot one’s sister or that the IRA killed one’s father, or is it necessary to have greater detail? Perhaps one requires the name of the combatant who carried out the killing, or the identity of the politician responsible for the policy being carried out.

Arriving at truth is another matter. Leaving aside the philosophical arguments about whether it is possible to achieve a general truth,¹⁰⁵ a complicating element in any truth-finding pro-

105. See generally Angela Hegarty, *Truth, Justice & Reconciliation? The Problem with Truth Processes*, 2 *GLOBAL REV. OF ETHNO-POLITICS* 97 (2002).

cess, is how one compels those involved in human rights violations to own up to the facts. It is generally not in the interests of former combatants on either side of a conflict to disclose facts that implicate them in criminal activity and which do not serve their version of history. In South Africa, this problem was addressed, with varying degrees of success, by the mechanism of exchanging “truth-telling” for amnesty.¹⁰⁶ It is difficult to see how this could be replicated in Northern Ireland, where the majority of paramilitary prisoners have been released, albeit on licence which may be revoked if they engage in paramilitary activity,¹⁰⁷ and where very few State agents have ever been held to account for their role in the conflict.

Despite the fact that the Inquiry has stressed that it is not a truth commission and that neither the 1921 Act nor the parliamentary resolution which set up the Inquiry mentions the word “truth” at all, all parties to the Inquiry repeatedly speak about “finding the truth.” This is quite a different aim than “investigating the events.” In fact the purpose of the Inquiry, given the history and context that surround it, makes it a form of truth-finding exercise. Some aspects of the Inquiry, such as the presence of international judges and its interpretation of its remit — for example the length of time spent by Counsel to the Tribunal in his marathon opening statement on the social and historical context — are further evidence that this inquiry may be interpreted as a form of truth process. This truth-finding function has been obstructed by delays and challenges, primarily from the military and the UK Ministry of Defence.¹⁰⁸ It may be that the very formal model of a Tribunal of Inquiry is not the correct format for a truth-finding exercise. That is, of course, provided that the Inquiry is intended to be such an exercise. As noted above, one must consider the proposition that inquiries are set up by governments to permit the deflection of criticism without actually providing accountability.

A. *Why Should Inquiries Be Public In Nature?*

Inquiries are held partly because the public has to be reas-

106. See PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 98-100 (2001).

107. See generally Kieran McEvoy, *Prisoners, The Agreement and the Political Character of the Northern Ireland Conflict*, 22 *FORDHAM INT'L L.J.* 1539 (1999).

108. See *infra* nn.111-114.

sured about the investigation being undertaken into controversial events that have undermined confidence in the rule of law. Limiting the extent to which that inquiry is conducted in public will inevitably lead to suspicions that a “cover-up” is taking place. The public nature of inquiries is also essential in uncovering the truth – investigations which are conducted in secret face both practical and political hurdles in persuading their audiences that they have arrived at the truth. As Lord Salmon himself observed:

[I]t is, in our view, of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth.¹⁰⁹

Thus, in order for an inquiry to be a truth-finding process, it has to take place in public. This inter-relationship between truth-finding and public process has been a running motif of the Bloody Sunday Inquiry, which has been severely hampered by the limitations on its public nature imposed by the courts. Prominent amongst the causes of the limitations has been the invocation by the UK government of “national security” as a reason to not disclose information relevant to the Inquiry’s work.¹¹⁰ In a series of legal challenges to the Inquiry by representatives of the soldiers, supported by the Ministry of Defence and paid for out of public funds,¹¹¹ it has been established that the vast majority of the military witnesses may give evidence anonymously,¹¹² that they are entitled to give their oral evidence in Britain and

109. REPORT OF THE ROYAL COMMISSION ON TRIBUNALS OF INQUIRY, *supra* n.28, at para 115.

110. See Robert Verkaik, *Soldiers Will Not Attend Bloody Sunday Inquiry*, INDEPENDENT, Dec. 20, 2000, at 8; see also, Seamus McKinney, *British Courts Could Stall Saville Truth*, IR. NEWS, Dec. 20, 2001, at 1 (quoting legal representatives and family members expressing concern that repeated interventions by the English courts would prevent the truth emerging).

111. Most of the former and serving military witnesses are represented by legal teams that have been instructed and paid for by the Treasury Solicitor. In a number of the judicial reviews their case has been supported directly by submissions from the Ministry of Defence.

