

**Addressing the Legacy of  
Northern Ireland's Past:  
The Human Rights  
Dimension**

Human Rights Centre  
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**QUEEN'S  
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## **Addressing the Legacy of Northern Ireland's Past – the Human Rights Dimension**

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measures are taken to address the legacy of Northern Ireland's past, it is essential that they conform with international human rights standards. Otherwise their credibility, as well as their effectiveness, could be undermined. We therefore welcome the inclusion of compliance with human rights obligations as one of the general principles which the various institutions established by the proposed Bill will have to adhere to when carrying out their functions. However we regret that 'human rights obligations' are defined in narrow terms as obligations arising under the Human Rights Act 1998. This ignores the additional human rights obligations existing under domestic law (such as the right of access to justice) and also those existing under various human rights treaties ratified by the UK other than the European Convention on Human Rights. These other treaties include the UN Convention on the Rights of Persons with Disabilities. There are also various 'soft law' international human rights best practice standards which we would expect the UK government to comply with, such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in 1985.<sup>1</sup>

There are few international human rights standards which set out in general terms how the past should be dealt with if a country is emerging from a violent conflict, but there are a number of binding standards relating to relevant specific rights, such as the right to life, the right not to be ill-treated, the right to a fair trial, the right to a private and family life, and the right to truth. This document sets out various human rights principles that should be kept in mind in the implementation of the legacy institutions, as well as at the end a reflection on the ICIR drawing from extensive research conducted on the ICLVR. This document should also be read in light of our separate submission on the needs and rights of seriously injured victims as a result of the Troubles/conflict in and around Northern Ireland.

### **The right to life**

The European Court of Human Rights has laid down specific standards that need to be met whenever an unexplained killing has occurred. The procedural limb of Article 2 ECHR requires an independent, effective and thorough investigation of the killing, including of how the killing

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<sup>1</sup> A/RES/40/34, 29 November 1985.

was planned and controlled. It must be an investigation which is capable of identifying those who may have been responsible for the killing, though there does yet seem to be a right to have such persons prosecuted if they are in fact identified. In domestic law, even if not yet in the judgments of the European Court of Human Rights, it is clear that the Police Service of Northern Ireland should not be investigating killings in which other police officers, whether still serving or not, and whether in the PSNI or not, may have been implicated: the dicta to the contrary by the European Court of Human Rights in *Brecknell v UK* seem of dubious authority today.<sup>2</sup> In any killing where there is a reasonable suggestion that police officers may have in some way colluded in the killing, or in the obstruction of a thorough investigation of the killing, the investigation should be undertaken by some force other than the PSNI.

As far as the reviews and investigations which have already taken place under the auspices of the Historical Enquiries Unit are concerned, it is not clear that they were all of the requisite investigatory standard demanded by Article 2 of the ECHR. The Chief Constable who established the HET, Sir Hugh Orde, has said that it was never the intention that HET should conduct investigations to that standard. Therefore, to ensure that there is no unfair distinction between killings by state forces and non-state actors drawn between cases examined by the HET and cases examined by the proposed HIU, the former cases would need to be looked at again to ensure that they have been no less thoroughly investigated than the latter. Both categories need to be investigated to Article 2 standards.

Clause 5 of the Bill assumes that the HET is still functioning, which of course it is not. Its ongoing work was taken over by the Legacy Investigations Branch (LIB) of the PSNI at the end of 2014. It is not clear from the proposed legislation how a decision will be made – and within 90 days as required by clause 5(2) – that deaths within the LIB’s remit which were previously within the HET’s remit will now be within the HIU’s remit. It would therefore not be sensible to apply the 90-day limit to the establishment of that category of deaths, given the need to satisfy the human rights investigative requirements of effectiveness and thoroughness. The imposition of any such unrealistic time limit could be a violation of Article 2 of the ECHR.

### **The right not to be ill-treated**

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<sup>2</sup> (2008) 46 EHRR 42.

The European Court of Human Rights has said that alleged violations of the right not to be ill-treated must be thoroughly investigated too. To the extent that the proposals in the Stormont House Agreement deal only with the rights of people who have been bereaved in the Northern Ireland conflict there is a danger that people who are still alive, but who suffered physical or mental injuries as a result of a violent incident during the conflict, might claim that they are being improperly discriminated against. While the need for the bereaved to know the truth about what happened to their loved ones is very important, it is arguable that the needs of the living injured are every bit as significant, if not more so (especially in view of the fact that the likelihood of successful prosecutions being initiated in relation to killings is very small).

