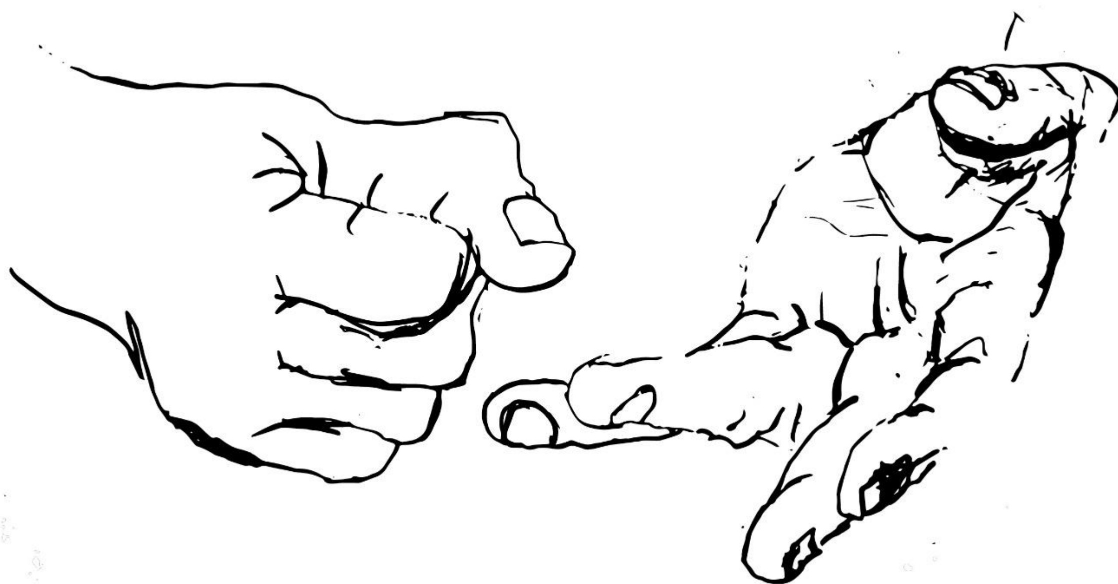
Legacy Matters
LEGAL SUPPLEMENT



is the Truth Recovery Process Compliant with Article 2 of the European Court of Human Rights?

Legacy Matters

Legal Supplement

Is The Truth Recovery Process Compliant with Article 2 of the European Court of Human Rights?

Executive Summary – Truth Recovery Process

1. Introduction:

This proposal was generated by discussions between former combatants, victim/survivors and academics. It outlines a Truth Recovery and Reconciliation process designed to address ongoing issues of harm and trauma, political intractability, social division and civil unrest in Northern Ireland, that could provide a road map out of the minefield of Legacy politics.

Well over 3,500 people died during the Troubles and over 47,000 were injured. It has been estimated that a third of people in Northern Ireland were affected directly or indirectly by political violence, and many others suffered in Britain, the Republic of Ireland and Europe.

Despite concerted efforts by politicians, officials, lawyers, NGO organisations, and community leaders, the complex justice issues that arose from the conflict remain unresolved. In this situation the Belfast Good Friday Agreement (1998) has evolved into a Political Truce rather than a Peace Agreement.

The Truth Recovery Process proposes an extra-judicial approach to achieving reconciliation on the facts for victim/survivors and former combatants alike. We regard this as a necessary first step towards healing past harms on the basis that without agreement on the facts, there can be no basis for agreement on anything else.

Unfortunately, the judicial approach adopted to date is cumbersome, time consuming, expensive, and often retraumatises victims and survivors. Far from leading to honest debate of the issues, or a full disclosure of the facts, let alone reconciling the parties, a trial often has the opposite effect because of its adversarial nature. Its main objective is to

determine guilt and innocence of a criminal offence. Every acquittal and every conviction is therefore viewed as a victory or defeat for one side or the other.

This proposal charts out a system of conditional amnesties for former combatants that encourages them to come forward and agree to enter into a process of meaningful engagement with victims and survivors. It will provide more information than a court case and hopefully a measure of atonement and even reconciliation.

Learning from other conflict situations – and indeed from the history of Ireland – it is clear that if horrific and unjust events from the past are not addressed, they will continue to ferment under the surface and erupt again in the future. (Pages 1-3)

2. The Current Context for a Proposed Truth Process

The British-Irish Intergovernmental Conference established under the terms of the Belfast Good Friday Agreement, and the Advice on A Charter of Rights for the Island of Ireland adopted in 2011 were aspirational rather than offering a practical way forward.

This section shows how the Truth Recovery Process can be incorporated within the parameters of the Belfast Good Friday Agreement and provide information from former combatants to victims and survivors in a more comprehensive and satisfactory way than the courts, or the 'filters' proposed in the latest Stormont House discussions.

It explains the intrinsic flaws involved in the HET and HIU approach, and why police officers are not best suited to carry out the investigative process.

It also looks at how the War of Independence, and Civil War were dealt with and at some guiding principles that should apply regarding to the more recent Troubles. (Pages 3-11)

3. Framework for the Process: A Justice- and Victim-Sensitive Approach

This section addresses issues affecting victims and survivors, which must be a central part of the reconciliation strategy and welcomes the initiative of the former Northern Ireland Secretary, Julian Smith, who broke the logjam over pensions for those seriously injured in the Troubles.

It addresses the concerns that those in the nationalist and Unionist communities, and in the security forces, might have over an extra-legal way forward. It describes how a conditional amnesty process would work and the sequencing steps involved in ensuring it is justice sensitive. It is not an easy 'get out of jail' option. Rather, it poses challenges for all concerned. But, as mentioned in the introduction, it provides a means of obtaining fuller disclosure of information, and the possibility of some degree of reconciliation and atonement. Former soldiers, police officers and paramilitary combatants will be freer to come forward with information about legacy cases because we know that at least some of them want to do that before it is too late. That space will not open up without lifting the fear of prosecution, including protection from prosecution under the Official Secrets Acts.

The report supports the proposal that mid-summer day [21st June] be dedicated to the theme of "Healing Through Remembering", and that it be marked by public events not alone on the island of Ireland but in Britain as well.

(Pages 11-14)

4. Moving Forward: A Reconciliation Commission; Reconfiguring the HIU, ICIR and IRG units

We propose that the British and Irish governments agree structures that facilitate an extra-legal truth recovery and

justice process as envisaged in Section 3.a.1.

This would involve the establishment, in the first instance, of a Reconciliation Commission with two subsidiary bodies dedicated to implementing the Truth Recovery Process. It would be headed by a mutually agreed international Chair, or two senior members of the British and Irish judiciaries, to which the Commission would be answerable.

The two operational components of the Commission would be:

1. A Truth Recovery Unit (In a Northern Ireland context this would replace the HIU).

2. A Justice Facilitation Unit. (In a Northern Ireland context this would replace the proposal for the ICIR,ICRIR).

It explains how the existing proposals could be reconfigured, who could participate in them and how a Truth Recovery Process based on a mediation and conciliation model, rather than a judicial/investigative approach, would work. While separate arrangements might have to be made to extend the process to Britain and the Republic, it recommends that the experience and expertise of the Victims Commission could be made available to all the parties concerned.

While the process would be confidential, where successful, participants would be encouraged and facilitated in becoming advocates for this model as an alternative to the courts.

Finally, it looks at how best to address the causes of the conflict in ways that would help communities in the North avoid a recrudescence of political violence. (Pages 14-20)

A Truth Recovery Process to Address Legacy issues of the Troubles (*full Text*)

Contents

1. Introduction

2. The Current Contexts for a Proposed Truth Process

3. Framework for the Process

4. Moving Forward: A Reconciliation Commission; Reconfiguring the HIU, ICIR and IRG units

1. Introduction

This document was generated from discussions with former combatants, victim/survivors and academics. It outlines a Truth Recovery and Reconciliation process designed to address ongoing issues of harm and trauma, political intractability, social divisions and civil unrest in Northern Ireland. This proposed process maps onto existing policy and legal structures already in place in Northern Ireland.

Figures vary for the number of people who died as a result of the armed conflict in Northern Ireland, but it has affected almost every family in the region. The Eames & Bradley CGP Report (2009), which provided probably the most definitive of many, gave a figure of 3,532, broken down in the following way:

- 2,055 deaths [58%] by republican paramilitary groups
- 1,020 deaths [29%] by loyalist groups
- 368 deaths [10%] by security forces
- 80 persons killed by unknown agents [2%]

In the 2007 edition of *Lost Lives* by David McKittrick (et al), a figure of 3,720 deaths is given but this is for a slightly longer period from 1968-2006. In addition, there were 16,209 bombings, 36,923 shootings and 47,541 people were injured. Further deaths and injuries occurred in Britain, in the Republic of Ireland and on the Continent.

There is immense human suffering behind these statistics. The Methodist Church in its submission to the NIO consultation on the proposed legacy structure estimates that one in three people of all ages in Northern Ireland have been directly or indirectly affected and one third of survivors have spoken of serious suicidal thoughts. The political failure to agree a post-conflict reconciliation process means that much trauma remains unaddressed to this day, both at an individual level for victims/survivors, for former combatants and at a collective societal level.

There have been concerted efforts by politicians, officials, lawyers, NGO organisations, and community leaders over the years to arrive at some overall political agreement to provide for a process to address the unresolved justice issues of the conflict. The fact that no substantive agreement has been possible apart from the Stormont House proposals (2014: paragraphs

21-55) highlights the complexity and sensitivities involved. However, it is imperative and urgent almost a quarter of a century after the signing of the Belfast Good Friday Agreement (1998) that both political and civil society leaders come together to set up a legacy architecture to address harms caused by the political violence of the armed conflict.

While there has been an understandable emphasis on the needs of victims/survivors in the conflict, the approach pursued to date leads individuals and communities to embrace victimhood and apportion blame to members of the 'other' community, be it denominational, political, the security forces, or individual paramilitary organisations. Far from reconciling people to the past, it constantly reinforces existing prejudices and nurtures a continuing sense of grievance.

Even disregarding the dubious practicality of pursuing each and every case through the courts, by its very nature such a judicial process cannot lead to honest debate, let alone reconciliation. Each court case is a battle in which legal teams will do whatever it takes to win, and every acquittal or conviction will be viewed as a victory or defeat for one side or the other.

Nor will judicial inquiries heal the harms of the armed conflict in Northern Ireland or, in many cases, deal with miscarriages of justice. They are by nature costly, time consuming, and inevitably have to be selective in the use of scarce resources by focusing on the most 'important' cases. These forms of legal combat cast a long shadow that precludes the sort of dialogue needed if there is to be some form of closure to the conflict, not only for individuals but for society as a whole.

Regarding miscarriages of justice, many paramilitaries were convicted of crimes they did not commit, because the only way in which they could clear themselves was by identifying who did do it, effectively becoming an informer. Even people not involved in any way in the events investigated, other than as eye witnesses or recipients of often unwanted information, risked being charged themselves or held in contempt of the judicial process if they refused to divulge all of the information in their possession.

This proposal charts a system of conditional amnesties for former combatants that encourages them to come forward and agree to enter into a process of meaningful engagement with victims/survivors which can help transform the harms experienced for all concerned, including the wider communities affected. These communities include families and individuals affected not only in Northern Ireland but also in Dublin, Monaghan, Dundalk, Manchester, Birmingham, London, and elsewhere on these islands.

Learning from other conflict situations – and indeed from the history of Ireland – it is clear that if horrific or unjust events are not clarified and dealt with by wider society, especially with regard to the people impacted directly by them, then they continue to ferment under the surface and erupt in the future. Rather than bequeath a burden of mutually unresolved grievances and memories of injustice to future generations and trap communities in future cycles of bitterness, these grievances and memories must be addressed to transform our relationship to the past and create a space that allows for engagement by all parties in developing a more collaborative future. Indeed, this Proposal serves as a logical and necessary extension of the Belfast Good Friday Agreement (1998), and seeks to help bring about the more peaceful future envisioned in the Agreement more than twenty years ago. It is premised on the belief that without agreement on the facts, there can be no basis for agreement on anything else.

2. The Current Contexts for a Proposed Truth Process 2a. A Logical and Necessary Extension of the Belfast Good Friday Agreement

The opening 'Declaration of Support' to the Good Friday Agreement is unequivocal in its commitment to helping victim/survivors of the conflict. Point 2 of the Declaration states that, 'We must never forget those who have died or been injured, and their families', adding that 'we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all'.

Point 5 acknowledges 'the substantial differences between our continuing, and equally legitimate, political aspirations', but goes on to commit the parties to striving 'in every practical way towards reconciliation and rapprochement within the framework of democratic and agreed arrangements'.

The British-Irish Intergovernmental Conference established under the terms of the Agreement commits both governments to establish Human Rights Commissions within their respective jurisdictions to promote bilateral co-operation in this area, an initiative in which the British Government has been more active than the Republic of Ireland. The Northern Ireland Human Rights Commission and Irish Human Rights and Equality Commission did produce an Advice on A Charter of Rights for the Island of Ireland in June 2011, but the 40 page document is an aspirational statement rather than offering a practical way forward.

(*There are only two references in the document to the Rights of Victims. The first of these is in a table on page 35, which lists the United Nations Declaration of Basic Principles of Justice of Victims of Crime and Abuse of Power 1985, the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure 1985 and the Council Framework Decision on the Standing of Victims in Criminal Proceedings 2001, as international treaties under which their rights can be vindicated. The second is a reference on page 40, under the heading of the '(Good Friday) Agreement 1998', which also omits to explain how victims may exercise these rights. All of these references envisage that such rights can only be met through the formal legal system at a time when other forms of conflict resolution through extra-legal mediation processes are being developed in other walks of life.*)

Under the 'Reconciliation and Victims of Violence' section that follows, all the contracting parties recognise 'that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation'. They further recognise 'that victims have a right to remember as well as to contribute to a changed society. The achievement of a peaceful and just society would be the true memorial to the victims of violence.

'The participants recognise that young people from areas affected by the troubles face particular difficulties' and they commit to the 'provision of services that are supportive and sensitive to the needs of victims' as 'a critical element' to the success of the Agreement. Such 'support will need to be channelled through both statutory and community-based voluntary organisations facilitating locally-based self-help and support networks'.

These groups already include organisations established by former combatants, some of whom have served long prison sentences. The value of their work in developing 'reconciliation and mutual understanding and respect between and within communities and traditions, in Northern Ireland and between North and South' is recognised as playing 'a vital role in consolidating peace and political agreement'. The parties 'pledge their continuing support to such organisations and will positively examine the case for enhanced financial assistance for the work of reconciliation'. The parties to the Agreement recognise

this work as, 'An essential aspect of the reconciliation process' promoting 'a culture of tolerance at every level of society'.

What is not acknowledged explicitly is that as well as involving former combatants who have served terms of imprisonment arising from their involvement in the conflict, these organisations also include participants who were involved, sometimes heavily involved in the conflict, but were never convicted of any offence. This does not prevent them from participating in these very positive educational and reconciliatory activities, but it does inhibit that activity and the degree to which they can make a contribution to the Truth Process and the opportunity of communicating their knowledge and experience to the wider community and, through it to the peace process.

This argument applies with equal relevance to the next section of the Good Friday Agreement on Economic, Social and Cultural Issues, particularly section 2 (i) 'tackling the problems of a divided society and social cohesion in urban, rural and border areas'.

The Belfast Good Friday Agreement also contains objectives outlined under its concluding heading on 'Policing and Justice', which lay emphasis on encouraging the role of 'community involvement where appropriate' in achieving its objectives, including the delivery of justice 'efficiently and effectively'.

Paragraph 5 of the 'Policing and Justice' part of the Agreement states that there will be a 'wide-ranging review of criminal justice (other than policing and those aspects of the system relating to the emergency legislation) to be carried out by the British Government through a mechanism with an independent element, in consultation with the political parties and others. The review will commence as soon as possible, will include wide consultation, and a report will be made to the Secretary of State no later than Autumn 1999.'

The lack of progress achieved does not invalidate this objective or the objectives contained in the accompanying Appendix (B). These include: measures to improve the responsiveness and accountability of, and any lay participation in the criminal justice system; mechanisms for addressing law reform; the scope for structured co-operation between the criminal justice agencies on both parts of the island;

These issues were also addressed in the Stormont House Agreement in the paragraphs dealing with 'The Past', or Legacy issues.

Implicit in the terms of the Stormont House Agreement is the failure of the traditional 'Policing and justice' system for reasons which are outlined in 2.c below to assist in consolidating the Peace Process. Rather, the failure to address the vexed question of amnesties in the Belfast Good Friday Agreement has resulted in the pursuit of Legacy cases in the courts. These are widely perceived as a way of continuing the conflict by other means.

Under the Stormont House Agreement the participants agreed to address a number of contentious social, economic and cultural issues where progress had stalled. Some of the cultural issues such as Flags and Parades reflected the continuing problem of a contested past, as did lack of progress on criminal justice issues.

Under 'the Past' heading, Paragraph 21 states that, 'As part of the transition to long-term peace and stability the participants agree that an approach to dealing with the past is necessary which respects the following principles:

o promoting reconciliation;

o upholding the rule of law;

o acknowledging and addressing the suffering of victims and urvivors;

o facilitating the pursuit of justice and information recovery;

o is human rights compliant; and

o is balanced, proportionate, transparent, fair and equitable.

Although the question of amnesties is not mentioned, the issue is implicit in the proposal for an Oral History project which proposes in Paragraph 23 that in collecting shared experiences 'consideration will be given to protecting contributors, and the body itself, from defamation claims.'