112. Lord Saville of Newdigate & Ors v. Widgery Soldiers & Ors R, *supra* n.31. They are known by cypher or an “Inquiry number,” although their full names and details are known to the Inquiry itself. The relatives of the dead, the surviving wounded, the media, and the general public do not officially know their names, although a number have been named or have identified themselves.

are not required to appear before the Inquiry in Derry,¹¹³ and that the bulk of police witnesses are entitled to give their evidence from behind screens.¹¹⁴ The cumulative effect of these challenges has been to undermine the application of public justice.

The Northern Ireland courts considered this when examining the issue of whether police officers should be allowed to give evidence from behind screens. Mr. Justice Kerr's view was that:

. . . there is a danger . . . in conflating the concept of the public nature of the Inquiry with the asserted need for witnesses to be identified and visible. The latter is relevant to the degree of confidence that people may have in the outcome of the Inquiry but the public nature of the proceeding is not eliminated by allowing witnesses to give evidence from behind screens. Put shortly, the Inquiry still takes place in public although the proceedings are not as open as before.¹¹⁵

Yet, public inquiries are held partly because the public has to be reassured that the investigation being undertaken into what are controversial events which have undermined confidence in the rule of law. One way in which that confidence is restored is to conduct that inquiry in public. Any limitation on that will hamper the truth-finding aspect of the Inquiry.

In the case of Bloody Sunday, the limitations upon the public nature of the Inquiry are taking place at the behest and for the benefit of those who are alleged to have been involved in the unlawful killings of fourteen civilians and the wounding of fourteen others. These limitations reflect those imposed at the Widgery Inquiry, where soldiers gave evidence anonymously and partly disguised, and which led to allegations of an official cover-up. It is precisely because the outcome of *this* Inquiry must inspire confidence, where the previous Inquiry did not, that the proceedings should be as open as possible. Diminishing the extent to which the inquiry is done in public gravely risks the pros-

113. *Id.*

114. In *The Matter Of An Application by the Next of Kin of Gerard Donaghy for Judicial Review and In the Matter Of A Decision Of The Bloody Sunday Inquiry*, [2002] NICA 25A-C (Feb. 7, 2002). These witnesses were seen while giving evidence by the legal teams, but not the families of the dead, the surviving wounded, the media and the general public.

115. In *the Matter of an Application by Mary Doherty for Judicial Review*, Judgment of Kerr, J. Northern Ireland High Ct., Q. B. Div. (Crown Side), judgement delivered Feb. 19, 2002, at 15.

pect of it uncovering the facts and establishing the truth, without interference or obstruction by the State and in a fashion that inspires confidence in its outcome and in the legal process generally. This has been a running controversy throughout the entire progress of the inquiry to date and may well be a key factor in the determination of the matter of public confidence. That the majority of military witnesses are giving evidence anonymously and in England, coupled with the inquiry's decision to allow a large number of serving and former police officers to give evidence from behind screens, has raised the whole question of what is meant by an "inquiry in public."

Comparisons may be drawn with other public inquiries in the UK, where witnesses alleged to have been involved in the killing of civilians were compelled to give evidence, despite threats and serious public disorder.¹¹⁶ The case can be made that, because the truth about the events of Bloody Sunday goes to the heart of the State's involvement in the conflict in Northern Ireland, the State is unwilling to fully co-operate with the inquiry it set up to uncover that truth. The approach of the State is echoed in that of the English courts that have been unsympathetic to the families' attempts to establish their rights to an independent inquiry. As Bernadette Devlin-McAliskey pithily put it when she came to give evidence: "This [inquiry] should be somewhere else, where the accused is not running the party."¹¹⁷ That lack of co-operation may fundamentally damage the Inquiry in uncovering the truth. There is no reason to assume that any other inquiry into the behaviour of the State in Northern Ireland would face any less opposition.

B. *The Meaning of the Right to Life*

This opposition to the discovery of truth is formulated in other ways – it is not presented as a policy or approach antitheti-

116. Consider the Stephen Lawrence inquiry, where those suspected of having been involved in the murder were required to give oral evidence in London, despite numerous unruly protests outside and invasions of the hearing room by militant protesters. *Lawrence Suspects Deny Involvement*, *GUARDIAN*, June 30, 1998, at 1. No such protests have taken place in respect of the current Bloody Sunday Inquiry, where the strongest protest was a silent walk-out by the families of the dead, when police officers gave their evidence from behind a screen.