It is discouraging that a consultation document on addressing the legacy of Northern Ireland's past has so little to say about the most obvious feature of that legacy – the number of victims still alive and who are still suffering. One of six general principles underpinning the Bill is the principle that the suffering of victims and survivors should be acknowledged, but in truth it does not seem to be in this Bill, certainly as far as survivors are concerned. To give those people fewer rights than people who have been bereaved might be a breach of section 75(1)(c) of the Northern Ireland Act 1998, which requires due regard to be given to the need to promote equality of opportunity between persons with a disability and persons without.

### **The right of access to justice**

Here too the position of the living injured seems inferior to that of the bereaved. If Mr X was killed in an explosion in 1985 and Mrs Y was maimed in the same explosion but is still alive, the family of Mr X will be able to trigger an investigation by the HIU, but Mrs Y herself will not. This is unfair, and possibly a breach of equality law and of the right of access to justice.

In the interests of ensuring the fairness of the overall trial process we welcome clause 25(8) of the Bill, which declares that it will not be a breach of any obligation of confidence owed by a relevant authority, or of any other restriction on the disclosure of information however imposed, for a relevant authority to make material available to the HIU.

We are concerned that under clause 36 of the Bill the Secretary of State may make regulations concerning the handling by the HIU of 'sensitive information', defined in clause 39 as including information which, if disclosed generally, might prejudice the national security interests of the

United Kingdom. The Bill does not make it clear whether the national security interests are confined to those which pertain today or whether they include those which pertained in the past. Nor does it indicate in any way what national security might mean in this context. Does it include, for example, ‘the fight against terrorism in Northern Ireland’, ‘the way intelligence information is recorded and processed’ or ‘the handling of informers’? Unless and until such questions are answered it is impossible to know whether it would be appropriate to give support to the Bill in this regard. One would hope that the answers would be consistent with two more of the general principles listed in clause 1 of the Bill, namely the principle that the rule of law should be upheld and the principle that the pursuit of justice and the recovery of information should be facilitated.

### **The right to a private and family life**

Care will need to be taken to ensure that submissions made to the Oral History Archive do not violate a third party’s right to a private and family life under Article 8 of the ECHR (as well as that party’s rights under the Data Protection Acts 1998 and 2018).

### **The right to truth**

Although it has not received the legal status and enforceability of rights contained within the Human Rights Act 1998, there is growing international recognition of the right to truth. The UN Special Rapporteur for Freedom of Expression has defined the right to truth as the right to know, to be informed or to freedom of information, while the Human Rights Council has emphasised that the public are entitled to access, to the fullest extent practicable, information regarding the actions and decision-making processes of their government. This collective dimension of the right to truth has been shared by the European Court of Human Rights, by finding that the ‘right to truth implied not only clarification of the immediate circumstances of the particular violations but also the clarification of the general context, the policies and institutional failures and decisions that had enabled their occurrence.’ Otherwise the exposure of the truth of such violations would be dependent on the willingness and capability of individual victims or their next of kin bringing proceedings.<sup>3</sup>

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<sup>3</sup> See *Al Nashiri v. Poland*, (Application no. 28761/11), Judgment, 24 July 2014, para.482; and *El Masri v the Former Yugoslav Republic of Macedonia*, (Application no. 39630/09), Judgment, 13 December 2012, para.191.

Within human rights law, the right to freedom of information has been included in the Universal Declaration of Human Rights and the European Convention on Human Rights, and there is an emerging awareness of the right to truth in cases of serious violations of human rights. This has been acknowledged by the UN General Assembly, for example in Resolution 68/165, which notes the importance of ‘respecting and ensuring the right to truth so as to contribute to ending impunity and to promote and protect human rights’. In the context of Northern Ireland, the UN Special Rapporteur for Truth, Justice, Reparations and Guarantees of Non-Recurrence, Pablo de Greiff, has noted the importance of independent and impartial procedures for facilitating truth-disclosure when dealing with the past. These principles should be kept in mind when investigating Troubles-related deaths, and any restrictions on information disclosure proportionately balanced against the rights of individuals.