The issue is addressed more explicitly in Paragraphs 45 to 49 dealing with the Independent Commission on Information Retrieval (ICIR).

Paragraph 45 states that, 'The ICIR's remit will cover both jurisdictions and will have the same functions in each. It will be entirely separate from the justice system.'

Paragraph 46 states that the ICIR 'will not disclose information provided to it to law enforcement or intelligence agencies and this information will be inadmissible in criminal and civil proceedings. These facts will be made clear to those seeking to access information through the body'.

Paragraph 47 states that, 'The ICIR will be given the immunities and privileges of an international body and would not be subject to judicial review, Freedom of Information, Data Protection and National Archives legislation, in either jurisdiction'.

Paragraph 48 provides that, 'Legislation will be taken forward by the UK Government, the Irish Government and the Assembly to implement the above decision on inadmissibility.'

Paragraph 49 states that, 'The ICIR will not disclose the identities of people who provide information. No individual who provides information to the body will be immune from prosecution for any crime committed should the required evidential test be satisfied by other means.'

The ICIR has been the most successful initiative undertaken under the auspices of the Stormont House Agreement and, if it is compliant with the terms of the Good Friday Agreement it is hard to see why a Conditional Amnesty scheme designed to recover the Truth about 1,700 unsolved murders and thousands of other serious incidents that led to life changing injuries for many people, and suffering for them and their families is not. This is especially so, given the enormous obstacles that face any attempt to make significant progress through the traditional justice system, as set out in 2.c. below on the Inability of Court and Police Systems to Address Legacy Justice Issues relating to the Conflict.

For all of these reasons we believe that the Truth Process outlined in this document is both a Logical and Necessary Extension to the Belfast Good Friday Agreement if we are to secure the Peace Process and ensure it becomes embedded in the political culture of these islands rather than being simply a means of securing a temporary truce between traditional enemies.

2.b. Inability of Court and Police Systems to Address Legacy Justice Issues relating to the Conflict

In making this submission, the working group has concluded that the delivery of justice for legacy cases has become nearly impossible. There are many practical difficulties and

obstacles that legacy cases are up against. Below is a list of 18 factors that operate at present and will affect the HIU if created:

a) Files and records have disappeared and evidence degraded.

b) Witnesses have died

c) Memories of all parties have deteriorated as years goes by

d) Miscarriages of justice involving people convicted of crimes they did not commit can rarely be revisited, especially those involved in paramilitary organisations, because the only way they can clear their names is by incriminating others, which, for many, would mean turning informer. The same dilemma faces eyewitnesses and recipients of, often unsolicited and unwanted information. This is also an injustice to victims and survivors who think they received justice and that the relevant individual(s) and organisation(s) were brought to account.

e) Access to evidence and documents is frequently denied on grounds of state security

f) The possibility of non-cooperation from retired police officers in the investigation of crimes, on the basis that investigatory power does not stretch into the retirement years

g) Fears among former combatants of being prosecuted if they voluntarily give information through the ICIR about the events they know about

h) Forensic examination is impossible on decommissioned IRA guns

i) The sheer number of cases amounting to some 1,700 killings (out of 3,532) that are unsolved and need to be re-investigated.

j) Each investigation will cost in the region of £1 million.

k) Budgetary constraints of the UK government will limit the number of cases.

l) Police resources and capacity are simply not there to carry out all of these investigations, which will severely impede the number that can go all the way to court for prosecution. There are approximately 800 murders a year in the United Kingdom, most of them 'relatively' simple cases and yet there is a chronic shortage of experienced investigators to deal with them. Solving often more complex crimes will put a huge strain on the HIU. The former PSNI Chief Constable, George Hamilton, has expressed serious concern at the impact unsolved Legacy investigations are having on the organisation's ability to meet its current obligations, which is undermining public confidence in the policing service, and retired RUC Assistant Chief Constable Alan McQuillan has estimated that, even if all the resources promised to the PSNI were delivered it might lead to the successful conclusion of some 70 outstanding Legacy cases.

m) Nor does this figure begin to address the even more numerous cases where victims/survivors suffered serious and often life changing injuries.

n) The HIU will be further hampered by political pressure to 'balance' investigations between different groups of former combatants, leading to delays and the questionable use of scarce resources, which is not in the interests of victims and survivors or the community at large.

o) If police officers are brought in from England for the investigations, they may not be familiar with the unique circumstances of the armed conflict in Northern Ireland.

p) Anyone convicted of a conflict-related offence, including multiple murders that occurred between 1973 and 1998 will only serve two years in prison under the terms of the Good Friday Agreement, creating serious anomalies in sentencing policy that may be open to legal challenge. See 3.a. below.

q) Very few historical prosecutions have succeeded in the courts and it was former Justice Minister David Ford's assessment in October 2015 that the HIU "might at best produce one or two prosecutions".

r) Uncovering the truth will only grow more difficult with time, unless more effective, and positive alternatives are found to the traditional criminal justice process.

While acknowledging the superb work undertaken by Jon Boucher's team it not expected to result in more than a few criminal convictions, probably in single figures.

2c. Historical Background

Amnesties have been used to help end violent political conflict in Ireland for centuries. They facilitated a return to normal life and mitigated against the most toxic legacies of past violence. The eighteenth century provided an important watershed in this context, dividing wars of contested dynastic and religious allegiances from those defined in more modern ideological terms. Unlike the Jacobite cause, which ended with the death of the Young Pretender in 1788, these new movements were not contingent on the fate of a dynasty or individual but were inspired by the ideals of the American and French revolutions. Because they were fuelled by a sense of injustice over unmet grievances, they were recurring and proved impervious to defeat.

The first and bloodiest contest of the modern era in Ireland was the Rising of 1798. Initially, it was the brutality with which the democratic reformist movement of the United Irishmen was suppressed that led to its most radical elements adopting the objective of an Irish Republic and the use of armed force to achieve it. But even in this exceptionally violent era, the government included amnesties in its political armoury. These methods of combating disaffection would recur, and their most consistent characteristic was political pragmatism.

Amnesties were often confined to leading opponents of the status quo and, or the release of prisoners on licence. However, once the Treaty was ratified by Dail Eireann on January 7th, 1922, the British government applied 'a general amnesty in respect of offences committed in Ireland for political motives prior to the operation of the Truce of 11th, July last'. A general release of prisoners followed and King George V expressed his 'confident hope that this act of oblivion will aid powerfully in establishing relations of friendship and goodwill between the peoples of Great Britain and Ireland'.

On November 7th, 1924, Dáil Éireann passed a similar resolution in relation to the Civil War, which had ended to all intents in military terms by May 1923. There had been earlier attempts to secure an end to the conflict by leaders of both sides, as well as by the Labour Party, Farmers Party and former members of the Cumann na nGaedheal government, but it was not until the military outcome was clear and the Free State government felt confident enough to release over 11,000 prisoners of war, including 500 women, that it took this long awaited step.

The resolution declared that,

> 'The Executive Council, being aware that large numbers of persons have been or are likely to be apprehended in respect of crimes committed or alleged to have been committed by them during the period hereinafter mentioned and having considered the reports of police and other officers responsible for the maintenance of law and order, is of opinion that no useful purpose would be served by the institution or continuance of prosecutions in respect of criminal acts committed or alleged to have been committed between the 6th day of December, 1921, and the 12th day of May, 1923, in any case in which it appears that the act was committed or purported to be committed in connection, directly or indirectly, with the state of rebellion and public disturbances created by the recent attempt to overthrow by force the lawfully established Government of Saorstát Eireann (including the Provisional Government), whether such connection arises from the act having been or purporting to have been committed in the course of the said rebellion and public disturbances or in aid or furtherance of the same or in the course or in aid or furtherance of the suppression of the said rebellion and public disturbances, and the Executive Council hereby declare and puts on record its considered opinion that the highest interests of the State and the promotion of the reign of law and order now happily restored would best be served by the responsible officers of the State discontinuing or refraining from instituting criminal proceedings in any such case as aforesaid, and, so far as it lawfully may so do, the Executive Council directs all officers of the State concerned in the administration of the law to act in accordance with the views hereinbefore expressed.'

There are a number of factors that led to this decision.

1. While the Government of Saorstát Eireann was the lawfully established Government under the terms of the Anglo-Irish Treaty of 1921, that Treaty only came into force on December 6th, 1922. Before that all of its actions, including the formation of the National Army and the attack on the Four Courts on June 28th, 1922, which marked the formal start of the Civil War were not covered by the Treaty.

2. Therefore, the leaders of the Free State were protecting themselves and their agents from prosecution, as well as their opponents.

3. It was a coming to terms with the fact that the new state could no longer afford the political, social or economic costs of the Civil War, including funding a large standing army and maintaining thousands of prisoners in The Curragh and other detention centres.

Finally, it represented an albeit reluctant recognition of the political legitimacy of the government's opponents, and their right to engage in the political process.

Many opponents of the Treaty still considered the Irish Republic to be the de jure government of Ireland, North and South. Nevertheless, the 1924 amnesty helped normalise politics within the new state and create a climate in which democracy could re-emerge, eventually relegating the political legacy of the Civil War to the pub, Dail chamber and election hustings. The Free State was not unique in enacting an amnesty during this period. Most European states emerging from the First World War enacted amnesties to help normalise often fraught political situations. The principal exception was the USSR.

The Good Friday Agreement of 1998, which marked the end of the recent 30 year conflict in Northern Ireland, did not include an amnesty. Nor did the Stormont House and Fresh Start agreements of 2014-15, or the New Decade, New Approach document of 2020. But the ceasefire declared by the IRA at the end of the 1956-1962 Border campaign was followed by

the release of all the prisoners under Royal prerogative, which might be a precedent for dealing with the issue again in Northern Ireland in the context of an overall settlement.

Paradoxically, this was because there was no unequivocal victor to the latest conflict. When previous IRA campaigns ended in defeat there were de facto amnesties as both the Irish and Northern Irish governments released internees. This was sometimes followed by the early release of convicted prisoners.

The Good Friday Agreement was therefore a truce, rather than a conclusion to the conflict. It created a breathing space within which a permanent peace could be constructed, while recognising that Northern Ireland remained a deeply divided society where political legacies from the past - and objectives for the future - remain contested.

The uncertain politico-military outcome of the struggle in Northern Ireland and the decision of the parties not to include an amnesty, either conditional or unconditional, as part of the peace process left a major Legacy issue for the victims and survivors of the conflict.

This 'unfinished business' continues to inflict suffering on a scale that is not only unacceptable in humanitarian terms, but has the capacity to undermine the peace process and sow the seeds of future conflict. Reliance on the half-way houses of information retrieval and the courts to deal with outstanding crimes committed by participants on all sides perpetuates rather than resolves the issues that led to the conflict in the first place.

War of Independence	Civil War 1922-24	Troubles 1968-1998
Clear cut political settlement	Clear cut military outcome	Unresolved military and political outcomes
Shared Democratic Values	Shared Political Legacy	Contested Political Legacies and Values
Rival States recognised the political legitimacy of the other	State and Civil Society vs 'Public Band' (IRA)	State vs several political and paramilitary bodies and Paramilitaries vs Paramilitaries
An Ethnographic Conflict in the North was elided by the negotiators and 'parked' for future resolution	Personal and Group Animosities and conflicting political objectives remained between two nationalist alliances	Personal and Group Animosities between nationalist and Unionist communities and within nationalist and Unionist communities remained
The Treaty was an international settlement in which both parties accepted the legitimacy of the other. The British Government declared an amnesty in 1922 for all illegal acts committed in the War of Independence	There was no legal basis for the actions of the Free State government before December 6th, 1922, when the Treaty came into effect. A general amnesty in 1924 covered the illegal actions of all protagonists, political as well as military	Legal clarity exists on the powers of the British and Irish states. There was an early release programme for serving prisoners but there was no general amnesty. It was left largely to the criminal justice system to deal with cases arising from the Troubles. 25 years later the British Government has introduced a new Northern Ireland Troubles (Legacy and Reconciliation) Bill that is strongly opposed by the Irish Government, all of the political parties in Northern Ireland and the British Labour Party

(This panel was updated on March 26th, 2023)

2.d Section on comparative approaches informing this document.

The legal systems of the United Kingdom and the Republic of Ireland are not designed to deal with the exceptional circumstances that led to a major armed conflict erupting in Northern Ireland; one that spilled over into the Republic and Britain, and even reached Europe on occasion. Both governments need to recognise this and be prepared to look at how other states, and how indeed they themselves have dealt with such conflicts in the past.

The absence of a statute of limitation on murder, similar to that which exists in many other states which are fully compliant with the European Convention on Human Rights, could also be examined with a view to applying it where former combatants make themselves amendable to a Truth Recovery Process.

2.e Further motivations for proposal and benefits of bringing about a Truth Process

Almost 25 years distant from the 1998 Agreement there could be new mature openings for victims/survivors and combatants to tell their stories, if safe opportunities are provided for them to be heard and acknowledged – something that people were not ready to do in the past.

Section 3 below advocates a need to switch from a prosecution-based justice system for legacy cases, and move beyond case-by-case criminal prosecutions. These rehearse the hurt and pain of victims/survivors as each case hits the headlines and deepens community divisions. Twenty-two years on, might it not be time to introduce a justice-sensitive, mediation approach towards healing the hurt before it is too late for those who have lived through the armed conflict?

A significant part of this different approach will be to switch over primarily to mediated processes to support victims/survivors in discovering the truth at their own pace through a reconfigured set of SHA units more fitted to reconciliation - a societal goal that could be facilitated by churches, community relations professionals and civil society groups. The working group would like to see a sustained effort over the next two years, using the fund to be provided by the British and Irish governments, to bring about inter-communal healing and reconciliation. This means diverting funds earmarked for court prosecutions and legal costs to a facilitated relational justice initiative.

This proposal recommends that the Reconciliation Commission could work within this refashioned legacy process alongside other agencies at local level. The new understandings that arise from this approach will sustain renewed efforts to reach out and hear the pain of other communities. By being released from the past, people will be better able to move forward together to build a reconciled and just society.

2.f Some guiding principles for a new approach

- Each victim/survivor has their own unique point of departure for their inner journey of working through what has taken place, the process of trauma recovery, the telling of their own truth and the discovery of as much objective truth as possible about what happened.

- Recovering the truth can lay the foundations for reconciliation. Truth is likely to be a precondition for embracing inter-communal reconciliation. The past can be held in healthy balance with the future.

- For healing to take place, the needs of victims/survivors can be met by sharing with former combatants the impact of the violence on their own lives and families. A safe process facilitated by a team of trained Mediation officers can lead to acknowledgement of the harm

done by or on behalf of the perpetrator, genuine expressions of sorrow and remorse, and the seeking of forgiveness.

- Justice is critical for ensuring accountability and a renewed respect for human rights and the rule of law. However, justice must not be confused with 'revenge' or 'retribution', which are capable of reigniting individual and sectarian conflict.

- A reconciliation process offers the opportunity to share in the presence of the other, in a safe place, the terrible things that one has experienced without fear of prosecution by the state, reprisal or retaliatory violence by those standing behind them.

- Victims/survivors struggle with forgiveness, particularly when others ask them to forgive; yet it can benefit the person who does the forgiving more than the person being forgiven. It frees victims/survivors to live their life without carrying the perpetrator on their back any longer and allows them to regain their human dignity. Repentance is a matter for the transgressor. Only they can seek it, or experience the relief from the sense of guilt that may result. Knowing that they are forgiven for their actions by those who have suffered from them can undoubtedly encourage them to atone for their actions.

- The scheme is voluntary and on a pilot basis. Former combatants who enter the pilot scheme and meet the conditions set out below would receive amnesties, even if the scheme was discontinued subsequently.

3. Framework for the Process: A Justice- and Victim-Sensitive Approach

3.a. Meeting the concerns of victims/survivors through a justice-sensitive approach

The starting point is to create a means by which the pain and loss of victims/survivors can be more suitably addressed because no effective legal remedy exists at present to do this. Their need is to obtain as much truth as possible about what happened and, most importantly, why it happened, as soon as possible. This is paramount because it is through truth recovery that healing can perhaps begin to occur. Second, victims/survivors need to achieve a sense of justice even at this late stage many years after the event, particularly in situations where there have been no prosecutions and are unlikely to be in the near future. Third, we know deeper issues remain that legal remedies will not repair. We have to look to inter-communal reconciliation initiatives such as when the stories of victims/survivors' experiences are heard, understood, and acknowledged by the other community. It is through such truth recovery processes that a sense of justice, as well as an acknowledgement of each other's identity can be regained. For those who say this is not real justice, we must emphasise that this should not be seen as a soft option. It is a more positive, painful, cathartic and emotionally healing experience than a court hearing; and capable of producing more information and greater insights for all involved than any court proceedings. Northern Ireland has many skilled facilitators who can assist victim/survivor groups through a province-wide initiative.

The early release provisions of the Good Friday Agreement are a particular issue for the Unionist community in the event of prosecutions going ahead against the security forces arising out of the investigations. This is because anyone convicted of murder in the earliest and bloodiest years of the conflict, that is prior to 1973, is liable to serve a full term, whereas even those convicted of multiple murders subsequently will serve no more than two years. Paradoxically, 1971 and 1972 were the bloodiest years of the Troubles and most of the fatal shootings involving the security forces also occurred pre-1973. This working group believes that the principle of a two years sentence established in the Belfast Good Friday Agreement [see 2.b.(n) above] should be applied across the board to everyone and welcomes the changes that are proposed in this regard.