117. See *Bloody Sunday Inquiry Transcript*, *supra* n.52, at 70 (11-12) (recounting events from Tuesday, May 15, 2001, Day 112 of the proceedings).

cal to truth. Instead a number of more subtle approaches are employed, for example, the demands of “national security,” which the state asserts require a non-disclosure of information. Another approach has been to employ the strictures of Article 2 of the European Convention on Human Rights to drive forward concerns that military and police personnel are at risk of their lives from dissident republicans. This has meant that the rights of the dead and their families, the victims of the alleged abuses, have been set up against of the rights of soldiers and police officers.

In the legal challenges to the Bloody Sunday Inquiry undertaken by the soldiers, the primary reason for the upholding of these legal challenges has been the manner in which the courts have chosen to apply Article 2 of the European Convention. The Convention was incorporated into UK law by the Human Rights Act 1998 and public authorities in the UK are under a statutory duty to act compatibly with the Convention.¹¹⁸ The issue first arose when the Inquiry, as noted above, sought to disclose to the families, their legal teams and the general public the full names, but not addresses nor any other personal details of the military personnel involved in Bloody Sunday. The Inquiry considered lengthy representations by representatives for the soldiers that their lives were at risk from Republican paramilitaries in Northern Ireland, but concluded that “[a]fter the most anxious consideration we have concluded that on the basis of the material presently before us our duty to carry out a public investigation overrides the concerns of the soldiers.”¹¹⁹

Those affected by the ruling challenged the decision in the English Courts and the decision of the High Court of England and Wales¹²⁰ to uphold the challenge was confirmed by the Court of Appeal in *R v Lord Saville of Newdigate & Ors ex parte A & Ors*.¹²¹ In an important passage, Lord Wolf observed that:

When a fundamental right such as the right to life is engaged, the options available to the reasonable decision maker are

118. Human Rights Act 1998, Sec. 6 (Eng.).

119. Bloody Sunday Inquiry, Tribunal Ruling, May 5, 1999, at para. 23.

120. Right Honourable Lord Saville of Newdigate *et al.* (Sitting As Bloody Sunday Inquiry) (EX PARTE A; B; D; H; J; K; M; O; Q; R; S; U; V; Z AND AC AND AD), [1999] EWHC Admin 556 (High Ct. of Justice of England & Wales, Queen’s Bench Div.) (June 17, 1999).

121. Lord Saville of Newdigate & Ors v. Widgery Soldiers & Ors., *supra* n.31.

curtailed. They are curtailed because it is unreasonable to reach a decision, which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words, it is not open to the decision maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and a degree of the interference with the human right involved and then apply the test accepted by Sir Thomas Bingham MR in *R v Ministry of Defence ex parte Smith* [1996] QB 517.¹²²

Thus, the court placed a premium upon the substantive Article 2 rights of the soldiers and preferred them over the procedural Article 2 rights of the families. On one reading of the case, the result was hardly surprising. After all, the rights of the relatives of deceased individuals to an independent, effective inquiry into the circumstances of those deaths will always be deemed to be subservient to the rights of living individuals who say they are in fear of their lives. As the Bloody Sunday Inquiry has put it:

Article 6 does not, in the circumstances of this Inquiry, advance the position of the families of those who were killed. Article 2, in its procedural aspect, gives to those families the entitlement to an open inquiry into the deaths that occurred. That entitlement is necessarily qualified by the need to take into account public interest immunity, especially where the disclosure of information would place at risk the life of another. This is simply to say again that the procedural aspects of Article 2 cannot override its substantive aspects.¹²³

However, if one examines the reasons why the jurisprudence on the procedural aspects of Article 2 developed, this approach begins to unravel. The case law of the Court of Human Rights developed so as to provide a method by which the substantive Article 2 rights of the dead could be posthumously asserted. This is no hollow assertion: it is important not simply so that the injustice of the killings can be exposed, but so that fu-

122. *Id.* at paras. 1867E–G.