The draft bill in its principles refers to the ‘recovery of information’, this should not be a data collection exercise, but rather that cross-community led initiative that has political support and engagement. Finding out the truth is not only the right of an individual, but has a ‘societal benefit’ in that by only understanding the mistakes of the past can we seek to prevent their recurrence.<sup>4</sup> This requires the findings of commissions and investigations to be discussed in an open, public and frank way. The European Court has held in a case involving national security and counter-terrorism, that such public scrutiny and debate is ‘essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts’.<sup>5</sup>

While most truth commissions in other contexts have held private hearings (Peru and South African being the notable exceptions), there is merit in have a range of foras to allow for private and public sessions on the past to raise public awareness and ensure transparency, rather than being left to a final report. That said given the limited evidence available for most deaths and serious injuries caused during the Troubles/conflict in and around Northern Ireland that will result in a conviction, it is likely that any truth to emerge will be beyond criminal investigations as required under Articles 2 and 3. Thus the ICIR will likely be the primary body for most

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<sup>4</sup> Study on the Right to Truth, para.58; *Anzualdo Castro v. Peru*, Judgment of 22 September 2009, (Preliminary Objection, Merits, Reparations and Costs), Series C No.202, para.119; and *The Massacres of El Mozote and neighbouring locations v. El Salvador*, Judgment of 25 October 2012, Merits, Reparations and Costs, Series C No. 252, para.298.

<sup>5</sup> *Al Nashiri v. Romania*, (Application No. 33234/12), Judgment, 31 May 2018, para.641.

victims to find out information requiring substantial effort to make it work and to be approachable for all interested actors (see our section on the ICIR for further details).

### **Right to Information**

Victims, their relatives and the public should have access to easily obtainable, in relevant languages and concise information on the transitional justice processes and progress. The state is responsible for dissemination information to victims and the general public on 'all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.'<sup>6</sup> Engagement with victims should be a 'two-way communication ... to conduct interactive activities, to listen to victims and respond to what they are saying, and to take into account victims' concerns'.<sup>7</sup>

In terms of consultations the Office of the High Commissioner for Human Rights sets out that:

'national consultations are a form of vigorous and respectful dialogue whereby the consulted parties are given the space to express themselves freely, in a secure environment, with a view to shaping or enhancing the design of transitional justice programmes.'<sup>8</sup>

As such they are not PR exercises and distinct from outreach. Once institutions are legislated for, set up and operational, outreach to affected communities is key. The United Nations Secretary General notes the important of outreach in ensuring the impact and sustainability of transitional justice institutions so that they are clearly understood and coherently communicated.<sup>9</sup> More recently the European Court under Article 10 on the right to freedom of expression and information has recognised its connection with the collective dimension of the right to truth for society and not just victims.<sup>10</sup>

### **Non-Recurrence and the Future of Rights and Equality**

If there is to be comprehensive consideration of the needs of the victims and survivors of the conflict then much more thought should be given to the adequacy of the current human rights

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<sup>6</sup> Principle 24, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 16 December 2005, (UNBPG).

<sup>7</sup> ICC Strategy in Relation to Victims 2009, ICC-ASP/8/45, para. 22.

<sup>8</sup> National consultations on transitional justice, Rule-of-Law Tools for Post-Conflict States, (2009), p3.

<sup>9</sup> Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, March 2010, p10.

<sup>10</sup> See *Youth Initiative for Human Rights v. Serbia*, (Application No. 48135/06), 25 June 2013; and *Magyar Helsinki Bizottság v Hungary*, (Application No. 18030/11, 8 November 2016).

and equality framework in Northern Ireland. It remains troubling that the conversations about the past and the future are decoupled to a significant extent in this consultation process. More thought should be given to the need for reflection and reform. This includes ensuring that relevant international legal standards are fully and effectively implemented in NI. The Bill of Rights process has been and remains one part of a larger discussion about the future of NI and there are many good ideas out there that can be revisited to ensure that future generations live in a society where there is a genuine culture of respect for human rights. It is regrettable that more thought has not been given to these questions. UN Special Rapporteur Pablo de Greiff notes that, a bill of rights can be an effective way to sustain peace, depending on the ability of courts to interpret it, a bill of rights can ensure that a ‘State commits itself to guaranteeing, respecting and promoting has a preventive potential that can be considerable.’<sup>11</sup> A bill of rights can also ‘act as a disincentive to marginalization and in this way remove a conflict factor’, strengthen the separation of powers and restrain executive powers.<sup>12</sup>