When all of these factors are taken into account, it becomes unclear how the need for truth and justice for victims/survivors can be met. As one survivor has argued: "We cannot forget the past. While I don't really see Justice as possible, it is a real injustice not being able to access the truth. I want to hear the truth around what happened and get to the bottom of things. That means documents being released or doors opened by the paramilitary gatekeepers so that victims like me can meet the perpetrator face to face to answer my questions and reveal the truth." This must also happen where state agencies are involved.
(*See the Submission by the Council on Social Responsibility of the Methodist Church in Ireland to the NIO consultation on the proposed legacy.*)

3.a.1. Recommendation for an extra-judicial way forward

Providing conditional amnesties to former combatants who are willing to engage in mediation processes might allow us to make access to the truth more immediately available in an efficient and timely manner:

- With victims/survivors no longer having to consider all the implications of legal proceedings, they can more freely access the truth through an official fact finding commission that can get answers to their questions (which have burdened many of them for decades).

- When victim/survivors' families request reports from police investigations into legacy cases, it could happen more speedily and in a spirit of full disclosure to achieve healing. The process by which the family report comes into the hands of victims/survivors can be provided through a family support team and not just be a clinical legal document. It can be done in a way that respects the humanity of people through a verbal interactive process.

- Former soldiers, police officers, paramilitary combatants and public servants will be freer to come forward with information about legacy cases because we know that at least some of them want to do that before it is too late. That space will not open up without lifting the fear of prosecution, including protection from prosecution under the Official Secrets Acts in the Republic of Ireland and the United Kingdom.

What is needed at this stage of the post-Agreement peace process is relational intercommunal justice; in other words, facilitate communities in restoring positive social relationships and living with their neighbours, without fear and the perpetuation of hatred it can foster. This can be achieved by facilitating a truth recovery process and acknowledging that, through multiple steps, it is possible to enable the victim/survivors to sit together with the former combatant(s) in a facilitated safe place. By recovering the truth of what happened together, expressing their mutual sorrow and regret, we can strengthen the resolve on all sides to ensure that political violence will never be used again to achieve identity aspirations. When this kind of justice is experienced, it restores respect for the rule of law and deters similar acts in the future.

3.b. Sequencing steps for introducing a Justice-sensitive approach

The first step is to appoint a Reconciliation Commission along the lines set out in Section 4(C) below to create the public environment for introducing both a victim-sensitive and a justice-sensitive approach. It would be difficult to introduce the legislation for conditional amnesties for former combatants without first initiating a process in the back channels to facilitate a series of acknowledgement statements coming from former republican and loyalist activists as well as from the two governments. The formula is already there in the October 1994 CLMC ceasefire statement that helped facilitate talks then. A new series of sequenced

acknowledgement statements is required from all parties involved in the conflict, updated and expanded to speak to the current situation. Elements in the wording need to connect the past suffering with renewed remorse, together with a recommitment by all parties to respect differing aspirations and pledge to never again return to using political violence.

In the original SHA proposals 2014, it was proposed (53) that the UK and Irish governments would consider making statements of acknowledgement at the end of the five year process through the Implementation and Reconciliation Group. We believe this sequence should be reversed. Acknowledgments would front load and kick off a process of sequenced meaningful steps so as to create the environment for legislation.

3.c. A victim-sensitive approach

There are six practical things that can be done for victims/survivors.

3.c.1 A pension for seriously injured victims/survivors.

There were understandable sensitivities around the issue of providing compensation to victims/survivors of the conflict, and particularly those who suffered life changing injuries, which have seriously impacted on their families as well. This was, in large part, because of the difficulty in arriving at an agreed definition of 'victim'. A major breakthrough came with the measures signed into law by the former Northern Ireland Secretary Julian Smith in February 2020. The implementation of pensions however has taken another two years and was only achieved thanks to the determination of victims' themselves.

3.c.2 David Bolton, who has years of field experience working with the victims/survivors of the Enniskillen and Omagh bombings, has emphasised the need to hear their expressions of loss and grief, particularly from those whose voices have not yet been heard. This includes providing the possibility in a safe space "to think and talk about outrage, grievance, guilt, shame, injustice, forgiveness and mercy." He calls for continued substantial public investment in Mental Health and Trauma Services that can be delivered at community level to address the traumatic stressors for individuals and families.

3.c.3 A central part of a victim-sensitive approach should be the establishment of the proposed independent PRONI Oral History Archive for families from all backgrounds to share voluntarily their experiences, their personal stories, and communal narratives related to the armed conflict in Northern Ireland. Families should be encouraged to share their lived experience in different formats, such as written statements, oral stories recorded in audio and in video archives. Already, some victims' organisations have done valuable work in making video recordings because people felt safe and had communal support to make such statements to camera. Consideration needs to be given to how this archive material can be made available for peace education on an inter-communal basis for adults and young people. It is important for each community to hear the other's stories. A facility should also be provided to include people affected by the conflict who live in Britain and the Republic.

3.c.4 The authors of Lost Lives (2001) have performed an invaluable task in producing a vital and easily accessible factual record of all those who have died as a result of the Troubles in Northern Ireland, Britain and the Republic. The authors should have been given continuing support to update the record as new information became available.
Unfortunately, that opportunity was missed, and with the death of Seamus Kelters in 2017, his colleagues decided that they would not return to the project.

3.c.5 The Irish Government has made some progress in compensating victims/survivors within its jurisdiction during the Troubles. A Remembrance Commission was established in the Republic of Ireland in October 2003 to acknowledge and assist bereaved families and

survivors of the conflict who lost relatives, or were injured within the State. An acknowledgement payment of €15,000 was awarded to bereaved families, while awards of up to a maximum of €40,000 were made to survivors, depending on the severity of their injuries.

Unfortunately, not all of those eligible to apply to the scheme were aware of its existence due to a rather weak advertising campaign. It was wound up in 2008 because the Government felt that all those who were eligible and wished to apply, had done so. Justice for the Forgotten (JFF), the main victims/support group involved, did its utmost to contact people who would not have known about the scheme otherwise and, on one occasion, received the assistance of the Gardaí in doing so.

However, after the scheme was wound up, JFF became aware of other eligible individuals who lost out because they were unaware of the scheme while it was operational. JFF believes that the scheme should have remained open indefinitely so that any eligible person who came forward could benefit. The Remembrance Commission was not pro-active in seeking out eligible families but relied on them to apply.

It remains unclear how Irish citizens who have been injured in the United Kingdom will be compensated, unless they also hold British citizenship. Compensation for people who were victims and survivors of Troubles related incidents in Europe has also to be addressed.

3.c.6 Mid-summer day [21st June] has been promoted by "Healing Through Remembering" and others as a day of personal reflection and acknowledgement, as well as a day to remember all those who have died in the conflict. This event deserves more widespread recognition and needs to have state support as a national day of reflection and remembrance in both parts of Ireland and Britain.

4. Moving Forward: A Reconciliation Commission; Reconfiguring the HIU, ICIR and IRG units

We propose that the British and Irish governments establish structures that facilitate an extra-legal truth recovery and justice process as envisaged in 3.a.1.

This Proposal sees the establishment in the first instance of a Reconciliation Commission which would oversee the creation of dedicated units within the new extra-legal context. The Commission would be headed by a mutually agreed international Chair, or two senior members of the British and Irish judiciaries. The Chief Executive of the Commission and its operational wings would be answerable to its Chair(s)

There would be two operational components to the Commission.

1. A Truth Recovery Unit (In a Northern Ireland context this would replace the HIU)

2. A Justice Facilitation Unit (In a Northern Ireland context this would replace the proposal for the ICIR)

A. Truth Recovery Unit (TRU)

The Truth Recovery Unit (TRU) needs to be seen as independent by all communities, as envisaged in the Stormont House Agreement (par 38) for the HIU. It should be staffed by professional civilian investigators instead of members of the PSNI, An Garda Siochana or any British police force. This is because the purpose of the unit is to verify information received by the Reconciliation Commission, not assemble evidence for a prosecution, and it will on occasion have to investigate the activities of police officers and members of state security agencies, North and South, and in Britain.

The TRU will have to operate in all jurisdictions covered by the agreement and there will be an obligation on the British and Irish governments to introduce the enabling legislation giving investigators the powers they need to perform their duties. It will be the responsibility of the Commission to ensure investigators comply with their obligations, optimise the use of resources and verify the accuracy of the information retrieved. It must ensure consistency in how investigations are handled across jurisdictions.

A.1 Getting access to the truth. The controversy surrounding the question of whether state agencies colluded with paramilitaries regarding the death and injury of victims has increased public speculation and in many cases, has added to the suffering it has cause to victims and their families. Victims and survivors need to know the truth and each investigation must seek to achieve this in the speediest way possible. Investigators will need to be as forthcoming as possible with victim/survivors and their families, without compromising the Reconciliation Process. In doing so, the investigators can help them come to terms with this new information. While there may be many complexities involved, every effort must be made to resolve investigations thoroughly and expeditiously.

B. Justice Facilitation Unit (JFU)

The original process offered by the Independent Commission on Information Retrieval (ICIR) was felt to be too clinical by many victims/survivors and former combatants. They felt it offered little dignity or humanity. There was little respect for victims/survivors when they received a family report. It was for many a dehumanising and re-traumatising experience. It was not sufficiently interactive and it was unsuited to a truth recovery process. It frequently failed to ensure factual and emotional closure as intended because only the victim/survivor can know the questions to which they need answers.

Specialised and highly sensitive victim/survivor emotional support will be needed for both the investigative stages of the process and the interactive phase. Truth recovery is about more than simply retrieving information and details about an individual who was injured or killed. The healing power of the truth recovery process is for the victims/survivors to make meaning out of the suffering caused by a violent event that often still remains fresh in the memory. Close cooperation will be needed between the Unit's family support workers and non-political/non-partisan support groups such as Wave.

Whom do we see participating in the safe mediation Process? Without being prescriptive, the following are among the groups affected:

- Protestant/unionist and Catholic/nationalist victims/survivors of the IRA
- Mainly Catholic nationalist victims/survivors of the Loyalist paramilitaries (UVF, RHC, UDA)
- Mainly Catholic nationalist victims/survivors of the British Army and Northern Ireland security forces particularly in the early years of the conflict 1969-1976
- Victims/Survivors of intra-paramilitary feuds within Protestant and Catholic communities
- People in Britain and the Republic who lost family members in Troubles related incidents
- Members and families of Security Force members killed or seriously injured

Will the victims/survivors and families participate? Initiatives of this kind have been convened in cooperation with victim/survivors organisations previously and found to be very healing for the victims/survivors involved.

Will former combatants have the confidence to come forward to give information and participate? At least some former combatants, whether members of paramilitary organisations or the security forces, may be willing to engage with victim/survivors, once it removes the possibility of prosecution.

The protocols drawn up by the JFU will be critical and broad guidelines will require input by representatives of both victim/survivor and former combatants' organisations. At the same time, it must be recognised that many former combatants will not avail of a conditional amnesty, especially one that involves engagement with their victims/survivors, nor will all those who suffered from their actions wish to engage. But at least both groups would be provided with a choice that does not exist at present.

For the former combatants, it not only removes the threat of prosecution and provide them with an opportunity to explain what happened from their perspective to victim/survivors, but it allows them to participate more fully in society. At the same time, it removes the protective shell of their own self-congratulatory tribes and forces them to confront the consequences of their actions.

For victim/survivors, the process also contains risks. Confronting perpetrators could be traumatic and would have to be a gradual process mediated by trained professionals. But even if the victims/survivors decided not to pursue the process to its completion, they would almost certainly obtain more information and a greater understanding of what happened than through any legal process.

B.1. The justice facilitation process will be a discrete mediation process co-designed with victims/survivors' families and/or former combatants, with the organisational support group in attendance on each side if needed. It will be held in a safe, confidential space based on similar rules to Chatham House and convened by the JFU facilitation team after careful preparation and bilateral meetings with each side.

B.1.1 There is a need for victims/survivors to tell their story about what happened and to have their pain and hurt understood and acknowledged by former combatants. After that, two key questions are important for them: Who did it? Why did they injure me, or kill my parent/husband/wife/sibling/child? They may also want to work on the deeper question: "What was it all for?"

B.1.2. For the former combatant, there is a need to clarify what happened and why. Arising from this interaction, there may remain unsolved issues or new questions on the part of the victims/survivors. In turn, there exists a need for former combatants to accept responsibility for what they have done and demonstrate credible remorse.

B.1.3. The justice facilitation Process should function as follows, providing the possibility of face-to-face access to the truth:

1. The former combatant approaches the JFU with an offer of disclosure.

2. The JFU has a Questionnaire the former combatant is required to fill out.

3. The former combatant must state what happened. When, Where, Why, How and to Whom? (If they know the identities of the victims/survivors, which in some cases they may not.)

4. They must make it clear if they are making an application on behalf of themselves or a group. If the latter they must provide proof of this through some accompanying documentation that can be independently verified showing the consent of the other parties. (While group applications may be less likely to occur,

they would remove certain limitations on the disclosure process that arise where individuals are acting on their own behalf.)

5. The contents of the application cannot be disclosed to any law enforcement agency, or other third party.

6. Nothing disclosed by the applicant(s) either intentionally, or inadvertently can be used to investigate or prosecute another individual or group.

7. Nothing disclosed by the applicant(s) either intentionally, or inadvertently can be used as the basis for a civil action for reparations or other damages or loss by victims/survivors. (Any compensation for loss of life, injuries, or other losses would be paid by the state, or states, concerned.)

8. The identity of the applicant(s) will remain confidential in the initial phase of the process and may remain so where its disclosure might have repercussions for their own family members. This might be a particular problem where injuries and deaths arose within communities as a result of intra-paramilitary conflicts.

9. Penalties only arise in the case of false statements. Such penalties should be significant enough to discourage cranks, attention seekers and malicious declarations.

10. It will be a criminal offence to disclose any information submitted by an applicant without their prior knowledge and consent. This applies to victim/survivors and their families as well as other parties to the Process.

11. Having received an application, the JFU will ask the TRU to appoint an investigator.

12. Having satisfied itself as to the applicant's bona fides, and the basic facts with the assistance of the TRU investigator, the JFU will then appoint a Mediation Officer to approach victim/survivors to notify them of the nature of the information received and ask them if they wish to engage with the former combatano(s)t. If so, on what basis? The Mediation Officer would also be able to call on the services of the TRU investigator as required. This would include interaction by the investigator with victim/survivors as well as former combatants.

13. Where the victims/survivors, or some of them in the case of groups, wish to engage, they would meet with the Mediation Officer initially to discuss the basis of the engagement. The first phase of the engagement would be through the Mediation Officer who would decide if, and when it would be appropriate for the parties to meet face to face.

14. The Mediation Officer will design protocols based on the discussions with former combatants and victims/survivors which both sides would be required to sign off on to enable the Process to move to the next stage. In the early phases of the programme this would be, inevitably, on a trial and error basis but drawing on best practice elsewhere.

15. The Mediation Officer would also have to consider the most appropriate conditions under which both sides would meet. Factors could include the state of health of the parties and whether both parties lived in the same jurisdiction. If the number of victims/survivors is large they might need to meet separately with former combatant(s), or in small groups. Factors such as mobility/disability/age/mental capacity might arise for some victims/survivors and indeed some former combatants.

16. Transportation, accommodation and other expenses should be available from an agreed fund.

17. The Mediation Officer would have discretion on whether to recommend counselling and other supports for victims/survivors or former combatants. Like travel expenses this would be paid for by the government(s) on the basis of an agreed fund.

18. To give some sort of finality to the process there would be a requirement for both sides to respond within specified time frames to each phase. Perhaps it could be three months for victims/survivors to respond to the initial contact from the Mediation Officer and nine months for the engagement process. Should the victims/survivors wish to withdraw from or suspend the engagement with the former combatant(s) they should be granted a three months period of reflection. However, the overall process would not take more than 15 months, except by the mutual agreement of the former combatant(s) and victim/survivors.

B.2. Joint Statements of Reconciliation and Statements of Acknowledgement

Where the process is concluded, there would be an agreed Joint Statement of Reconciliation, or at least a shared understanding of what happened. Whether the parties engage face to face or not, the aim of the process is to agree to a Joint Statement of Reconciliation whenever possible. The primary goal of the Joint Statements of Reconciliation would be to secure reconciliation on the truth and accuracy of the relevant information. Hopefully, the Joint Statements would also entail interpersonal reconciliation between victims/survivors and former combatants, although it would be wise to recognise that this would not be possible in many cases.

In the Joint Statements, both sides would undertake to provide an account of the incident(s) and to having their account checked against other sources such as newspapers, eyewitnesses and other participants in the process. The Mediation Officer and TRU investigator would be given full access to official documents, including army and police records, to ensure the account is as full and accurate as possible. In particularly sensitive instances, this task might be undertaken by the Judges appointed to oversee the Process.

If the process is not completed, it would be open to each party to make a statement providing their own understanding of what has transpired, which would be made available to the other side. In such a case, the parties' records would be placed in a secure archive that could not be opened until all the participants had died, or they subsequently consented to publication.

If a joint statement is achieved, the finding should first be made available to the involved parties, and then should be made public after a short period of time (no more than three months). In this case, the parties would be encouraged to engage with the wider community, schools, conflict resolution groups, researchers, and other relevant audiences in order to promote greater understanding of the nature of the conflict; inspire others to participate; and counter the longstanding problem of the transgenerational transfer of conflict that bedevils societies such as Northern Ireland.