123. Bloody Sunday Inquiry, Ruling on Public Interest Immunity, Time-Delay Procedure, Anonymity, Screening and Venue Applications, Dec. 19, 2002, at para. 38.

ture deaths may be prevented and the rule of law upheld. For individuals killed by the State, the only remaining way to affirm their substantive Article 2 rights is through the assertion by their surviving relatives of their procedural rights to an independent, effective investigation. The conflict is not in fact between the substantive right to life of one group of individuals and the procedural rights of another group, but between the substantive rights to life of two groups of individuals, one killed by the other. The fact that the courts have chosen to frame the debate differently and thus to prefer the rights of the combatants over the victims should not be allowed to obscure this important fact. As the European Court of Human Rights observed in *McKerr v. UK*:

[T]he right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events.¹²⁴

Properly implementing this means deciding first how the “requisite protection” of the rights of the families may be achieved. The approach of the UK courts in the application of the ECtHR, Article 2 jurisprudence in the Bloody Sunday cases has placed potentially serious limitations on these rights and has almost certainly damaged the full investigation and disclosure of the State’s activities in depriving people of their lives. It may be presumed that these courts would take a similar approach in the future if asked to adjudicate conflicts between the rights of those acting on behalf of the State and those whom they are accused of harming. These conflicts will inevitably arise if other public inquiries take place into the State’s activities in Northern Ireland. The differing approaches taken by the domestic and international courts on this specific issue illustrate the dilemma. This issue should not become a reason not to hold such public inquiries, but instead, should prompt serious reflection on how best to address it. Thus, one important consideration to emerge from the progress of the Bloody Sunday Inquiry to date is what should be the proper venue for adjudicating such conflicts.

124. *McKerr v. UK*, *supra* n.20, at para. 148.

C. *Acting Fairly?*

Another aspect of the Bloody Sunday Inquiry's processes to cause concern has been its approach to civilian witnesses. A number of these witnesses have been very rigorously questioned by counsel for the Inquiry and for the soldiers as to knowledge they may have about the membership of various wings of the IRA. The Inquiry has said that this is prompted by its view that there was no other avenue open to the Inquiry in its inquisitorial role. Lord Saville explained it thus: "it is our basic duty to discover the whole truth if the only way we can do that, unsatisfactory though that is, is to ask questions about rumours and who knew who and so on."¹²⁵

In response to this approach, it may be argued that it is both unfair and unproductive to press civilian witnesses as to who they had heard might have been in the IRA. It is unfair, because the vast majority of civilian witnesses do not know who was in the IRA.¹²⁶ Nor are they legally represented during cross-examination. If they were, their legal representatives might observe that such questions may be a breach of the Salmon principles,¹²⁷ as in effect, witnesses are being asked what knowledge they have of the membership of an organization, proscribed under UK law and pursued for its activities, which amount to criminal offences. Possession of such knowledge, therefore, amounts in law to knowledge of a criminal conspiracy. Furthermore, refusal to supply such information may amount to a criminal offence under Section 89 (2)(c) of the Terrorism Act 2000.¹²⁸ The witnesses themselves probably do not possess this knowledge. However, as both counsel for the Inquiry and counsel for the various soldiers have pressed a number of witnesses quite severely on this issue, the implication is that they believe the witness has or may have such information. The Salmon principles give clear guidance on this: if a witness is going to be asked such ques-

125. *Bloody Sunday Inquiry Transcript*, *supra* n.52, at Day 87, 7 (11-14).

126. See BISHOP & MAILLIE, *supra* n.55. The IRA is a secret organization; its rules on knowledge and disclosure of membership are fairly specific. *Id.*

127. Salmon Principles, *supra* n.28. Principle 2 states: "Before any person who is involved in an inquiry is called as a witness, he should be informed of any allegations which are made against him and of the substance of the evidence in support of them." *Id.*

128. In Part VII, which applies only to Northern Ireland and preserves a section from the previous incarnations of the Northern Ireland (Emergency Provisions) Acts.

tions, then the witness has the right to be informed in advance of such questions.

This approach is also unfair because it might be observed that civilian witnesses are being pursued by the Inquiry because of something *other* individuals or organizations have failed to do. Lord Saville's remarks quoted above support such an observation. It is a conclusion which is supported further by the fact that the Inquiry has identified around forty individuals whom it believes to have been connected to the IRA in Derry in 1972, but of whom a very small number have thus far agreed to co-operate with the Inquiry.¹²⁹ As the Inquiry has subpoena powers, it might be wondered why it does not simply require these individuals to attend and give evidence, instead of badgering civilians for information they may not possess.