## **Gender**

The Troubles/conflict in and around Northern Ireland has a gendered impact on the way it affected women and girls. While the majority of those killed were young men, it had a profound impact on women who were forced to become primary breadwinners, carers and legacy advocates for their killed or injured relatives, sacrificing their own careers, education and dreams, as well as affecting their physical and mental health. In the legacy legislation and institutions particular attention should be paid to the Gender Principles for Dealing with the Legacy of the Past as well as international standards such as the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation. This requires efforts for gender inclusion in the design, participation and decision making in such processes, as well as gender sensitivity in the understanding of harm and appropriate remedies. There is also a large information gap on the use of gender based and sexual violence during the Troubles/conflict in and around Northern Ireland that requires further research on its extent and appropriate redress.

## **Children**

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<sup>11</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence: Prevention, A/72/523, 12 October 2017, para.38.

<sup>12</sup> Ibid. paras.39-40.

There remains a lack of concerted effort to understand and redress the transgenerational impact of the Troubles/conflict in and around Northern Ireland. The Commission for Victims and Survivors found that transgenerational trauma on subsequent generations as a ‘distinctive factor associated with mental illness, substance dependency, and other problems for young people and their families.’<sup>13</sup> Greater effort needs to be taken to reduce and eventually remove social and economic barriers faced by children and grandchildren of those directly affected by the violence, as well as cultural and political barriers between communities. This ‘thick’ reconciliation will be a difficult, if not impossible, task for the Implementation and Reconciliation Group alone. It will instead require a substantial shift in policy and politicking from ‘green and orange’ issues, to substantially addressing low educational attainment amongst some communities, mental health and suicide amongst young people, shared education, as well as creating a sustainable economy, which is to an extent dependent on political stability. As clichéd as it is to say that children are our future, there is a need to educate them on the mistakes of our shared past, so that they can learn and grow from our shortcomings to prevent the recurrence of violence in the future.

## **LGBT+**

The importance of ensuring equality of opportunity for victims and survivors of all sexual orientations is given regrettably little attention by the section 75 assessment for these legacy proposals. In particular, it does not recognise that the human rights belonging to homosexual members of Northern Ireland society may have been affected by the conflict in unique ways and that specific action may be ‘required in order to ensure the full enjoyment of the human rights of these persons’.<sup>14</sup> Explicitly recognising the possibility of unique impacts on individuals with a historically marginalised sexual orientation might helpfully engender better conditions for the participation of this group in the mechanisms proposed. The Oral History Archive, in particular, presents various opportunities and risks to be borne in mind in this connection. Given the historical hostility levelled at homosexuality in Northern Ireland, the role of the Public Records Office in ‘inviting the contribution of oral history records’ under clause 51(8)(a) of the Bill holds some potential to realise the right of homosexuals to impart information about their experiences during the conflict in keeping with Article 10 ECHR; something which might not have been

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<sup>13</sup> Commission for Victims and Survivors (2015), *Towards a Better Future?*, p96.

<sup>14</sup> Council of Europe, Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity (31 March 2010).

possible due to state-imposed restrictions on homosexual practices pertaining during some of the time period defined by clause 51(1)(a). Engagement with relevant community organisations in the LGBT+ sector would therefore be particularly advisable as a part of the pursuit to fulfil clause 51(8)(a) in our view.

At the same time, those with a responsibility for maintaining the Oral History Archive should be kept alive to the risk of receiving records containing homophobic statements capable of amounting to hate speech and be made mindful of the limitations on Article 10 ECHR in this regard. It is also possible that the mechanisms proposed could lead to the exposure of uniquely unacceptable treatment towards homosexuals either in detention or in the security forces during the period of time defined by clause 51(1)(a). Both of these possibilities engage the risk of disclosures relating to torture or inhuman or degrading treatment or punishment contrary to the absolute requirements of Article 3 ECHR in conjunction with Article 14 ECHR.<sup>15</sup> Moreover, it is essential that equal respect for any impact on the private and family lives of homosexuals affected by the conflict should be recognised with appropriate sensitivity in accordance with Article 8 ECHR.