Perpetrators who do not avail of the conditional amnesty remain at risk of facing the full rigour of the law should their offences subsequently come to light. This is an important condition that differentiates conditional amnesties from a general amnesty. This initiative could be accompanied by additional resources being made available for the investigation of outstanding offences. In doing so it also provides an incentive for other former combatants to come forward if they see the pilot scheme is working.

Dealing with the past is a sensitive issue and is viewed very differently by the political leadership of the two main communities because they want to talk about different things arising from their different perspectives of what happened in the armed conflict in Northern Ireland It will be an important challenge to find a way of facilitating dialogue that produces statements of acknowledgement and reconciliation on the past and the legacy of violence rather than constant reiteration of legacy issues.

The greater political challenge is how civil society might encourage political leaders to go beyond their own political narratives by acknowledging the concerns, collective hurts and fears of the other side. There are currently two communal narratives that go back into history and make it difficult for each side to accept the legitimacy of the other's narrative. Given all that has happened, not only in recent decades but recent centuries, the need for a fresh approach is self-evident and urgent. In our view – and in our experience – people can be reconciled in spite of their irreconcilable narratives.

B.3. As outlined above, the Reconciliation Commission will be subject to oversight by the British and Irish governments.

As far as possible, it should utilise existing structures in each jurisdiction. In Northern Ireland, the main site of the conflict, it could be housed within the Victims Commission, with the Victims Commissioner serving as a member of the Reconciliation Commission oversight body. It could draw on the existing professional networks of the Community Relations Council that extend all the way down to the district Good Relations units across the province. This could help reduce set up costs and allow for a speedier operationalisation of the support services for the initial pilot project phase.

In Britain and the Republic separate arrangements might be made, but hopefully the resources and experience of the Victims Commission would be available, as well as extra funding provided by the British and Irish governments to enable it to do so.

B.4. Inter-communal Circle event for acknowledgement

The Reconciliation Commission might also promote dialogue between victim/survivor families from one community telling their story to the other community, so that their experience can be heard, understood and acknowledged. This could be between local neighbour communities or between rural and urban communities in an inter-communal exchange/encounter.

C. Reconciliation Commission (RComm)

The Co-Chairs have an important role to play not alone in overseeing the efficient and fair operation of the JFU and TRU but in providing moral leadership to civil society and eliciting a political response from party leaders. The two governments must also give leadership and set political time aside to support the process over the two years as the pilot develops.

The first year should be devoted to getting the three units up and running to achieve their project goals. The final six months will involve a more active time for Commission members to pull together the themes and lessons emerging from the truth recovery and facilitation units. This will prepare the way for the report from academic historians and lay the ground for the statements of acknowledgement from the churches, civil society organisations and the two governments.

C.1. Composition of the new Commission

- Two Independent Co-Chairs to be appointed by the UK and Irish governments. These should be senior Judges who are not currently serving in either the UK or RoI jurisdictions. Former senior Judges from another jurisdiction, who are acceptable to both governments could also serve.

- An agreed number of members representative of civil society groups: including representatives of the churches, trauma specialists, legal, academic and political science academics, victims/survivors and former combatants.

This proposal envisions the two Co-Chairs setting up an executive team within the Commission to deliver the two year programme of reconciliation work.

C.2. Independent academic report on themes

The challenge for the academic team appointed to assess the causes of the conflict is to create a historic context after fifty years that helps all communities in Northern Ireland, Britain and the Republic to understand better what happened and draw the lessons for us all. The academics are unlikely to come up with one agreed bridging narrative without some process of consensus building being put in place by the RComm. The Commission should facilitate multiple communal narratives, particularly when both North and South, will also be commemorating the War of Independence, the establishment of the Irish Free State, the setting up of Stormont in Northern Ireland and the Civil War.

More recently, it has been suggested by emeritus Professor Henry Patterson that the work of historians should start early on, after the Commission has been established. This proposal supports his view that themes and contextual issues should be addressed by academics in the background. The report by the two foreign policy experts, Richard Haass and Meghan O'Sullivan in 2013, made a list of themes that may be worthy of exploration.

28 May 2020

ACKNOWLEDGEMENT

The Truth Recovery Process wishes to thank Jackson Skeen for his expert assistance in helping draft the document under the mentorship of Dr Katherine O'Donnell when he was a Mitchell Scholar at University College Dublin, 2018-2019

References

Bolton, David. Conflict, Peace, and Mental Health Addressing the Consequences of Conflict and Trauma in Northern Ireland. Manchester: Manchester University Press, 2017.

Boraine, Alex. All Truth is Bitter. PLACE: NIACRO and Victim Support, 1999.

Corry, Geoffrey. "Finding Meaning: Melting the Stone in Relational Disputes", Chapter 12 in Eames, Robin and Denis Bradley, Report of the Consultative Group on the Past, Commission Appointed by the Northern Ireland Secretary of State (2009), www.cgpni.org

Flanagan, C and Smith, N The Effective Detective: Identifying the skills of an effective SIO, Police Research Series, Paper 122, Home Office, 2000.

Garda Inspectorate, Crime Investigation Report, 2014,

Hohmann, Christian. Truth-finding: A Path to Reconciliation? Church and Peace, 2000.

Lally, C. 'Gardaí concerned at shortage of specialist investigators', Irish Times, March 27th, 2018,

Lebaron, Michelle, and Carrie Macleod, Andrew Floyer Acland LeBaron, Carrie MacLeod & Andrew Floyer Acland (Eds), The Choreography of Resolution. PLACE:, American Bar Association, (2013.)]

Lederach, John Paul. Building Peace: Sustainable Reconciliation in Divided Societies. PLACE: United States Institute of Peace Press, 1997.

McKittrick, David and Seamus Kelters, Brian Feeney, Chris Thornton, David McVea, Lost Lives: The Stories of the Men, Women and Children who Died as a Result of the Northern Ireland Troubles. PLACE: Mainstream Publishing, 2001.

McQuillan, A 'The peace process has destroyed the ability to deliver for victims,' Belfast News Letter, October 20th, 2018

Methodist Church in Ireland, Submission by the Council on Social Responsibility of the Methodist Church in Ireland to the NIO Consultation on the Proposed Legacy Structure Place, 2018

Sutton, Malcolm. An Index of Deaths from the Conflict in Ireland. Belfast: Beyond the Pale Publications, 1999.

Sarkin, Jeremy. Carrots and Sticks: The TRC and the South African Amnesty Process. PLACE: Intersentia, 2004.

To: Truth Recovery Process

Re: Opinion on compliance with Article 2 ECHR

Date: 07 May 2021

SUMMARY

1. Alternative or restorative justice models such as the model proposed by TRP may comply with Article 2 of the ECHR where they provide an effective investigation into deaths. Article 2 does not require any particular outcome, such as a prosecution / conviction, but rather establishes a minimum standard of investigation which the State must provide into deaths caused by State actors, deaths in suspicious circumstances, or deaths which occurred during a conflict.

2. TRP's proposed model appears to comply with many of the indicia for an 'effective investigation' as discussed in the caselaw of the European Court of Human Rights ('ECtHR'), although this will very much depend on the detail of how the model is implemented and on the funding allocated.

3. Although the ECtHR has ruled out blanket amnesties in several cases, it has never considered a conditional amnesty such as that proposed by TRP.

4. The primary question is whether Article 2 requires the availability of 'punishment'. From an examination of the caselaw, it appears that the purpose behind requiring punishment is: 1) to end impunity, 2) to provide publicity and 3) to achieve deterrence. Arguably all three factors are met under the restorative justice model.

5. For those reasons, it appears that TRP's model – in theory – complies with Article 2.

Table of Contents

Background 3
Stormont House Agreement 4
Historical Investigations Unit 5
Independent Commission on Information Retrieval 5
Move away from the SHA and the new 'Fast- Track' Approach 6
TRP's Proposal 7
Truth Recovery Unit 8
Justice Facilitation Unit 8
Confidentiality / Anonymity 10
Conditional Amnesty 11
Differences between the Stormont House Agreement and the TRP's proposals .. 11
Legacy Prosecutions under the Status Quo 12
Sentencing 13
Article 2 ECHR 13
The Duty to carry out an 'Effective Official Investigation' 14
Independence and Impartiality 17
Thorough and Adequate 17
Participation of Victims / Family Members 18
Public Scrutiny and Punishment 18
Applicability to deaths in State custody 19
ECHR and Amnesties 19
Applicability of Article 2 to Post-Conflict Societies 21
Restorative Justice and the Victim's Directive 22
Rights when a decision is made to prosecute 24
Rights when a decision is made not to prosecute .... **Error! Bookmark not defined.**
Restorative Justice 24
International Human Rights Law and the 'Right to Know' 25
Application of Article 2 ECHR to TRP's Proposals 27
Adequacy of Investigations 29
Does Article 2 require 'Punishment'? 29
Conclusion 31

OPINION

1. Truth Recovery Process ('TRP') seeks the opinion of counsel as to whether theproposed 'Truth Recovery and Reconciliation Process' model is in compliance with Article 2 of the European Convention of Human Rights.

Background

2. TRP are a group representing former combatants, community activists, academics, victims and survivors of the conflict in Northern Ireland. TRP support the implementation of a 'Truth Recovery and Reconciliation Process' as an alternative model for investigating and addressing unlawful killings committed during the Troubles.

3. TRP estimate that the armed conflict in Northern Ireland affected 'almost every family in the region', leading to more than 3,500 deaths between 1969 and 2001, as well as many thousands of people suffering injuries. TRP note that the 'immense human suffering' caused does not remain within the geographical borders of Northern Ireland, but is shared by many families across the island of Ireland, the United Kingdom and further abroad.

4. Despite the long passage of time since the Good Friday Agreement, there is no specialised overarching mechanism - such as a 'Truth and Reconciliation Commission for Northern Ireland' - to investigate killings that occurred during the Troubles.

5. In 2014, the Stormont House Agreement proposed a mechanism to 'deal with the past', facilitating legacy investigations and allowing family members to directly seek information on their loved one's death. The Agreement has not yet been implemented.

6. In January 2020, the UK Government committed to introducing legislation to implement the Stormont House Agreement within 100 days. By March 2020, however, a new proposal was introduced which appeared to shift the focus away from implementing the Stormont House Agreement towards a new 'fast track' model.

7. TRP's proposal is intended as a 'logical and necessary extension' of the Good Friday Agreement (1998), providing an alternative – non-judicial – post-conflict reconciliation process for Northern Ireland.

Stormont House Agreement

8. As TRP's proposal builds upon the structures and mechanisms proposed in the Stormont House Agreement, it is worth examining it in detail before proceeding to TRP's model.

9. The Stormont House Agreement was published on 23 December 2014 following intensive discussion between the Northern Irish Executive and the British and Irish governments. Among other objectives, the Agreement set out a proposed structure for truth and reconciliation processes in Northern Ireland.

10. Section 21, entitled 'The Past', provides:

"As part of the transition to long-term peace and stability the participants agree that an approach to dealing with the past is necessary which respects the following principles:

- *promoting reconciliation;*
- *upholding the rule of law;*
- *acknowledging and addressing the suffering of victims and survivors;*
- *facilitating the pursuit of justice and information recovery;*
- *is human rights compliant; and*
- *is balanced, proportionate, transparent, fair and equitable."*

11. In furtherance of this goal, it was agreed that the Executive would establish an 'Oral History Archive' by 2016 and implement a comprehensive Mental Trauma Service, accessible through the NHS and supported by the Victims and Survivors Service.

12. Legacy investigations would be facilitated by two new organisations: the Historical Investigations Unit ('HIU') and the Independent Commission on Information Retrieval

('ICIR'). These would be overseen by an Implementation and Reconciliation Group ('IRG') and would be time limited, with work to be completed within five years of thegroup's establishment.

Historical Investigations Unit

13. The HIU was intended to carry out investigations into '*outstanding Troubles-related deaths'*, taking over work from the Historical Enquiries Team and the Police Ombudsman from Northern Ireland. The HIU was intended as independent and victim centred.

14. Once an investigation was complete, the DPP would decide whether or not to prosecute. Legacy inquests would continue alongside the process.

Independent Commission on Information Retrieval

15. The ICIR was intended as an independent cross-border organisation, *'entirely separate*' from the justice system.

16. Section 41 sets out the objectives of the ICIR:

"The objective of the ICIR will be to enable victims and survivors to seek and privately receive information about the (Troubles-related) deaths of their next of kin."

17. The organisation was intended to build upon the work of the Independent Commission on the Location of Victims' Remains, established in 1999 to locate the remains of 16 people – 'The Disappeared' – presumed to have been murdered during the Troubles.

18. Information gathered by the ICIR – including identities of people providing information – would not be disclosed to law enforcement, or intelligence agencies, and would be inadmissible in criminal and civil investigations.

19. The Stormont House Agreement did not envisage the granting of an amnesty / immunity against prosecution in respect of any offences under investigation.

20. Section 49 provides:

"No individual who provides information to the body will be immune from prosecution for any crime committed should the required evidential test be satisfiedby other means."

21. The Stormont House Agreement has not been implemented to date.

Move away from the Stormont House Agreement and the new 'Fast- Track' Approach

22. In January 2020, the '*New Decade, New Approach*' Agreement was published wherein the UK Government promised to publish and introduce legislation within 100 days to implement the Stormont House Agreement.

23. In March 2020, the UK Government announced a new 'fast-track' framework for legacy investigations, intended to "*...help victims of the Troubles in Northern Ireland towards reconciliation with the pain and trauma of the past and ending vexatious claims against veterans."*

24. A press release from 18th March 2020 states:

"A new independent body will conduct swift, final examinations of all the unresolved deaths. Only those cases where there is new compelling evidence and a realistic prospect of a prosecution will be investigated. Once cases have been considered there will be a legal bar on any future investigation occurring. This willend the cycle of reinvestigations for the families of victims and veterans alike."[1]

25. This proposal has been met with some concern from groups such as the Committee on the Administration of Justice which describes it as an '*abandonment'* of the Stormont

[1] https://www.gov.uk/government/news/uk-government-sets-out-way-forward-on-the-legacy-of-the-past-in- northern-ireland

House Agreement process, as opposed to an implementation of the principles containedwithin it. [2]

26. On 18th March 2020, the Department of Foreign Affairs issued a statement affirming its commitment to the Stormont House Agreement:

"The Stormont House Agreement framework is the way forward ... Where the UK Government are proposing significant changes to that framework, these must be discussed and agreed by both Governments and the parties to the Northern IrelandExecutive."[3]

27. The Minister for Foreign Affairs noted:

"In terms of the issues the UK Government has raised today about the treatment ofBritish military veterans, our position is again clear. There should be effective investigations into all Troubles-related deaths, regardless of the perpetrator. We would not support a proposal to introduce any special measure or treatment, regarding investigation of state or non-state actors in Northern Ireland.

"The rule of law and the protections afforded by the European Convention on Human Rights must apply equally to everyone and must be upheld, and this principle is at the core of the Stormont House framework."

TRP's Proposal

28. The 'Truth Recovery and Reconciliation Process' proposes establishing a Reconciliation Commission which will comprise of two bodies: 1) a Truth Recovery Unit and 2) A Justice Facilitation Unit.

29. The Reconciliation Commission would oversee the other two units.

[2] https://caj.org.uk/2020/03/18/caj-response-to-new-approach-legacy/
[3] https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2020/march/statement-by-tanaiste-on- uk-government-legacy-announcement.php

Truth Recovery Unit

30. The Truth Recovery Unit would replace the HIU and would hold many of the same functions. It would be established as a fully independent body staffed by professional civilian investigators, rather than members of the PSNI or An Garda Síochána.

31. The key distinction, as articulated by the TRP, is that the Truth Recovery Unit's role would be to *"...verify information received by the Reconciliation Commission"*, rather than *"...assemble evidence for a prosecution."*

32. As the Unit would have to carry out cross-border and extraterritorial investigations, TRP envisage that the Unit would have to be given significant powers of investigation by the Irish and UK Governments.

33. In addition, the Unit would require the power to investigate the activities of police officers and members of the security forces.

Justice Facilitation Unit

34. The Justice Facilitation Unit ('JFU') would replace the ICIR, allowing for a 'safe mediation process' to take place between former combatants and victims / family members – creating a new model for restorative justice.

35. At least initially, the mediation process would apply to killings carried out during the 'Troubles' although there is potential for the model to be applied to other crimes, and other time periods, should it prove successful.

36. The mediation procedures will be largely determined by the parties but TRP envisage that it would typically proceed as follows:

    - A former combatant approaches JFU with an offer of disclosure relating to a killing, providing a minimum level of detail (eg When, Where, Why, How, to Whom – if possible)

- The JFU contacts the Truth Recovery Unit, which appoints an Investigator in respect of the case and verifies the information provided. Penalties will apply for making a false statement.
- Once the information has been verified by the Investigator, the JFU appoints a Mediation Officer to approach victims / family members. The Mediation Officer informs the victims /family members about the nature of the information involved and ascertains whether they wish to engage with the process, and - if so – on what terms.
- The structure of the restorative justice process will be largely directed by the parties in consultation with the Mediation Officer. This might involve drawing up terms of engagement, protocols, timetables etc. through discussion with both sides.
- Supports should be available to both parties including counselling, transportation, accommodation and other expenses.
- In the interests of finality, the process would conclude within an agreed time period from the commencement of the initial offer of disclosure.

37. After the engagement process has concluded, TRP envisages that the parties would agree a 'Joint Statement of Reconciliation', setting out an agreed set of facts / account of the incident which can then be checked against contemporary sources by the Mediation Officer and TRU Investigator. The investigation process would require verification of the information provided by the former combatant from the beginning.