While civilian witnesses were entitled to legal representation when giving their written statements, it has been rare for such a witness to be accompanied by counsel.¹³⁰ In the Inquiry's view, they are the Inquiry's witnesses and as such need no specific legal representation. Yet, when the military witnesses give evidence, they do so in the presence of their counsel and they, therefore, seem to be at an advantage before the Inquiry.

Lord Saville himself seemed unclear on this matter, when he remarked that "there are plenty of barristers in this room acting for the interested parties, the families and so on who I am sure would be the first to raise the matter with us if they felt we had not treated the citizens of this city properly."¹³¹

The next day, counsel for the families rose to point out that they were not instructed, by nor would they be able to defend, civilian witnesses. As Mr Mansfield put it: "[w]e do not represent witnesses other than the families we are personally responsible for."¹³²

The civilian witnesses therefore are the sole purvey of the Inquiry, whose eagerness to seek the truth may conflict with the interests of civilian witnesses who are not legally represented.

129. *Bloody Sunday Inquiry Transcript*, *supra* n.52, Day 236, at 159 (22-23).

130. At least one such witness has in fact been refused such representation. Videotape: Witness: The Civilian Experience of The Bloody Sunday Inquiry, Interview with Dr. Raymond McClean, Transcripts of Interviews conducted for Bloody Sunday Trust (Jan. 30, 2002) (on file with the author).

131. *Bloody Sunday Inquiry Transcript*, *supra* n.52, Day 86, at 169 (14-18).

132. *Id.* Day 87, at 9 (13-15).

There is some public concern about the treatment of civilian witnesses¹³³ and in particular, the pressure by the Inquiry upon these witnesses to name IRA members.¹³⁴ This pressure has caused great apprehension among many of the civilian eyewitnesses and made the difficult experience of giving evidence all the harder.¹³⁵

It seems that the Inquiry must carry out the difficult task of satisfying the two well-established rules of acting fairly and efficiently. Inquiries must be able to ask hard questions of witnesses, but that must be done in a way that satisfies the obligation to the witnesses to treat them fairly.¹³⁶

In his comment upon the Argentine junta-trials, Mark Osiel notes that:

[I]n focusing on the acts and intentions of very top elites, the courts not only missed the macro-picture: the story of mass collaboration and institutional support for administrative brutality. They also missed the micro-picture: the story of the victims—the human experience of uncomprehending suffering that official brutality produced.¹³⁷

In the case of the Bloody Sunday Inquiry, this has interesting parallels. Some of those called as witnesses also had relatives killed by the State. Some had subsequently become involved in paramilitary activity. Such witnesses found their credibility and their evidence challenged. As Osiel observes:

. . . at the Argentine junta trial, witness-survivors found themselves facing questions concerning, for instance, their membership in guerrilla groups, questions identical to those their abductors had asked them under torture; the experience of public testimony was thus personally degrading, rather than

133. See Angela Hegarty, *A Suspect Community?*, DERRY NEWS, Sept. 27, 2001, at 10.

134. See e.g., Eamonn McDermott, *Saville Shifts Sights*, SUNDAY BUS. POST, Mar. 4 2001; see also *Editorial*, DERRY J., Mar. 10, 2001 (on file with the author); *Bloody Sunday Inquiry Transcript*, *supra* n.52, Day 87, at 4 (7-25) (reporting oral submissions by Richard Harvey).

135. Transcripts of Interviews conducted for Bloody Sunday Trust, *supra* n.130.

136. See Louis Blom Cooper, *Witnesses and the Scott Inquiry*, PUB. L. 1-3 (Spring 1994); see also Louis Blom Cooper, *Witnesses Before Public Inquiries: An Example of Unfairness*, PUB. L. 11-12 (Spring 1996); Geoffrey Howe, *Procedure at the Scott inquiry*, PUB. L. (Autumn 1996) 445-60; Sir Richard Scott, *Procedures at Inquiries — The Duty to Be Fair*, 11 L. Q. REV. 596 (1995).