### **Other harms**

The Troubles/conflict in and around Northern Ireland caused a range of harms to individuals, families and communities. While the focus on the right to life and Article 2 requirements are important, they are not the only facet of violence that people suffered. Many individuals were forced into exile and still live under threat from returning home. Others were forcibly displaced from their homes, forced to sell homes and farms at reduced amounts and unable to still live in their family homestead. Notably there has been insufficient attention and investigation to map out gender based and sexual violence committed by a range of actors and individuals during the Troubles/conflict in and around Northern Ireland. There is a need to address the needs of seriously injured victims as a priority. We have submitted a separate, more detailed document to this effect to echo the voices of seriously injured victims.

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<sup>15</sup> We emphasise these risks because both environments have been historically prone to the ill-treatment of homosexuals, thereby engaging the rights set out above and resulting in applications to the European Court of Human Rights.

It seems that other harms have been back-ended through the Implementation and Reconciliation Group. Instead greater consideration needs to be given to addressing these violations beyond just Article 2 compliance, to understand and remedy the nature and context of violence, and web of responsible actors. This may require going beyond legal institutions by involving community organisations to facilitate the return of those forced from their homes or creating a safe and supportive environment for victims of sexual and gender based violence to come forward, whether through the ICIR, oral history archive or even the PSNI.

### **Scope of harm**

While most of the individuals affected by the Troubles/conflict in Northern Ireland, violence was also perpetrated in Great Britain and the Republic of Ireland. Victims in Great Britain and the Republic of Ireland should have the same rights to redress under the legacy mechanisms as victims in Northern Ireland and bilateral legislation in each jurisdiction should reflect this. There are also victims outside these islands who were affected and should be informed as far as possible of the processes that they can contribute to or benefit from.

There is also need to consider those who were injured during the 1956-1962 violence which saw a number of people injured and killed, some of whom are still alive or have relatives seeking answers.

### **Reconciliation**

Principle 1(a) states that ‘reconciliation should be promoted’ in the SHA bill. Reconciliation is often seen as an ambiguous term, but it is understood as a goal and a long process.<sup>16</sup> Reconciliation can be ‘thin’ or ‘thick’. Seils points out that a thin approach to reconciliation as ‘individuals, groups, and institutions peacefully coexisting but with little or no trust, respect, or shared values between them.’ Whereas a thicker approach to reconciliation entails ‘relationships built on trust, respect, and shared values, which may all contribute to the restoration of dignity that may have been lost as a result of violations.’<sup>17</sup> The Implementation and Reconciliation Group will need to strike the balance between advancing national reconciliation in Northern

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<sup>16</sup> David Bloomfield, Reconciliation: an Introduction, in D. Bloomfield, T. Barnes and L. Huyse (eds.), *Reconciliation After Violent Conflict: A Handbook*, IDEA, 10-18, p12. See also Paul Seils, *The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions*, ICTJ 2017.

<sup>17</sup> Paul Seils, *The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions*, ICTJ 2017, p6.

Ireland, improving cross-community relations and at the local level, and encouraging a national conversation on the past and reconciliation. This will be difficult for it to achieve by itself and it will need to be supported by a range of actors to provide concerted, constructively critical, political, community, cultural and social leadership. As suggested in the Peruvian truth commission (CVR),

‘reconciliation comprises of three levels: 1) at the political level, it is a reconciliation between the State including the Armed Forces and society, and it is also between the political parties, society and the State; 2) at the social level, it is a reconciliation of the institutions and public spaces of civil society with the whole society, especially with the secularly neglected ethnic groups; and 3) at the interpersonal level, it is a reconciliation between the members of communities or institutions that were confronted because of the generalized violence. It is hoped that this process of reconciliation will be reflected in education, in the family, in the media and in the daily life of all Peruvians. Finally, because of the richness of its dimensions, reconciliation is an open and permanent process, which serves as a common goal for our society. Approaching this is a task for all Peruvians.’<sup>18</sup>