38. TRP anticipates that – should a particularly sensitive incident arise – this task of verifying the Joint Statement could be undertaken by a Judge, or panel of Judges where the information provided involves persons in multiple jurisdictions.

39. After the Joint Statement is verified, it would then be made public. Following this:

"...the parties would be encouraged to engage with the wider community, schools,conflict resolution groups, researchers, and other relevant audiences in order to promote greater understanding of the nature of the conflict; inspire others to participate; and counter the longstanding problem of the transgenerational transferof conflict that bedevils societies such as Northern Ireland."

40. If the parties do not complete the engagement process, or cannot reach agreement on aJoint Statement, the parties would each provide an individual Statement setting out theirown understanding of what occurred. The Statement would be made available to the other party and subsequently would be placed in a secure archive which would not be released until after all participants in the process have died.

Confidentiality / Anonymity

41. The model as proposed requires that information which is disclosed to the Justice Facilitation Unit would remain confidential until the conclusion of the process.

42. The identity of the applicant will remain confidential throughout the initial stages of the process. TRP envisage that it might be necessary to allow for longer lasting anonymity, where disclosure of the applicant's identity might lead to reprisals or might result in a risk to safety.

43. Additionally:
    - Information disclosed would not be shared with any law enforcement agency orthird party.
    - Information disclosed – whether 'intentionally or inadvertently' – could not beused to investigate or prosecute any other individual or group.
    - Information disclosed - 'intentionally or inadvertently' – would be incapable of grounding a civil claim for damages / reparations on behalf of any person.
    - It would be an offence to share information disclosed by a former combatantwithout their consent.

44. TRP argue that confidentiality will encourage combatants to come forward without fear for their safety. They further highlight miscarriages of justice, where paramilitaries may have been convicted of crimes they did not commit because they could not reveal the true perpetrator.

Conditional Amnesty

45. The proposal envisions that perpetrators and former combatants who engage in the TRP process will be granted immunity from future criminal or civil prosecutions in respect of the information they disclose. This immunity, or amnesty, will be conditional on their full participation in the process and is revocable upon discovery of fraud / deceit etc. on the part of the former combatant.

46. TRP instruct that the conditional immunity will work as follows:
    - Provided that the former combatant's information is verified during the Investigation Process, an immunity will apply in respect of the information disclosed by them.
    - The immunity will bar any future criminal prosecutions arising from the incident disclosed, as well as any civil claims grounded on the same incident (e.g. a claim under tort for damages).
    - Victims or family members can withdraw from the process at any point.
    - If the former combatant fails to engage with the process in good faith, they may face a penalty.

47. TRP envisage that applications could be made on behalf of an individual combatant or a group. Should immunity be provided, this would apply to both individuals and members of the group.

48. At the conclusion of the process, TRP envisages that victims / survivors / family members would be entitled to reparations, payable by the State.

Differences between the Stormont House Agreement and the TRP's proposals

49. The key differences between the Stormont House Agreement ('SHA') and TRP's proposal are as follows:
    a. The SHA allows victims / family members only to initiate the process. Under the TRP, the process can be initiated by a former combatant or by a victim / family member.

b. The SHA does not allow for a restorative justice process between family members and former combatants.
c. The SHA does not provide immunity in respect of offences disclosed, whereas the TRP creates an immunity conditional upon good faith engagement with the process.

Legacy Prosecutions under the *status quo*

50. Very few legacy investigations have been completed in the last decade, and even fewer have resulted in convictions.

51. The Committee on the Administration of Justice provided the following figures in theirreport of April 2020.

"…since January 2012, 33 cases have been passed by investigators to the DPPfor decisions on whether or not to prosecute.
The DPP has initiated legacy prosecutions in 17 cases, deciding not to prosecute in 16 cases.
Eight of the cases that went forward to prosecution were against alleged republican paramilitaries, 4 against alleged loyalists and 5 against British Army personnel (6 soldiers in total, one case involves two soldiers).
Nine cases are currently before the courts (2 suspected republicans, 2 suspectedloyalists and 5 British Army personnel).
Since 2012, 4 prosecutions have resulted in convictions - 2 republicans and 2 loyalists."[4]

52. There has never been a single conviction of a member of the security forces as a result of a legacy investigation.

53. At present, investigations are carried out primarily by the PSNI and the NorthernIreland Police Ombudsman. The Historical Enquiries Team carried out investigations

[4] *Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealingwith the Past in Northern Ireland* at p. 4

until 2004. Once an investigation has been completed, the Director of PublicProsecution decides on whether or not to proceed with a prosecution.

54. The Stormont House Agreement envisions that the investigatory work would be taken over by the Historical Investigations Unit, but that the procedure would operate in more or less the same way and that the DPP would continue to make the final decision as to whether or not to prosecute in any particular case.

55. In contrast, TRP's proposals remove the DPP – and the potential of prosecution - from the process.

Sentencing

56. Following the Northern Ireland Sentences Act 1998, a person convicted of a conflict-related offence after 1973, who meets the criteria for eligibility for early release, will only serve a maximum of two years, regardless of the length of sentence imposed by the court.

Article 2 ECHR

57. Article 2 of the ECHR protects the right to life.

Article 2 - Right to Life

1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
2. *Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*

   (a) in defence of any person from unlawful violence;

   (b) in order to effect a lawful arrest or to prevent the escape of a personlawfully detained;

   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

58. The provision creates two substantive obligations for States: the duty to protect life, and the duty not to take life unlawfully. The duty to protect the right to life 'by law' involves:

…a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.[5]

59. Article 2 creates a further – procedural – obligation, requiring States to carry out an effective investigation into alleged breaches of the right to life.[6] This is an aspect of the duty to protect the right to life 'by law'. This duty to investigate arises only where there is a breach of one of the two substantive duties under Article 2, i.e. where death or life-threatening injury has occurred. There is no requirement for a particular form or model of investigation to take place, however the ECtHR has clarified that a certain minimum standard must be reached for the investigation to be considered 'effective'.

60. Article 2 creates an obligation of *means*, not of *result*.[7] The purpose of an investigation under Article 2 is not to secure any particular outcome – such as a prosecution – but to"*…secure the effective implementation of the domestic laws safeguarding the right to life*" and to ensure the accountability of State actors and bodies for deaths occurring under their responsibility.[8]

61. The obligations imposed by Article 2 are non-derogable, meaning that a State cannot limit or suspend it in a time of emergency, apart from deaths resulting from a lawful act of war.[9] The ECHR – including Article 2 – continues to apply in the context of an armed conflict, albeit through the prism of international humanitarian law.

The Duty to carry out an 'Effective Official Investigation'

62. In *McCann and Others*[10], the ECtHR held:

[5] *Makaratzis v. Greece*, Application no. 50385/99, 20 December 2004 at [57].
[6] *Edwards v. United Kingdom*, Application no.46477/99, 14 March 2002 at [71].
[7] *Makaratzis v. Greece*, Application no. 50385/99, 20 December 2004 at [74].
[8] *Anguelova v. Bulgaria*, Application no. 38361/97, 13 June 2002.
[9] ECHR, Art 15(2).
[10] *McCann v. United Kingdom,* Application no. 18984/91, 27 September 1995.

“The obligation to protect the right to life under this provision, read inconjunction with the State’s general duty under Article 1 of the Convention to ‘secure everyone within their jurisdiction the rights and freedoms defined in Convention’, required by implication that there should be some form of effectiveofficial investigation when individuals have been killed as a result of the use offorce by, inter alios, agents of the State.”

63. The duty to investigate applies to killings carried out by State forces and deaths in State custody, as well as cases where a person sustains life-threatening injuries in suspicious circumstances – even where the presumed perpetrator is not a State agent.[11]

64. It appears that the right may apply in cases of deaths involving State responsibility due to negligence. In such cases, the State must provide an effective independent judicial system, where facts can be established, perpetrators held liable and appropriate redress provided to victims.[12]

65. An ‘effective official investigation’ must fulfil several criteria. It should:
    a. be carried out with promptness and reasonable expedition;[13]
    b. be sufficiently independent and impartial – “both at law and in practice”;[14]
    c. involve a *“thorough, impartial and careful examination of the circumstances surrounding the killing”* – in other words, the investigation has to be *adequate*;[15]
    d. Allow victims / family members of victims to access the materials and conclusions of the investigation;
    e. Allow for public scrutiny and provide punishments that would deter others;[16]

[11] *Mustafa Tunç and Fecire Tunç v. Turkey,* application no. 10987/10, 25 June 2013
[12] *Sinim v. Turkey*, application no. 9441/10, 6 June 2017; *Ciechońska v. Poland,* application no. 19776/04, 14 June 2011.
[13] *Jordan v. UK* (2001) 37 EHRR 52.
[14] *Nachova v. Bulgaria*, application no 43577/98 and 43579/98, 26 February 2004.
[15] *McCann and Others v. United Kingdom* (1995) 21 EHRR 97 at [163].
[16] *McKerr v. UK,* Application no. 28883/95, 4 May 2001; *Oneryildiz v Turkey*, Application No. 48939/99, 30 November 2004.

f. the investigation must also be capable of leading to a determination of whether the death was caused unlawfully, and – if so – to the identification and punishment of those responsible.[17]

66. These factors are important indicia of the compliance of an investigation with Article 2; however, not all of these factors must be present for an investigation to be considered 'effective'. Even a flawed investigation may comply with article 2.[18]

67. The object and purpose of the ECHR – an instrument for the protection of individual human beings – requires that Article 2 be interpreted and applied in a way which makes its safeguards practical and effective.[19] Article 2 must not be interpreted in a way which imposes an impossible or disproportionate burden on the authorities, in respect of policing or resources. What amounts to an impossible and/or disproportionate burden will depend on the *"very particular facts and contexts"* of an individual case.[20] Inactivity on the part of State authorities for long periods of time, however, cannot be justified – even where objective difficulties exist arising from conflict or a post-conflict situation.[21] The State is under similar obligations to investigate in the context of forced disappearance, torture and other kinds of inhumane and degrading treatment.

68. Any deficiency in the investigation which undermines its ability to establish the cause of death or the identity of the persons responsible will risk breaching Article 2.[22] The nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depends on the circumstances of the particular case. Each case will be assessed on the basis of all relevant facts and with regard to the practical realities of the investigative work.[23]

---

[17] *Varnava and Others v. Turkey*, Application nos. 16064/90 and others, judgment of 18 September 2009 at [191];
Palić v. Bosnia and Herzegovina, Application no. 4704/04, 15 February 2011.
[18] *McCann and Others v. United Kingdom* (1995) 21 EHRR 97
[19] *McCann and Others v. United Kingdom* (1995) 21 EHRR 97; *Khashiyev and Akayeva v. Russia*, Applicationsno. 57942/00 and 57945/00, 24 February 2005 at [131]
[20] *Palić v. Bosnia and Herzegovina*, Application no. 4704/04, 15 February 2011 at [70]; *Brecknell v. The United Kingdom*, Application no. 32457/04, 27 November 2007 at [62].
[21] *Jelić v. Croatia*, Application no. 57856/11, 12 June 2014 at [92].
[22] *Mikheyev v. Russia*, Application no. 77617/01, 26 January 2006, at[107] et seq.; *Assenov and Others v. Bulgaria*, Application No. 24760/94, 28 October 1998 at [102]
[23] Velcea and Mazăre v. Romania, Application no. 64301/01, 1 December 2009,

Promptness and Reasonable Expedition

69. An effective investigation is one that is carried out within a reasonably prompt period of time. The obligation to investigate applies primarily throughout the period during which the authorities could reasonably be expected to discover the perpetrator. Where a great passage of time has passed since the unlawful killing, it does not appear that the State will be subject to the same obligation to investigate.[24]

70. Where information which casts new light on the circumstances of a killing arises at a later stage, however, the obligation to investigate may be revived. The State may be obliged to take further investigative measures in the event that fresh evidence emerges.[25] The renewed obligation to investigate will depend on the circumstances of the case and might be restricted to verifying the credibility of the source, or of the purported new evidence.[26]

71. The Court has recognised the ongoing public interest in prosecuting and convicting perpetrators of unlawful killings, particularly in relation to war crimes and crimes against humanity.[27] However the authorities are entitled to take into account the prospects of success of any prosecution in allocating resources to the renewed investigation.[28]

Independence and Impartiality

72. The investigation must be carried out by persons who are independent from those implicated in the events, meaning that there should be a lack of hierarchical and institutional connection as well as practical independence.

Thorough and Adequate

73. An investigation will be 'thorough' where:

---

[24] *Šilih v. Slovenia*, Application No. 71463/01, 9 April 2009 at [157].
[25] *Brecknell v. the United Kingdom*, Application No. 32457/04, 27 November 2007 at [71].
[26] *Cerf v. Turkey*, Application No. 12938/07, at [65].
[27] *Jelić v. Croatia*, Application No. 57856/11, 12 June 2014 at [52].
[28] *Brecknell v. the United Kingdom*, Application No. 32457/04, 27 November 2007 at [71].

a. the authorities take whatever reasonable steps they can to secure the evidence concerning the incident – such as eye-witness testimony, forensic evidence, autopsies;
b. the authorities make a genuine attempt to find out what happened and do notrely on hasty or ill-founded conclusions to close their investigation or as thebasis of their decisions;
c. the investigation was capable of leading to the establishment of the facts of the case and to the identification and, possibly, the punishment of those responsible;
d. the investigation's conclusions are based on objective and impartial analysis of all relevant elements – failure to follow an obvious line of inquiry may indicate that the investigation was not thorough.

74. Failure to gather all relevant information may breach Article 2, particularly when the information is within the power or procurement of the State. In *Makaratzis v. Greece*, a failure on the part of the respondent State to gather a list of all policemen involved in a shooting, or to gather all bullets at the scene of the shooting, was a violation of Article 2.

Participation of Victims / Family Members

75. The investigation should involve members of the victim's family as far as possible.[29] It must be commenced by the State, however, and will not satisfy Article 2 if family members or survivors are required to carry out their own investigation.

Public Scrutiny and Punishment

76. The requirement to carry out an investigation is *"...not an obligation of results but of means"*. Provided that a thorough investigation is carried out into the death, the obligation may be satisfied in the absence of a conviction. The investigation, including any subsequent trial, must be open to public scrutiny. In successive cases, the ECtHR has held that an 'effective' investigation is one that produces information which is capable of leading to the *'identification and punishment of those responsible'*.[30] This obligation might be satisfied through civil proceedings, such as an administrative or

[29] *R (Amin) v. S.O.S. Home Dept* [2003] 4 All ER 1264.
[30] *McKerr v. UK*, Application no. 28883/95, 4 May 2001 at [171].

regulatory investigation which leads to findings of fact as to the identity of a perpetrator.[31]

77. The ECtHR has held that:

"...national courts should not under any circumstances be prepared to allow life-endangering offences and grave attacks on physical and moral integrity togo unpunished."[32]

78. However, there is no right to obtain a particular outcome - such as a prosecution or conviction – or to obtain a particular sentence. Rather, the Court highlights the need to deter future perpetrators – through punishment or publicity – as well as the importanceof compensating victims and family members.

Applicability to deaths in State custody

79. Where a person dies in custody, or in the care of the State, the obligation to investigate may be even higher, and the payment of financial damages alone will not satisfy the State's obligations.

"Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regardedas resting on the authorities to provide a satisfactory and convincing explanation."[33]

80. Successive ECtHR judgments have clarified that this higher bar applies because – in such cases – the knowledge is peculiarly within the grasp of the State.

ECHR and Amnesties

81. In *Ali and Ayşe Duran v. Turkey*[34], a young man died in police custody, as a result of beatings by four police officers. Although the police officers were duly convicted, the

---

[31] *Powell v. UK* (2000) 30 EHRR CD 152, [2000] ECHR 703
[32] *Ali and Ayse Duran v. Turkey,* Application No. 42942/02, 8 April 2008 at [61].
[33] *Salman v. Turkey*, Application No. 21986/93, 27 June 2000 at [100].
[34] *Ali and Ayse Duran v. Turkey,* Application No. 42942/02, 8 April 2008.

operation of their sentences was suspended. The Court considered that the suspension of the prison sentences was comparable to a *"partial amnesty … since, consequently, the convicted officers enjoyed virtual impunity despite their conviction."*[35] As a result,the suspension was not permissible.

82. In *Margus v. Croatia*,[36] the Court considered the application of the General Amnesty Act 1996, which applied a general amnesty in respect of all criminal offences committed in connection with the war in Croatia between 17 August 1990 and 23 August 1996, save in respect of those acts which amounted to the gravest breaches of humanitarian law or to war crimes, including the crime of genocide. The applicant had been indicted on charges of war crimes against the general population and sought to rely on the General Amnesty to prevent his prosecution. The Grand Chamber held that a blanket amnesty granting amnesty in respect of the killing or ill-treatment of civilians would:

"…run contrary to the State's obligations under Articles 2 and 3 of theConvention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible."[37]

83. The Court noted the 'growing tendency' in international law to view amnesties for grave breaches of fundamental human rights as 'unacceptable' for the reasons that theyare *"…incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights."*[38] The Court quoted the United Nations Human Rights Committee General Comment on Article 7 of the International Covenant, in relation to the granting of amnesties by some States in respect of acts of torture, which held:

"…amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and toensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible. [39]

---

[35] *Ali and Ayse Duran v. Turkey,* Application No. 42942/02, 8 April 2008 at [69].
[36] *Margus v. Croatia,* Application no. 4455/10, 27 May 2014.
[37] *Margus v. Croatia,* Application no. 4455/10, 27 May 2014 at [127]
[38] *Margus v. Croatia,* Application no. 4455/10, 27 May 2014 at [139]
[39] General Comment No. 20, Article 7 (Forty-fourth session, 1992)

84. Notably – however – the Court accepted that amnesties might be possible where there were some particular circumstances, *"such as a reconciliation process and/or a form of compensation to the victims"*. No such circumstances were present on the facts.