137. See OSIEL, *supra* n.1, at 103-04.

empowering.¹³⁸

This raises questions about what *effect* the experience of giving evidence is having upon witnesses. At the halfway stage of the Inquiry, just before it moved to London in September 2002, the majority of witnesses had been local people, many of whom had not been called before Widgery. Many reported the experience as a negative one,¹³⁹ and questions remain about the fairness of the process towards civilian witnesses. If the experience of giving evidence leaves people less confident about the legal process than before, then, one may ask, how is the purpose of “restoring confidence in the rule of law” achieved? In truth processes, cross-examination of witnesses is unusual. In such proceedings, the purpose of the oral evidence is for the story, the experience to be heard, acknowledged, and honoured. But legal processes do not always accommodate such narratives. As Julie Mertus has remarked: “the process and the language of law transmutes individual experiences into a categorically neat something else. Law does not permit a single witness to tell their own coherent narrative; it chops their stories into digestible parts.”¹⁴⁰

For those giving evidence to the Bloody Sunday Inquiry, this has a remarkable resonance. The experience of giving evidence has frequently been a confusing, intimidating one. Witnesses face phalanxes of lawyers, dozens of computer screens, and a multitude of maps, photographs and written information. Their own written statements, some given two or more years before, are scanned and displayed on large screens, but there is no natural narrative flow. Sections of those statements, those deemed relevant by the lawyers, are selected for further analysis, and compared to statements made thirty years ago¹⁴¹ or previously unseen transcripts of interviews given to journalists, over which the witness may have had no control. This is, as Mertus observes, an inevitable consequence of the legal process, but traumatic exper-

138. *Id.* at 104.

139. Transcripts of Interviews conducted for Bloody Sunday Trust, *supra* n.130.

140. Mertus, *supra* n.95, at 150.

141. While the vast majority of those witnesses called by The Bloody Sunday Inquiry were not called to give oral or written evidence to Widgery, many of them did make brief written statements in the NICRA statement taking exercise (*see* MULLAN, *supra* n.43, at 32-39). These statements have been used as evidence by the Inquiry in addition to the more contemporary written statements made to it.

iences do not fit neatly into a series of files on a hard drive, accurate, accessible, and complete at all times. Scant allowance is made for the elapse of three decades or the chaos of the circumstances in which the memory was formed. The differences, however slight, between a witnesses' story now and thirty years ago are subtly proffered as reasons to disbelieve the evidence and the charge of murder against the State. Because all of the witnesses' versions of events, spanning thirty years, do not exactly correspond, they become unreliable.

There is little awareness that the manner and the language in which people tell their stories to friends, communities, and the media is necessarily different from the one which they will be obliged to use when taking part in a legal hearing. The trauma invoked when people are obliged to relive terrifying events and the consequent display of emotion makes those people altogether less reliable in the law's eyes than the calm recall of a civil servant, a general or a prime minister, who did not witness the events and who were not affected in the same way. It is this disparity between what legal process will accept as 'truth' and that of those who experienced the events, which causes some of the greatest disjunction between victims and witnesses and the official discourse. If legal processes are to be the only way in which official discourse is constructed or by which the acknowledged version of the truth can be arrived at, then the processes need to be more flexible, more open and more disposed to accommodate victims' narratives.

D. *The Role of Law*

The infliction of human rights abuses gives rise to multi-faceted legal, political, and social processes. While such abuses are tragic for the individuals and families to whom they happen, and in some cases become iconic for their communities, they also become part of the fabric of those processes. As in Northern Ireland, the denial of human rights abuses by their authors feeds the next cycle of violence and abuse. When those in power engage in violations of human rights and deny that they were wrong, the harm done to the rule of law is palpable. Even greater harm is done when legal processes are used to deny the wrong done or are contorted to criminalize the activities of one set of combatants but not another. It is useful to reflect, there-

fore, upon the usefulness of law in both establishing truth and healing memory.

It is probably the case that a very literal highly legal process may not assist in examining the “truth” of those events. That does not mean that the law is not a necessary element of any truth-finding process, but it may be better employed as part of a larger, more fluid framework. Law is simply one tool or path to truth, not the sole means by which truth is obtained. Purely legal processes are not right, and ceding the direction and control of truth processes entirely to lawyers is not helpful.

Yet, if the law is such an imperfect tool, why bother with it at all? It is because accountability is necessary to prevent perennial impunity, and unless law officially corrects the authorized narrative that no harm was done, the impunity and the damage done by it persists. Legal truth processes may be imperfect but they are necessary as it is only through law that the rule of law may be restored. This is especially so in cases where the legal system has been employed by the State in pursuit of its political objectives during a conflict, as was the case in Northern Ireland.

It is equally necessary to be realistic about the capacity of legal processes. Those who seek to use the law as a way of finding the truth and of honouring their experiences should be warned about its limits. They need to be aware that this will be a painful, traumatic process, which will inevitably involve trade-offs that leave many people unhappy. In this respect, truth-finding is like the negotiation of peace agreements. What may also be very difficult for people to accept is the necessary “myth-busting” that goes along with truth-finding. Arriving at truth will, on occasion, require the relinquishing of cherished ideas and folk tales about iconic events, constructed through a community counter narrative that evolved in opposition to the official version. Because of this, and because of the trauma that reliving human rights abuses necessarily brings, support mechanisms should be built into the process at every stage for all of those who participate in it, even those who, at the outset, may dismiss the need for such support.

*CONCLUSION: SOME PRINCIPLES FOR A TRUTH-FINDING
PROCESS IN NORTHERN IRELAND*

There is much interest about whether and what sort of truth

process Northern Ireland should have. However, the purposes of such a process would be better served by first determining the benchmarks by which any model should be measured and then going on to consider the design, of which there may be a number of permutations. From the themes that have emerged from the international standards and out of the experience of public inquiries to date in Northern Ireland, it is possible to construct a rubric against which any proposed model may be assessed.

In advance of the establishment of any truth-finding process, key questions should be decided, so that the answers to those questions can inform the design of the process. For example, what is the aim of the procedure: is it reconciliation, shared memory, or acknowledgement? These may be confused in the minds of the general public and political leaders, but they are not interchangeable. The confusion over the definition of "truth" must also be resolved before embarking on any truth process, so that there is some degree of consensus on what is meant by "truth" and crucially, on what is achievable in a truth process. This may entail the negotiation among all the different victims and combatants, a negotiation that may be described as a form of "precursor truth process."

The truth process itself must be capable of uncovering the facts and establishing the truth, without interference or obstruction by the State. It should, therefore, have not just the necessary powers of subpoena and discovery that a Tribunal of Inquiry possesses, but it must also be genuinely independent of the State in all its key aspects. The nature of the process must be such as to inspire confidence in its outcome, primarily among its key stakeholders, that is those who are entitled to it. It must seek to repair of the rule of law and establish public confidence in the legal process. It will do so if it complies with international human rights standards. It will do so if it is not limited in its truth-finding by the powerful and the self-interested. That is primarily why the international standards place so much emphasis on the rights of those who are the victims of human rights abuses, because in such an equation, they are the powerless.

Self-evidently, the process should treat those involved fairly and in doing so, should pay close regard to the manner in which evidence is taken and witnesses are treated. It appears that extensive oral hearings in the context of a wholly legal process inevitably become adversarial and are perhaps damaging to those

giving evidence. This may not be the best method by which peoples' stories are recorded and acknowledged and other ways of doing this should be explored. It will, however, be necessary in the course of a process intended to provide accountability to test the reliability of evidence. Some thought should be devoted in advance, therefore, to the different categories of narratives, their aims, and the different ways in which they can be accommodated.

The question therefore remains: are public inquiries the correct mechanism for finding truth and achieving justice? In the course of the conflict in Northern Ireland, public inquiries have not, so far, provided a proper means of making the State accountable for its actions. That they have not done so is not because the public inquiry is a deficient model, but because in the main, these were public inquiries that were controlled in their important aspects by those elements of the State that had an interest in preventing accountability. Put simply, these were not fully independent inquiries. This struggle between state interests and truth-finding is illustrated by the difficulties that have beset the Bloody Sunday Inquiry and is crystallized in the arguments over what Article 2 and the right to life mean in the context of that inquiry.

It may be that a variation on the public inquiry model, as it has previously been used, could form the basis of the design. A public inquiry, cognizant of all of the foregoing, in the form of an investigating judicial panel replete with all necessary powers, might be one way of undertaking truth-finding. However, it will be necessary for there to be some form of external independent "guarantor" who will adjudicate conflicts in the process. It is unlikely that the UK courts could be that independent guarantor,¹⁴² given their attitude to the challenges to the Bloody Sunday Inquiry. Like many domestic courts confronted by the amulet of "national security," they have preferred to accept the case made by the State rather than that of those who allege they are its victims.¹⁴³ In the case of Bloody Sunday, the UK courts have shown themselves consistently unwilling to unpack the reasons

142. See Stephen Livingstone, *The Judiciary and Legal Profession in Transition*, in HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND 143-55 (Colin Harvey ed., 2001) (considering the role of the Northern Irish courts during the conflict).