85. In *Ould Dah v. France*[40], the Court considered that that an amnesty was generally incompatible with the duty incumbent on States to investigate acts such as torture. Accordingly, the obligation to prosecute criminals would be undermined by granting impunity to the perpetrator through an amnesty procedure which – arguably – could beconsidered contrary to international law.

86. Where a State agent has been charged with crimes involving torture or ill-treatment, the ECtHR has held that it is 'of the utmost importance' that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should notbe permissible.[41]

Applicability of Article 2 to post-conflict societies

87. The ECtHR has confirmed the applicability of Article 2 to post-conflict situations, including in countries of the former Yugoslavia,[42] and has held that the procedural obligation under Article 2 continues to apply in "*difficult security conditions, including in a context of armed conflict*."[43]

88. In *Al-Skeini and Others v. the United Kingdom*[44], the Court held:

"...where the death (and disappearances) to be investigated under Article 2 occur in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and concrete constraints may compel the

42. United Nations Human Rights Committee, General Comment No. 20, Article 7 (Forty-fourth session, 1992).

[40] *Ould Dah v. France*, Application no. 13113/03, 17 March 2009.

[41] *Abdülsamet Yaman v. Turkey,* Application no. 32446/96, 2 November 2004; *Okkalı v. Turkey*, Application no.52067/99, 17 October 2006; *Yeşil and Sevim v. Turkey,* Application no. 34738/04, 5 June 2007.

[42] *Al-Skeini and Ors v. United Kingdom*, Application no, 55721/07, 7 July 2011.; *Jularić v. Croatia,* Applicationno. 20106/06, 20 January 2011.

[43] *Al-Skeini and Ors v. United Kingdom*, Application no, 55721/07, 7 July 2011.

[44] *Al-Skeini and Ors v. United Kingdom*, Application no, 55721/07, 7 July 2011.

use of less effective measures of investigation or may cause an investigation to be delayed."[45]

89. Nevertheless, the Court held that:

"*…the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.*"[46]

90. The obligation to investigate applies even during a time of conflict, as:

"neither the prevalence of violent armed clashes nor the high incidence of fatalitiescan displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted."[47]

91. Family members have a 'right to know' the fate of their loved ones and the location of their remains.[48] This is part of the State's duty to protect and guarantee human rights.[49] Customary humanitarian law further requires States to provide information to family members about their loved ones' deaths and burial sites, and to provide access to their graves.[50] These rights are universal and apply in the course of a conflict, as well as to post-conflict societies. Family members who are prevented from knowing the truth about their deceased loved ones, including the location of their bodies, experience an ongoing violation of Article 8 rights to respect for private and family life.[51]

Restorative Justice and the Victim's Directive

92. As the ECtHR has not examined the applicability of Article 2 to restorative justice schemes such as TRP's proposals, other international instruments can be taken into account. The Court has previously held that the ECHR and protocols "*…cannot be*

---

[45] *Al-Skeini and Ors v. United Kingdom*, Application no, 55721/07, 7 July 2011; *Bazorkina v. Russia*, Application no. 69481/01, 27 July 2006, at [121].
[46] *Al-Skeini and Ors v. United Kingdom*, Application no, 55721/07, 7 July 2011 at [164].
[47] *Kaya v. Turkey* (1998) 28 EHRR 1 at [91].
[48] Protocol Additional to the Geneva Conventions of 12 August 1949, and related to the protection of victims of international armed conflicts (hereinafter 'Protocol I') (8 June 1977) 1125 UNTS 3.
[49] *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights*
(E/CN.4/2006/91) at [45].
[50] While international humanitarian law generally does not apply unless there is an armed conflict, Protocol I Additional to the Geneva Conventions appear to reflect a rule of customary law which is binding on States and State institutions regardless of whether an armed conflict is ongoing.
[51] Ibid at [122]-[123].

interpreted in a vacuum but must be interpreted in harmony with the general principlesof international law of which they form part."[52]Account can be taken of developments in international law, as well as *"any relevant rules of international law applicable in the relations between the parties"*[53] and in particular the rules concerning the international protection of human rights.[54]

93. The Victims Directive (2012/29/EU)[55] attempts to establish an EU wide minimum standard of rights protection for victims of crime. The Directive has been transposed into Irish and UK law and was implemented in Northern Ireland by means of the Victim Charter (Justice Act (Northern Ireland) 2015) Order 2015.[56] The UK left the EU on the 31st January 2020. EU law continued to apply during the transition period until 31st December 2020. After that period the Protocol on Ireland / Northern Ireland became applicable, which aims – among other things – to uphold the Good Friday Agreement.[57]

94. Under Article 2 of the Victims' Rights Directive (2012/29/EU) "victim" means *"a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by an offence;" and also constitutes "family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death"*. Family members are defined under the Directive as *"the spouse, the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuousbasis, the relatives in direct line, the siblings and the dependants of the victim"*. In essence, victims are defined in terms of the effect that the offence has had on them or on a family member. Victims benefit from the Convention regardless of whether a formal complaint has been made or whether a suspect has been identified.

[52] *Margus v. Croatia,* Application no. 4455/10, 27 May 2010 at [129].
[53] Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties,
[54] *Margus v. Croatia,* Application no. 4455/10, 27 May 2010 at [129].
[55] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA
[56] The Directive was transposed in Ireland by means of the Criminal Justice (Victims of Crime) Act 2017 and in the UK by way of various codes of practice, detailed at this link. https://www.gov.uk/government/publications/hmrc-eu-directives-eu-victims-directive-201229eu/hmrc- responsibilities-for-standards-on-the-rights-support-and-protections-of-victims-of-crime-eu-victims-directive- 201229eu
[57] https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_104

95. The Directive provides victims with procedural rights to appropriate information, support and protection during investigations and criminal proceedings and victims may be able to participate in criminal proceedings.

Rights when a decision is made in respect of prosecution

96. The Directive requires clear, adequate and timely information to be provided to victims of crime and their family members, in a format that the victim can understand, to ensure that victims are kept fully abreast of the developments in a prosecution.

97. Article 6(1)(a) confirms the right of victims to request information on *"…any decision … not to prosecute the offender*". The Directive is drafted with a two-stage process in mind. First, the victim should be given *"…a brief summary of reasons for the decisionconcerned"*, in order to allow them to decide whether to seek a review of that decision.The question of what *"…a brief summary"* means is addressed in Article 11(3), whichstates that victims should *"…receive sufficient information to decide whether to requesta review of any decision not to prosecute"*.

Restorative Justice

98. The Directive attempts to provide a framework for restorative justice services, which are acknowledged as being *"…of great benefit to the victim, but require safeguards to prevent secondary and repeat victimisation, intimidation and retaliation."* RestorativeJustice is defined as including *"…any process whereby the victim and the offender areenabled, if they freely consent, to participate actively in the resolution of matters arisingfrom the criminal offence through the help of an impartial third party."*. In thepreamble, the specific example is given of 'victim-offender mediation'.

99. Article 12 of the Directive deals with rights safeguards in the context of restorative justice.

12(1). Member States shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shallensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at leastthe following conditions:

(a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

(b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement;

(c) the offender has acknowledged the basic facts of the case;

(d) any agreement is arrived at voluntarily and may be taken intoaccount in any further criminal proceedings;

(e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

(2). Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral.

100. The Directive envisages restorative justice as interactive and primarily victim focused. Victims and family members must provide informed consent to participating in a restorative justice process and must be protected by adequate safeguards in the national law from intimidation or retaliation.

International Human Rights Law and the Requirement for an Effective Investigation

101. States are obliged to provide effective remedies at the domestic level for alleged violations of human rights. This requires States to ensure that every individual has access to a court of law or administrative body that will competently and impartially oversee the investigation, prosecution, and punishment of human rights violations, and provide redress. States must further protect victims who are willing to testify against their oppressors, and who need protection.

102. These obligations are reflected in international human rights treaties, including Article 2 of the International Covenant on Civil and Political Rights which imposes a duty on States not to violate, and to protect against the violation of, human rights, as well as the duty to provide meaningful domestic remedies for human rights violations. Similar obligations are shown under Article 13 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 6 of the International Covenant on the Elimination of All Forms of Racial Discrimination, Article 8 of the Universal Declaration on Human Rights and the African Charter.

103. The willingness and effective ability to bring human rights violators to justice is essential both to a state's commitment to the rule of law and to deterring such criminal acts in the future. Thus, the duty to investigate, prosecute, and punish human rights violations, though not expressly defined in most treaties, is inherent to a state's duty to protect human rights and is consistently emphasized by the international monitoring bodies. Where States fail to combat impunity, this will have the effect of undermining the State's perceived commitment to the rule of law and the public's confidence in democratic institutions and the requirement that everyone must be equal before, and subject to, the law. A culture of impunity also *"widens a gap between those close to the power structures and others, who are vulnerable to human rights abuses."*[58]

104. The international monitoring bodies have generally denounced broad grants of immunity for the most egregious human rights violations. In *Rodriguez v. Uruguay*[59], the Human Rights Committee concluded that a Uruguayan law that ended the possibility of bringing judicial proceedings against the state for alleged human rights violations during the years of military rule violated the ICCPR. The Committee ruled:

[A]mnesties for gross violations of human rights… are incompatible with the obligations of the State party under the Covenant. The Committee notes with deep concern that the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby

[58] See UN doc. E/CN.4/2000/3, *Extrajudicial, summary or arbitrary executions,* Report of the Special Rapporteur, Ms. Asma Jahangir, p. 30, at [87].
[59] *Rodriguez v. Uruguay*, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994).

prevents the State party from discharging its responsibility to provide effectiveremedies to the victims of those abuses. Moreover, the Committee is concernedthat, in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations.[60]

105. In a number of cases, the Inter-American Court of Human Rights has said that amnesties are inconsistent with the American Convention on Human Rights. In *Barrios Altos v Peru*, the Court considered concerned 'self-amnesty' laws passed by the Fujimori government in 1995 shielding himself and others from immunity for a number of massacres carried out in 1991 and 1992, committed by the paramilitary death squad 'La Colina' and ordered by then President Fujimori. The Court held:

This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[61]

106. The Court considered that the 1995 amnesty laws violated the rights of the survivors and victim's families to be heard by a tribunal pursuant to 8.1 ACHR as well as their right to judicial pursuant to Article 25 ACHR. The Court further held that the amnesty laws impeded the investigation, capture, prosecution and conviction of those responsible for the Barrios Altos massacre in contravention of Article 1.1 ACHR. Finally, the Court held that the laws contributed to the defencelessness of victims and the perpetuation of impunity and were *"manifestly incompatible with the aims and spiritof the [ACHR]."*[62]

---

[60] *Rodriguez v. Uruguay*, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994) at [12.4]. [61] Inter-Am. Court H.R., *Barrios Altos v. Peru*, Merits, Judgment of 14 March 2001, Series C, No. 75 at [41]. [62] Inter-Am. Court H.R., *Barrios Altos v. Peru*, Merits, Judgment of 14 March 2001, Series C, No. 75 at [43].

107. The Court confirmed this approach in a number of later decisions, including *La Cantuta*[63] and *Almonacid v. Chile*.[64] The decision in *La Cantuta* concerned the same Peruvian amnesties, while *Almonacid v. Chile* concerned the extra-judicial killing of a professor in September 1973 by state police forces during the Pinochet regime. It is notable that all cases concerned 'self-amnesties' in cases where amnesties were granted in respect of killings carried out by state forces, however, the Court does not distinguish this factor in its jurisprudence. Rather, the Court highlights the 'jus cogens' nature of the prohibition of torture and prohibition on extra-judicial killings, and concludes that amnesties shield perpetrators of human rights violations from prosecution. The Court further highlights the effect of amnesty laws on the right of survivors and family members to a fair trial and judicial protection.

Application of Article 2 ECHR to TRP's Proposals

108. As identified throughout this opinion, Article 2 ECHR creates an obligation of process, but not of outcome.

- When the right to life has been breached, the State must carry out an independent, effective investigation into the causes of that death.
- Although the investigation must reach a certain minimum standard, there is norequirement that any person be prosecuted or convicted for the killing.

109. The primary question for TRP is whether the mediation process proposedcomplies with the Article 2 obligation to provide an effective investigation into deaths.

110. TRP's process would appear to comply with several indicia of an 'effective' investigation. TRP envisage that the process would:

- Proceed promptly and conclude within a predefined time period, as decided bythe parties.
- Be carried out by independent, impartial bodies.

[63] Inter-Am. Court H.R., *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment of 29 November 2006,Series C, No. 162.
[64] Inter-Am. Court H.R., *Almonacid Arellano y otros v. Chile,* Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 September 2006, Series C, No. 154.

- Allow for the participation of victims and family members, through the mediation process.
- Allow for a determination of whether a death was caused unlawfully as well as the identity of the perpetrator.
- Allow for public scrutiny of the outcome, through the publication of the JointStatements by mutual consent of the parties.

111. Two primary questions follow.

a. Will the investigations be adequate?

b. Does Article 2 require the availability of a 'punishment'?

Adequacy of Investigations

112. TRP's process envisages that the investigation will be driven primarily by the perpetrator's disclosure of information. The Truth Recovery Unit will verify that information and follow up any further leads, however, it will not initiate investigations and will not prepare files for prosecution.

113. In theory, it appears that the TRU may be able to carry out an adequate investigation, provided that it is properly funded and facilitated in carrying out its investigations. The civilian investigators would need to receive substantive training and be given cross-border and extraterritorial powers in relation to accessing information and documents.

Does Article 2 require 'Punishment'?

114. Although it appears that blanket amnesties for unlawful killings are prohibited by the ECHR, the ultimate objective behind this is to prevent impunity for perpetrators. When discussing Article 2, the Court highlights the importance of public scrutiny, as well as the availability of punishment to deter future offences or killings. Neither factor is present in the event of a blanket amnesty.

115. The Court does not appear to have considered a conditional amnesty or immunity, along the lines suggested by TRP.

116. There are several key points of distinction from a blanket amnesty (or a 'self-amnesty', as seen in the caselaw of the IACHR):

a. The purpose of the conditional amnesty is not to avoid impunity, but rather to allow an avenue for information to be disclosed to family members / survivors of unlawful killings.
b. TRP's proposal would run parallel to the criminal justice system, and would not replace it. Family members or victims who wished to seek answers through traditional means would not be obliged to engage in the Truth Recovery process.
c. Although TRP's proposal does not envisage the imposition of penalties, it would allow for public scrutiny through the publication of Joint Statements.
d. TRP's focus is on legacy investigations. Arguably, the need for deterrence does not arise where any new offences committed would not be dealt with under this framework.

117. The ECtHR has not had the opportunity to examine restorative justice structures – such as TRP's proposal – in the context of Article 2 ECHR. Should it do so, it may have regard to the international context – including the Victim's Directive. TRP's proposals appear to be in line with the minimum rights standards envisaged under thatDirective.

118. In particular:

a. Victims and family members can withdraw from the process at any time.
b. Victims and family members can shape the procedures and rules of engagement with the perpetrator through engagement with the Mediation Officer.
c. Safeguards will be put in place – through the Mediation Officer – to prevent intimidation or retaliation against any participating victim, family member or former combatant.

119. For those reasons, it appears that the unavailability of a 'punishment' might notbe fatal to compliance with Article 2.

120. Finally, it is worth noting that TRP's process is an attempt to bring closure to families and victims who would otherwise be unlikely to discover the truth about their

loved one. In that context, the Court should weigh up the different rights involved – including the family member's right to the truth about their loved one under Article 8 – and find that the proposed model does provide an 'effective' investigation in the circumstances.

Conclusion

121. The current state of affairs in respect of legacy investigations in Northern Ireland is far from satisfactory.

122. TRP attempts to provide an alternative model for truth and reconciliation in the context of unlawful killings during the Troubles. The model is inherently 'opt-in' – for both parties.

123. There is no suggestion that the model proposed should entirely replace the prosecution of crimes, or the hearing of legacy inquests. The process is entirely voluntary and dependent on the good will, informed consent and continued participation of both parties.

124. It does not appear that facilitating the mediation process would prevent the State from carrying out an effective investigation. By definition, the legacy cases which would qualify for this model are ones where the State's ability to investigate is restricted – by the passage of time, by the death of witnesses, by the fear of reprisals or prosecution on the part of participants.

125. Rather, it appears that the mediation process might facilitate the provision of new information which is not available to investigators through other means.

126. TRP's model closely follows the structure proposed in the Stormont House Agreement, which was intended by all parties to comply with Article 2 obligations. Although a conditional amnesty or immunity is proposed, it appears that this is largely consistent with the ECtHR's jurisprudence and with international instruments such as the Victim's Directive.

127. For those reasons it appears to us that the model proposed by TRP would in theory comply with Article 2 of the ECHR.

128. Nothing further occurs.

Céile Varley B.L.Michael Lynn S.C.

The UK Governments ‘conditional immunity scheme’ legislation won’t be compatible with the ECHR – would TRP’s?

By Daniel Holder

Director

Committee for the Administration of Justice

In this *Legacy Matters* piece, I have been asked to provide a critique of the Truth Recovery Process (TRP) proposals for new legacy bodies to deal with the past in NI. The TRP proposals centre on a conditional amnesty tied to a mediation and information recovery mechanism. In this article, I will focus in particular on whether the proposed model would be compatible with human rights law under the European Convention on Human Rights (ECHR).

I am a Committee on the Administration of Justice (CAJ) member of the ‘Model Bill Team’ – the long-standing partnership between legal academics at QUB and CAJ as the principal NI human rights NGO. We have worked on the detail of NI legacy proposals for over a decade (see https://www.dealingwiththepastni.com/) – providing free legal and policy advice to a broad range of stakeholders including the British and Irish governments, the Council of Europe, political parties, victims and survivors and a wide range of civic society leaders.

Both UN and Council of Europe legal experts have called on the UK Government to withdraw its Northern Ireland Troubles (Legacy and Reconciliation) Bill citing incompatibility with the ECHR and UN human rights treaties. Their concerns relate in particular to the legality of the proposed amnesty/immunity scheme and whether duties to ensure effective and independent investigations into past human rights violations would be thwarted by the Bill.

This piece will first explore the broader context for these TRP proposals; it will then review the TRP proposals and others that have been put forward as an alternative to the 2014 Stormont House Agreement which was agreed to in 2014 by the two governments and ultimately supported by four of the five main political parties in Northern Ireland. Finally, I will address whether the TRP proposals could be human rights compliant.

Context in which the TRP proposals have been developed –could the last year mark a high point in truth recovery?

There is of course nothing new or novel about the suggestion truth recovery mechanisms should be established to deal with the legacy of the NI conflict. Variants of this proposal have previously been suggested by Sinn Féin, the cross community civil society group Healing Through Remembering and the Tony Blair appointed Consultative Group on the Past. The latter two proposals in particular directly informed the hard worn political consensus that emerged from the years of negotiations which culminated in the Stormont House Agreement (SHA).

A public consultation on draft legislation to enact the SHA in 2018 received 17,000 responses (most of them broadly supportive) and the previous Secretary of State for NI, Julian Smith, promised to implement the SHA legislation within 100 days in 2020. This was no doubt a key factor in Boris Johnson's decision to sack him. This context is very important i.e. there is nothing new about the idea of a truth recovery mechanism to address the legacy of the past in NI and indeed variants of it have informed and been incorporated into a hard won international agreement that was subsequently unilaterally abandoned by the UK government.

Another very important point of context is the work of the existing legal mechanisms to address the past (police and police ombudsman investigations, legacy inquests, civil actions etc). Despite a long history of delay and prevarication on the part of state agencies, in recent years these different legal mechanisms have slowly begun to deliver truth recovery for families. For example, take the Ballymurphy and other legacy inquests, the weighty Police Ombudsman Operation Greenwich and Achille reports (examining complaints of RUC collusive activity with the UDA in the north west of NI and south Belfast respectively) and the information emerging from civil cases and trials. The two Ombudsman reports alone came in at 338 and 344 pages of 'information recovery with teeth' providing historical clarification on past practices.

The origins of these legacy mechanisms are outworkings of cases taken by CAJ and others to the European Court of Human Rights following the GFA. In the pipeline are more inquests, Ombudsman reports that will 'complete the picture' of patterns of RUC practice and the Operation Kenova reports where over 50,000 pages of evidence have been gathered on the actions of both state and non-state actors. It is no coincidence that at this particular juncture in history, just as these mechanism have finally begun to deliver for victims and their families, that the UK Legacy and 'Reconciliation' Bill now proposes to permanently close down all of these legal routes to truth and justice. If this agenda prevails the last year or so could mark the high point of truth recovery.

Of course, the existing mechanisms are not without significant gaps and limitations. The rationale for replacing them with the agreed SHA mechanisms was to address these deficiencies and to ensure that the new, properly resourced mechanisms are primarily focused on truth-recovery. Number 1 was an Historical Investigations Unit (HIU), an independent unit investigating with full police powers. Its main product was to be the provision of comprehensive and verifiable information in Family Reports. Complementing this were (2) continued legacy inquests; (3) an Independent Commission on Information Retrieval (ICIR) and (4) an Oral History Archive. The ICIR was designed as an international cross-border body that would function (much like the Disappeared Commission). The ICIR would engage with armed groups and state agencies including through interlocutors. The key product envisaged was 'Protected Statements' that could be shared with victims and their families and that could not be used in criminal and legal proceedings. It is important to stress that this was not an amnesty and effective investigations could still be carried out by the HIU.

As noted, both the proposed HIU and existing police investigations into legacy cases also leave open the possibility of a 'justice outcome'. However, there has long been a general consensus for evidential reasons that such prosecutions would be the exception rather than the norm (the PSNI's HET led to three convictions). The primary output, as noted, was to be information recovery reports – albeit produced with the 'legal teeth' of full police powers including arrest, search and seizure, access to intelligence and so forth.

It is worth setting this out in detail as the current UK legacy bill has been accompanied by a barrage of misleading NIO propaganda implying that both the present system and SHA are all about prosecutions (what is erroneously referred to as 'lawfare') and that the UK Legacy Bill is really about a sensible switch to reconciliation focused truth-recovery.

This is gaslighting on an industrial scale but has gained considerable traction in the right-wing press.

One does not need to dig too deep to find a more convincing official explanation for the current legacy proposals from Ministers themselves. Brandon Lewis himself openly stated that his Bill was about ending investigations into the military, who would no longer have to fear a 'knock on the door'.

In short, the Bill would shut down all existing mechanisms at a time when they are actually delivering. It would replace them with a new legacy Commission with limited legal powers under the direction and control of ministers. At the centre of the new Bill is a *de facto* amnesty. Having modified the originally proposed blanket amnesty (broader in scope than that of General Pinochet) the Bill provides for a 'conditional immunity' scheme with a suspiciously low threshold. No new information at all is required to be granted immunity and applicants merely need to state that this is their honest belief as to what happened and they must be granted and amnesty. A solider, for example, could possibly give a copy of their original RMP statement and meet the threshold. This, it would appear, is precisely what it is designed to do.

Crucially what this immunity could do is put its beneficiaries beyond the scope of any effective future investigation. The type of police powers that have allowed Operation Kenova to amass reams of evidence are highly unlikely to be operational against a person with immunity. In view of the fact that this Legacy Bill is a 'solo-run' by the UK government, with no buy-in from victims and other key stakeholders, it is highly unlikely that significant numbers (save for those state actors wishing to pocket immunity from prosecution) will volunteer information to it.

It is also worth bearing in mind the various ways in which the UK government sought to derail the implementation of the SHA before Boris Johnson torpedoed it entirely (the first time in our peace process that an international agreement has been explicitly torn up). For example, the official SHA implementation legislation put forward by the NIO contained a controversial provision that Ministers would have powers to censor HIU and ICIR reports, removing information going to families that conflicted with the undefined national security interests of the UK or indeed any information that related to Special Branch, MI5 or military intelligence. This 'national security+' veto is replicated in the current Bill.

However well meaning, it is important to highlight this broader context when presenting any 'new' proposals for truth recovery. The NIO will seize upon anything that can be presented as endorsing its false narrative that the SHA and current system is all about prosecutions and that advocates of it simply haven't seen the light about the need to prioritise truth recovery and reconciliation. This narrative is a fig leaf for an agenda designed to secure impunity for state actors wherein proper investigations are replaced with 'reviews' largely limited to papers and 'volunteered' information. If the TRP proposals are presented in a manner that validates the NIO suggestion that no legacy truth recovery is taking place at present, nor was planned under the SHA, this risks inadvertently validating an NIO narrative being put forward as cover to end truth recovery.

The TRP and other alternative proposals to the SHA

The UK failure to implement the SHA since 2014 has allowed time for a number of other alternative proposals to emerge, a significant number of which were intended to disapply the rule of law to the security forces. The Model Bill Team critiqued these in a detailed report in 2020.[1] As with the current Bill, we did not consider any of these proposals to be ECHR compliant.

There are duties under Article 2 ECHR for independent, effective investigations into conflict-related killings. Such investigations should usually have the possibility of leading to prosecution or punishment. There is limited ECHR case law on amnesties suggesting this requirement could be limited if there is a compelling case that an amnesty is necessary for reconciliation. This is why the NIO is currently pretending that its legacy Bill is essentially about reconciliation (and why the proposals on oral history and memorialisation are now front and centre). This assertion has become increasingly surreal, given the almost universal opposition to the Bill from right across the victims' sector and within political and civil society here– the people it is supposedly meant to reconcile. The key question for ECHR compliance is whether deaths and other human rights violations will still be able to be subject to *effective* investigations, something that is reliant on a legacy body having legal teeth and powers- rather than being limited to information that *might* be volunteered to it.

The proposals put forward by the TRP of course differ from the UK legacy Bill and other SHA alternatives. The key ECHR test remains the same: could effective, independent investigations still take place if the TRP mechanism was in place? If not the proposals would still facilitate impunity, regardless the intention.

The TRP Proposals, set out in the document dated 28 May 2020 and further elaborated in a 2021 legal opinion, are centred around the creation of the two new units under the auspices of a Reconciliation Commission namely:

- A 'Truth Recovery Unit' (TRU) - to have 'investigation' powers but only to be used for *verifying' information* volunteered by participants in the process organised by the second unit.
- A 'Justice Facilitation Unit' (JFU) – facilitating a mediation process between victims/survivors and former combatants with a view to producing a joint statement of reconciliation. (If such a statement is not agreed instead each party could make their own statement setting out their version of events to be placed in a secure archive until both participants have died or consent to publication.)

The process is predicated on an amnesty for state and non-state actors who participate with the JFU process as an incentive to provide information. The verification of the information they provide is to be undertaken cross checking it against official records, and other sources including newspaper reports and information from other participants in the process.

It is unclear what level of information has to be provided to avail of the amnesty. The legal opinion on the proposals (para 36) sets out that it is to be a minimum level of detail about the actual incident, once verified by the TRU, that allows the mediation process to continue. Information in a Joint Statement of Reconciliation would also be verified by

[1] Model Bill Team (2020) *Prosecutions, Imprisonment and the Rule of Law: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland*. Available at https://www.dealingwiththepastni.com/project-outputs/project-reports/prosecutions-imprisonment-and-the-stormont-house-agreement-a-critical-analysis-of-proposals-on-dealing-with-the-past-in-northern-ireland

the TRU and hence the amnesty –which can also be applied to other members of the group involved- will be dependent on verifying that information.

The two units are expressly designed to replace the HIU and ICIR envisaged under the Stormont House Agreement. The fate of the Oral History Archive is unclear.

Unlike the UK legacy Bill, the TRP proposals at least envisage PSNI legacy investigations continuing in parallel alongside the two new units and persons without an amnesty still being liable to prosecution. The situation of the current Police Ombudsman legacy investigations and legacy inquests is unclear.

Can the TRP proposals be human rights compliant?

An effective investigation compliant with ECHR Article 2 is required to be a '*thorough, impartial and careful examination of the circumstances surrounding the killing*'. It is to be capable of determining matters such as if the use of lethal force was lawful. It needs to be able to lead to findings, on the basis of an '*an objective and impartial analysis of all relevant elements*.'

It is immediately apparent that the TRP proposed bodies cannot *themselves*, conduct Article 2 compliant *investigations* - nor is this necessarily intended.

Along with the victims' experiences the only information provided is limited to that provided by the combatant(s) responsible for the incident. The TRU cannot 'investigate' at all. Its role is expressly limited to trying to verify this information. Armed groups or state organisations cannot independently investigate themselves.

The only output as such is a potential agreed statement between the combatant and the victim about a particular incident. There is no adjudicator of facts outside of these parties who can reach any findings. None of the other elements of an investigation (records, ballistics, autopsies, forensics, intelligence, tested eyewitness information, information obtained through arrest and questioning powers; in cross examination etc) are to be considered. It is not proposed to equip the TRP bodies with any other powers similar to a truth type-commission to compel information and cooperation.

If the person responsible for the incident is no longer around then, by definition, no information at all is available. If they are it is dependent on them coming forward to volunteer information. To date there has been no buy-in from any of the larger groupings of protagonists in the conflict. Unless expressly set aside, members of the security forces may also be precluded from giving information by the Official Secrets Acts or other provisions. Whilst the suggestion is that some class of an amnesty will incentivise testimony, this is questionable when it is widely accepted that: very few legacy prosecutions will take place anyway; participation may open combatants up to prosecution for other incidents; and it is not clear if amnesty is granted at the beginning or the end. If at the beginning on the basis of minimum information about the incident this recovers little information at all. If confirmation of amnesty is only given at the end of the process this risk may provide little incentive to cooperate.

Notwithstanding these legal and logistical issues there is still the potential for such a process to recover accurate information provided state and non-state actors alike volunteer tell the full truth, albeit in small numbers. Here it is important to consider the real risk of such a process being used by protagonists to promote their own narratives (e.g. loyalists in asserting their own agency are likely to downplay collusion). The

viability of such a process to provide accountability for patterns of human rights violations becomes limited.

The TRU process for verifying information is largely limited to cross-checking against official records and open-source material. Contrast this to the inquest system where for example the Ballymurphy families were able to rely on legal counsel with powers of cross examination. Could the TRU proposals (being limited to 'verifying' the soldiers' statements) have reliably reached the conclusions demined by the coroner? Could what the judge described as the "deliberately false account" of the accused in the criminal trial in the McAnespie killing have been exposed without judicial powers, on a review of the papers by the TRU?

Whilst the TRU process envisages conditioning the amnesty for persons who are not truthful or act in bad faith, and penalties for false statements, the NIO has offered up similar amendments to its own Bill but the Council of Europe have made clear this does not address its concerns of ECHR incompatibility.

All of the above may not be as relevant if the TRP proposals are not intended themselves to provide for ECHR compliant investigations, but instead to simply complement other mechanisms that can do so.

However, attention then turns as to whether the prosed TRP mechanisms could thwart or hinder other bodies conducting effective investigations into legacy cases if they are not closed down. Along with the broader ECHR limitations on amnesties this is a significant issue when considering ECHR compliance of the TRP proposals.

The main problem is that TRP proposals insofar as they grant an amnesty (for what could be relatively limited information) could put the beneficiaries of the amnesty beyond the reach of any meaningful ECHR-compliant effective investigation by another mechanism.

As alluded to earlier where you have an amnesty the types of police-powers essential for any investigation with teeth are unlikely to be exercisable. You cannot be arrested and questioned for an offence you have an amnesty for. This is one of the central reasons that the UK legacy bill is not ECHR compatible. The same problem would arise with the TRP proposals.

In conclusion the TRP proposals follow many others on truth recovery. They are made in a context where existing legal mechanisms dealing with legacy cases are delivering truth-recovery at a faster pace than ever before but face being shut down to facilitate an agenda of impunity. In assessing the proposals it seems straightforward the proposed TRP body cannot conduct 'effective investigations' in itself but this does not seem to be intended. The broader problem is that the amnesty they could grant state and non state actors alike could put such persons beyond the reach of effective investigations by any other legacy mechanism that is ultimately established. Along with the broader ECHR limitations on amnesties it is this in particular that would thwart the ECHR compatibility of the TRP proposals.

LEGACY:

WHAT ARTICLE 2 OBLIGATION?

AUSTEN MORGAN[2]

The Right to Life

Article 2 of the 1950 European convention on human rights ('ECHR') was given effect in UK law, including in Northern Ireland ('NI'), through the Human Rights Act ('HRA') 1998, from 2 October 2000. It now reads effectively: '(1) Everyone's right to life shall be protected by law.[3] (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape

---

[2] Dr Austen Morgan is a barrister in London and Belfast. He practises from: 33 Bedford Row chambers. His next book, to be published by the Black Spring Press Group in April 2023, is: *Pretence: why the United Kingdom needs a written constitution.*

[3] The deletion reflects: protocol no. 6, 28 April 1983, articles 1 & 2; and protocol no. 13, 3 May 2002, article 1.

of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'

The right to life (substantive) was violated by the UK, in the NI troubles, 1968-98, mainly because the state did not succeed fully in preventing republicans and loyalists abusing the human rights of police officers, soldiers and civilians. There was state responsibility, but much greater terrorist culpability.[4]

Contrary to the view that every state killing is a violation of Article 2, the Strasbourg court has permitted the reasonable use of force, not least in the Jean Charles de Menezes case in London, following the 7/7 London transport bombings.[5] De Menezes could well be revisited, given it was most certainly an English shoot to kill case with a great deal of impunity. Putting this opinion another way: if John Boutcher (who was a silver commander for the London Metropolitan Police on 22 July 2005) did nothing unlawful according to Strasbourg, then why is there a presumption regarding NI that soldiers and police, during the troubles, violated, not just article 2 substantive, but unquestionably article 2 procedural?

Article 2 substantive, as we must now refer to the original provision, relates to a person being killed, and, if it is a state killing, whether there was effectively a minimum use of force. Article 2 procedural is a more recent confection (explained immediately below), and relates to relatives securing a proper investigation of, a difficult point, state killings or all killings.

A New Human Right: Article 2 Procedural?

[4] R (A and Others) v Lord Saville of Newdigate [2001] EWCA Civ 2048 [2002] 1 WLR 1249; *McCann v United Kingdom* (1995) 21 EHRR 97.

[5] *Da Silva v United Kingdom* (2016) 63 EHRR 12.