143. See George Alexander, *The Illusory Protection of Human Rights by National Courts*

for the findings by the UK security services that the military witnesses are at a greater risk if they give evidence in Northern Ireland than in London. There is scant consideration given to the fact that the security services are themselves an interested party before the Inquiry. There appears to be little comprehension that a security assessment emanating from the Ministry of Defence that supports the position taken by former employees of the Ministry of Defence will be treated with downright suspicion among sections of the population in Northern Ireland. These security assessments provided the main basis on which the courts acceded to all of the requests for judicial reviews by those representing the military and former soldiers. As one judge observed: “[t]he conclusion that there was no objective reason for fear on the part of the officers would itself have been perverse in the light of the intelligence evidence.”¹⁴⁴

In essence, the truth-finding function of the Bloody Sunday Inquiry is hampered because of the continuing struggle between the official and unofficial versions of history, which it seeks to resolve. Any truth process, even one which is as unofficial a truth process as the Bloody Sunday Inquiry, needs to secure the support of the combatants, as well as the victims and the witnesses.¹⁴⁵ The evidence from the Inquiry is that achieving such support is going to be very difficult. Perhaps this is an inevitable consequence of the fact that, despite the Good Friday Agreement and the huge reduction in violence, the Northern Irish conflict is not yet settled. It may be that a resolution between the different versions of history is not yet possible, if ever.

There was a reasonable presumption that the State, in setting up the new inquiry, was preparing to abandon its defence of its version of history, at least in respect of Bloody Sunday. This is clearly not the case. It is this continuing contestation of the past that compels the State to try to retain control, however covertly and indirectly, over truth-seeking processes, such as the Bloody Sunday Inquiry. It wishes to ensure that the official truth is its version. There can be little doubt that the State will seek to do

During Periods of Emergency, 5 HUMAN RIGHTS L. J. 1 (1984) (stating that this is not an unusual response).

144. Per Girvan, J., *In the Matter of an Application by the Next of Kin of Gerard Donaghy for Judicial Review and In The Matter of a Decision of the Bloody Sunday Inquiry*, [2002] NICA 25B (Feb. 7, 2002).

145. Some of whom may also be combatants.

the same with any new inquiries set up to investigate its activities. Nor is the State the only party to the conflict with a history to preserve - the paramilitary combatants and the organizations to which they belonged also have an interest in denying aspects of their activities and elevating others. If those involved in the conflict remain engaged in this battle for its meaning and use truth-finding processes as a ground for that battle, then no domestic mechanism can ever succeed in satisfying the requirements of justice.

This may be an unsatisfactory conclusion, given the current state of affairs in the international community, but perhaps a solution is not to look to it as the adjudicator of such local conflicts, but to follow the model of the peace process itself and allow the two governments and the people of Ireland to be the architects of a truth process. The Good Friday Agreement envisages all-Ireland institutions and a number have been set up, by way of international treaties signed by both governments, with the necessary mechanisms arranged by way of enabling legislation in both jurisdictions.¹⁴⁶ This model might also work when designing a truth process to address the unresolved legacies of the conflict, the violence of the State and the paramilitaries. However, such a body should be truly independent of either government and it should be possible, when designing such a process, to build in the independent adjudication mechanisms necessary to resolve the kinds of disputes that have arisen in the Bloody Sunday Inquiry.

To borrow the language of the ECtHR, a truth process for Northern Ireland must be an official, effective, public and a fully independent investigation, capable of ensuring accountability in practice as well as in theory and centrally involving the next of kin.¹⁴⁷ Large sums of public money are likely to be expended on such processes with the aim of achieving accountability and re-establishing the rule of law. Nothing short of those standards will deliver those aims. Critiques of the British public inquiry model are not rejections of the need to find truth and provide

146. For example, the "cross-border bodies" or the "implementation bodies" set up under the Agreement Establishing Implementation Bodies, Mar. 8, 1999, Ir.-U.K.-N.Ir., available at <http://www.irlgov.ie/iveagh/>; see also Northern Ireland Act 1998, ch. 47 (Eng.).

147. These are the principles laid down by the ECtHR in *Jordan et. al. v. UK*, *supra* n.19.

accountability, but are intended, instead, to better inform the design of a model by which that need could be achieved. Finding such a model has to be done because the recovery of the rule of law is an ethical and political necessity and an essential component of justice and peace.