Below are the main post-troubles NI cases heard by the court chronologically, beginning with the so-called McKerr group of cases of 4 May 2001[6]:

- (1) Jordan v United Kingdom, 4 May 2001, concerning Pearse Jordan, an IRA member, who was shot by a police officer after a car chase in Belfast in November 1992[7];

- (2) McKerr v United Kingdom, 4 May 2001, concerning Gervaise McKerr (driving a car with two others), all being killed as suspected terrorists by pursuing police officers in Lurgan in November 1982[8];

• (3) Kelly v United Kingdom, the eight IRA members killed by the SAS defending Loughgall police station in May 1987[9];

• (4) Shanaghan v United Kingdom, 4 May 2001, probably a IRA member, who was killed by loyalists while driving his van near Castlederg in August 1991[10];

• (5) McShane v United Kingdom, 28 May 2002, killed by an army vehicle during a late-night riot in Londonderry on 13 July 1996[11];

• (6) Finucane v United Kingdom, 1 July 2003, the killing of catholic solicitor Patrick Finucane in Belfast in 1989 by loyalists in the presence of his

---

[6] This terminology was not used on 4 May 2001. It may have emerged subsequently because McKerr was the oldest case.
[7] (2003) 37 EHRR 2.
[8] (2002) 34 EHRR 20.
[9] [2001] Inquest LR 125.
[10] [2001] Inquest LR 149.
[11] (2002) 35 EHRR 23.

family[12];

- (7) Brecknell v United Kingdom, 27 November 2007, one of three customers killed in a loyalist attack upon a bar in Silverbridge, Co. Armagh in 1975[13];

- (8) McCaughey v United Kingdom, 16 July 2013 (a much later case), two IRA members killed at a suspected arms dump by soldiers near Loughgall in 1990. This was essentially a delayed investigation case[14];

- (9) Hemsworth v United Kingdom, 16 July 2013 (also a much later case), a person assaulted by police in July 1997 who died months later (in January 1998)[15].

The so-called McKerr group of cases at Strasbourg established the principle of an adequate and efficient investigation following a killing. The principle spread from NI, and from terrorist conflicts. In doing so, differences of interpretation opened up, between NI and the rest of the UK.

There is not one case at Strasbourg from: a family member of a soldier, from England, Wales or Scotland, gunned down in bandit country by the IRA; the widow of a police officer, from NI; a catholic killed by the IRA, whether allegedly an informer or not; a protestant killed by loyalists, for whatever particular reason; or even an acknowledged republican killed by a loyalist paramilitary, or *vice versa*. Every one of these victims just specified has surviving (and succeeding) relatives, somewhere. True, none of those victims has come forward. But where

[12] (2003) 37 EHRR 29.
[13] (2008) 46 EHRR 42.
[14] (2014) 58 EHRR 13.
[15] Unreported.

are the lawyers who might assist their applications in the age of lawfare? And what incentive has the Strasbourg court given? Instead, it has responsively shaped a narrative, in nine pro-republican cases, by admitting applications of: alleged trigger-happy soldiers and police; and, of course – most controversially, collusion, where the UK state allegedly ran loyalism as a counter-terrorist strategy (even though the attrition rate in the domestic courts was more strongly anti-loyalist than anti-republican because protestants informed communally at a higher level than catholics).

This line of cases is characterised by:

1. No findings of fact regarding allegations (a function performed by the former European commission of human rights);
2. The creation of a retrospective obligation on member states, formally requiring the reopening of investigations whenever first conducted;
3. The emergence of a new class of applicants, namely relatives of a dead person impliedly treated as victims regardless of the late family member;
4. The failure to ascribe culpability to non-state actors, the loyalist killings being treated as analogous to state killings on the basis of no substantive evidence;
5. Liberal optimism about investigations revealing the truth and leading to reconciliation (as opposed to the de-legitimizing of the sovereignty of the respondent state); and
6. The institutionalisation of damages awards for inadequate investigations, regardless of the circumstances (and contrary to the McCann case in 1995, where terrorism was not to be rewarded even though the three victims in Gibraltar were unarmed on the day).

These cases were applied in Strasbourg cases involving other member-states. Then, in seemingly relating the procedural obligation to a substantive violation of Article 2, the Court went as far as proclaiming a new human right in a Slovenian medical negligence case in 2009.[16]

[16] *Silih v Slovenia* (2009) 49 EHRR 37.

I submit that this is outside the jurisdiction of the European Court of Human Rights.[17]: **f**urther, that the constitutional way would be a protocol to the convention agreed by the member states adding Srticle 2 procedural to the convention.

The court went further, in another non-NI case, Silih v Slovenia, extending the reach of the Convention in 2011 to 14 January 1966, long before it took effect in the UK on 14 January 1966.[18]. Judge Bratza, from the UK, and Judge Turmen (Turkey) dissented vigorously in *Silih's case*, as any international lawyer might have done, given the law on the temporal scope of a multi-lateral agreement: 'To our regret, we are unable to agree with the majority of the Grand Chamber that the Court has jurisdiction *ratione temporis* to examine the applicants' complaint that the domestic authorities failed to deal with their claim arising out of their son's death with the level of diligence required by Article 2 of the Convention. In our view, the [respondent] Government's preliminary objection to the Court's jurisdiction is well founded and should have been upheld. In consequence, we have voted against the finding of the majority that there has been a violation of Article 2 in its procedural aspect.'[19]

Strasbourg judges wrestled with the concept of 'critical date' (a confection of the court) from which retrospectivity would be permitted. That could be different for each member-state. In the case of the UK, there were the following options: 4 November 1950, the signing of the convention; 8 March 1951, ratifying the convention; 3 September 1953, entry into force (in international law) of the convention in the UK; 14 January 1966, UK applications to Strasbourg permitted; and 2 October 2000, the Human Rights Act 1998 brought into force in the UK. The Supreme Court picked 1966 (as the latest of four dates), in 2015[20]. It did not even consider 2000. When Lord Kerr considered *Finucane's case* in 2019[21], he did not expressly discuss

[17] ECHR, article 19.

[18] *Janowiec v Russia* (2014) 58 EHRR 30. On the reach of the convention in space, see: *Al-Skeini v United Kingdom* (2011) 53 EHRR 18.

[19] Paras O-IV1 – O-IV21, especially O-IV1.

[20] *R (Keyu) v SoS for foreign and commonwealth affairs* [2015] UKSC 69 [2016] AC 1355.

[21] *Re Finucane's Application for Judicial Review* [2019] UKSC 7 [2019] 3 All ER 191.

which UK date applied (though it appears to have been 2000) because he was concerned about a killing in 1989.

Domestic Law in the United Kingdom

Article 2 only became available in UK law when the Human Rights Act 1998 was brought into force on 2 October 2000. The McKerr group of cases from NI, however, led to a decision, in March 2004, of the senior domestic courts to hold that it could not apply to any deaths in NI before 2 October 2000. This remains good law.[22] The house of lords/supreme court declined, despite subsequent opportunities, to overturn this ruling of no article 2 procedural cases before 2 October 2000. It sat there, largely unaddressed – until the landmark decision of December 2021 discussed below.

I submit that, since 2 October 2000, regardless of the position before that date, it has not been possible to access Article 2 in domestic law, other than through the Human Rights Act 1998. Statute law eclipses the common law, and any access to an international agreement. Further, that, as regards the use of Article 2 procedural in English law, the senior courts have exercised restraint in England and Wales, in contrast to the way the obligation is articulated regarding legacy cases in and from NI.[23]

The idea of an adequate investigation, from the Strasbourg McKerr group of cases in May 2001, has been specified, and re-specified, by the Strasbourg court. The effect has been the widening of the procedural obligation. It is not clear whether the court appreciated in 2001

[22] *McKerr's Application for Judicial Review, Re* [2004] UKHL 12 [2004] 1 WLR 807; *McCaughey's Application for Judicial Review, Re* [2011] UKSC 20 [2012] 1 AC 725*; R (on the application of Keyu) v SoS for Foreign* & *Commonwealth Affairs* [2015] UKSC 69 [2016] AC 1355; *Finucane's Application for Judicial Review,* Re [2019] UKSC 7 [2019] 3 All ER 191.

[23] *R (Parkinson) v Kent Senior Coroner* [2018] EWHC 1501 (Admin) [2018] 4 WLR 106; *R (Morahan) v West London Assistant Coroner* [2021] EWHC 1603 (Admin) [2021] 3 WLR 919.

that NI only had one police force. This had the effect of making every investigation from 1968 potentially unlawful in human rights law; because there was no one independent to investigate the RUC. More recently, Strasbourg has suggested that the RUC and the PSNI are not related.[24] This weakens the moral force of the Article 2 in terms of procedural obligations, since a PSNI investigation might pass muster. While the Court has evidently tried to set the floor to a standard for effective investigations, there has been a tendency in domestic law to refer to the standard as a ceiling – to be smashed in pursuit of a lawful investigation.[25] Given that Strasbourg does not make findings of fact, then any application from NI, as long as the relatives argue lack of respect for them or, better, collusion on the part of loyalists, is enough to trigger the Article 2 procedural obligation, and an inevitable finding of violation where damages are concerned.

Human Rights Act 1998 Section 2

In 1998, parliament enacted section 2(1): 'A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any - (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights ... '.

It took some time, but UK judges now know – at least as regards criminal liability – that they are not bound by Strasbourg case law.[26]

The *dictum* of Lord Neuberger probably continues to apply: 'Where…there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive

---

[24] *Brecknell v United Kingdom* [2007] 46 EHRR 42.

[25] Finucane's Application for Judicial Review, Re [2019] UKSC 7 3 All ER 191 (report of Sir Desmond de Silva QC - *The Report of the Patrick Finucane Review,* 2 vols (and 841 pp), HC 802-I & II, 12 December 2012 – not article 2 compliant according to Lord Kerr in the supreme court because it was not a full judicial inquiry [para 134]).

[26] *R v Horncastle (Michael Christopher)* [2009] UKSC 14 [2010] 2 AC 373; *Reilly's Application for Judicial Review, Re* [2013] UKSC 61 [2014] AC 1115; *R (on the application of Chester) v SoS for Justice* R [2013] UKSC 63 [2014] AC 271; and *R (on the application of Hallam) v SoS for Justice* [2019] UKSC 2 [2020] AC 279.

or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this [Supreme] court not to follow that line.'[27] Domestic courts do not have to follow Strasbourg.

Conclusion before *McQuillan*

It was in May 2001, with the so-called McKerr line of cases, that Strasbourg sought to assist reconciliation in NI. Allowing for distance from the problem, and a certain naivety, it may have been reasonable for the ECtHR to impose a retrospective obligation on the UK to hold effective investigations for troubles deaths (or was it only state killings? – the point is still obscure) reaching back now for fifty or so years.

Twenty two years after 2001, one is required to be intellectually critical of the case law on Article 2 procedural from NI. The following legal questions are raised legitimately:

- Did the ECtHR have the jurisdiction to create a new human right or was that only for the member states through a new protocol to the convention?[28];

- Has Article 2 procedural not eclipsed Article 2 substantive, as happened in the Jean Charles De Menezes case in 2005 in London[29];

- Does section 2 of the Human Rights Act 1998, as recognised belatedly by the domestic courts, not mean that Strasbourg jurisprudence is not binding in the UK as domestic authorities are?;

[27] *Manchester City Council v Pinnock* [2011] UKSC 6 [2011] 2 WLR 220, para 4.
[28] ECHR, article 19.
[29] *Da Silva v United Kingdom* (2016) 63 EHRR 12.

- Is this not evident in the way the NI courts have helped perpetuate a dogma ('not Article 2 compliant'), when the senior courts of England and Wales treat Article 2 procedural much more circumspectly?[30]; and

- Did the House of Lords, in what might be called the alternative domestic Gervaise McKerr line of cases from 2004, not hold that Article 2 procedural could not apply to deaths before 2 October 2000, when the Human Rights Act 1998 was brought into force?[31]

The Supreme Court Decision in *McQuillan*

In June 2021, the Supreme Court heard two appeals from three applications in NI, over three days. The first applicant, Margaret McQuillan, complained about the killing of her sister, Jean Smyth, in Belfast in 1972 (the army later coming under suspicion). This is the case Jon Boutcher is investigating in Operation Mizzenmast. The second and third applicants, Francis McGuigan and Mary McKenna, raised the 1971 case of the 12 (later 14) 'hooded men', when five army interrogation techniques were used on detainees by the police. Back in 1978, the Strasbourg court (not following the commission on a particular violation of Article 3) had referred to the interrogations as inhuman and degrading treatment only.[32]

These three cases made progress in NI. The first applicant was overshadowed by the hooded men case. This was because a human rights non-governmental organisation had found allegedly incriminating material in the UK national archives in Kew. The material had been

[30] *R (Parkinson) v Kent Senior Coroner* [2018] EWHC 1501 (Admin) [2018] 4 WLR 106; *R (Morahan) v West London Assistant Coroner* [2021] EWHC 1603 (Admin) [2021] 3 WLR 919.

[31] *McKerr's Application for Judicial Review, Re* [2004] UKHL 12 [2004] 1 WLR 807; *McCaughey's Application for Judicial Review, Re* [2011] UKSC 20 [2012] 1 AC 725*; R (on the application of Keyu) v SoS for Foreign* & *Commonwealth Affairs* [2015] UKSC 69 [2016] AC 1355; *Finucane's Application for Judicial Review,* Re [2019] UKSC 7 [2019] 3 All ER 191.

[32] *Ireland v United Kingdom* (1979-80) 2 EHRR 25.

used in a 2014 RTE documentary promoting the theme of torture.[33] In the Court of Appeal, in September 2019, there was a split: Morgan LCJ and Stephens LJ versus Sir Donnell Denny. Strasbourg had refused in 2018 (on the basis of the RTE documentary) to re-open the Ireland v UK case[34], but the Court of Appeal majority effectively did so, re-branding the five interrogation techniques as torture.[35] This was arguably unlawful; that certainly became clear when the Supreme Court handed down *R (on the application of AB) v SoS for Justice* [2021] UKSC28 [2021] 3 WLR 494 in July 2021. Sir Donnell's dissent was to prove prescient.

The Supreme Court judgment of 15 December 2021 allowed the appeal of the Secretary of State for NI, the chief constable of the PSNI, and the Department of Justice in NI. Local media, however, concentrated upon a PSNI investigation into the hooded men case in October 2014, which had been quashed as irrational by Maguire J originally (a decision never reversed). That was old news being recycled.

The significance of *McQuillan* is that the Supreme Court went back to the domestic Kerr line of cases from 2004. This is beyond doubt, and any possibility of retreat. The judgment reaffirmed the Human Rights Act 1998 being brought into force on 2 October 2000. Thus, the so-called critical date shifted expressly from 1966 to 2000: 'The general presumption is that a statute which creates rights and obligations does not have retrospective effect. This reflects values of fairness, legal certainty and the rule of law. It is desirable that people, including public officials and public authorities, should be able to determine their legal rights and obligations at the time of acting or omitting to act. It is generally unfair to treat people as subject to obligations of which they were not on notice at the time.'[36] But, the Supreme Court never considered whether an applicant could still access a Strasbourg right through the common law. I submit that, if this had been possible before 2 October 2000, parliament

[33] *The Torture Files,* broadcast 4 June 2014.
[34] *Ireland v United Kingdom* (2018) EHRR SE1.
[35] Paras 73 to 115 (especially 74-77) & 116..
[36] Para 151.

ensured that there was only one way after that date. The Supreme Court, despite a judgment of 100 pages, did not consider this properly or at all.

The Supreme Court – as with Lord Kerr in *Finucane's case* – then went to the Strasbourg authorities.[37] It did not reaffirm the new Article 2 procedural right, from *Silih's case*. It did, however, consider the question of temporal scope, in *Janowiec's case*: first, the so-called 'genuine connection' test (and the ten-year rule); and the so-called 'convention values' test, taking us back potentially to 1950. Lord Kerr – working back from 2000 – and with the ten-year rule from Strasbourg – could not get quite to the killing of Patrick Finucane on 12 February 1989; he therefore finessed the test to make it fit the dates.[38] Significantly, the Supreme Court now criticised this: 'We have reservations as to whether Lord Kerr was right to interpret *Janowiec* as he did. This court has not been invited to depart from its decision in *Re Finucane* but we note that the extension beyond ten years allowed in *Re Finucane* involved less than two more years.'[39] Query whether domestic law will permit incremental stretching of the Strasbourg elastic to fit around a necessary date?

Conclusion

The Supreme Court answered the original applicants as follows: Margaret McQuillan was told that 1972 was way before 2000, even applying the ten-year Strasbourg rule; Francis McQuillan and Mary McKenna were told that Strasbourg had properly decided the *Ireland v United Kingdom* case in 2018: RTE had not produced any new evidence justifying a re-opening of the inter-state case after 40 years.

---

[37] It went first to *Brecknell v United Kingdom* (2008) 46 EHRR 42, which permitted the re-opening of investigations, years after a death, on the basis of fresh evidence (though it declined to formulate such a test). (paras 69-72)

[38] Paras 107-11.

[39] Para 144.

That leaves the convention values test, and the possibility of going back to 1950 (a legally insignificant date in international law because it was only a signing), which neither Strasbourg nor the Supreme Court has contemplated for any NI legacy case. That does not mean that the legacy practitioners will not give it a try, with a new or existing application.

McQuillan's case would probably be the end of the matter in English law. NI, however, is different. And here, it might take at least one more heave, and reliance upon section 2 of the Human Rights Act, to affirm the domestic McKerr line of cases without the so-called Strasbourg authorities on temporal scope.

The Supreme Court still has the problem. Lord Kerr, applying the ten-year rule in *Finucane's case*, stretched it by another two years. Margaret McQuillan has been told that 1972 was much too early. So, how do we resolve deaths between 8 June 1972, which is definitely out, and 12 February 1989, which appears to be still in?