While reconciliation is not defined in the bill, nor should it, it is important to ensure procedural protections for those involved in any official reconciliation processes. The UN Impunity Principles set out that ‘forgiveness, which may be an important element of reconciliation, implies, insofar as it is a private act, that the victim or the victim’s beneficiaries know the perpetrator of the violations and that the latter has acknowledged his or her deeds.’<sup>19</sup>

Reconciliation is not another word for impunity or shortcomings in justice. Archbishop Desmond Tutu as Chairperson of the South African Truth and Reconciliation Commission said that,

‘Reconciliation is not about being cosy; it is not about pretending that things were other than they were. Reconciliation based on falsehood, on not facing up to reality, is not true reconciliation and will not last ... We believe we have provided enough of the truth about our past for there to be a consensus about it. There is consensus that atrocious things were done on all sides ... We should accept that truth has emerged even though it has initially alienated people from one another. The truth can be, and often is, divisive. However, it is only on the basis of truth that true reconciliation can take place. True reconciliation is not easy; it is not cheap.’<sup>20</sup>

Reconciliation should be a fully informed, staged, consensual and voluntary process. Meetings between victim, perpetrators, affected communities and other actors, may take a number of

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<sup>18</sup> Toma IX, Capítulo 1 Fundamentos de la Reconciliación, p2.

<sup>19</sup> Preamble, E/CN.4/2005/102/Add.1.

<sup>20</sup> Truth and Reconciliation Commission of South Africa Report, Volume 1, 29 October 1998, para.69-71.

sessions and not be forced upon any individual to accept the outcome. Importantly reparations must feature as part of any reconciliation processes, by publicly acknowledging their suffering and providing appropriate remedies. As such reconciliation is seen as part of the process and end of the comprehensive package of transitional justice measures (truth, justice, reparations and guarantees of non-recurrence). As the Peruvian truth commission stated,

‘If truth is a precondition of reconciliation, justice is at the same time its condition and its result. This is so because justice has different dimensions, which it is essential to consider and enforce in its specificity. It is, in the first place, of a judicial nature, since the law must be investigated and applied with all rigor so that the crimes do not go unpunished. Second, justice is also restorative, in the sense that it strives to compensate the victims for the damage inflicted. And it is, in short, political and social justice, which must contribute to the redistribution of access to power and to the assets of society, on the basis of the rights recognized through reconciliation itself.’<sup>21</sup>

In the case of the Colombian peace agreement while it included a comprehensive transitional justice package which is still ongoing, it also included early collective acts of acknowledgement of responsibility by the FARC, the Colombian government and other responsible sectors of society involved in violence. These measures were to be coordinated with religious institutions involved in the peace process to meet the expectations of victims and affected communities, and conducted in a ‘formal, public and solemn’ manner.<sup>22</sup> While the work of the IRG is back-ended in the legacy package for Northern Ireland, efforts can be made to build social and political capital in the transitional and reconciliation process at an earlier stage by responsible actors by providing public acknowledgement and remedial efforts, as well as proactively engaging in the ICIR.

### **Right to Remedy**

In the SHA bill Principle 1(c) makes reference to ‘the suffering of victims and survivors should be acknowledged’, which echoes sentiments of the Good Friday Agreement and the empty ‘right to remember’ of victims. International law stipulates that states are obliged to provide appropriate reparations to victims of gross violations of human rights and grave breaches of

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<sup>21</sup> Toma IX, Capítulo 1 Fundamentos de la Reconciliación, p1.

<sup>22</sup> Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, 24 November 2016, p188.

international law, no matter who the responsible party is for the violence;<sup>23</sup> the United Kingdom and Irish government supported these principles at the United Nations.<sup>24</sup>

Under international law the right to remedy includes ‘(a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; [and] (c) access to relevant information concerning violations and reparation mechanisms.’<sup>25</sup> The state is bound to facilitate and provide for victims’ right to remedy, which goes beyond acknowledgement, to provide substantive measures to alleviate their harm through reparations. These measures include restitution, compensation, rehabilitation, measures of satisfaction and guarantees of non-recurrence.

Greater attention needs to be paid to victims’ right to reparation that acknowledges their suffering and provide adequate and appropriate measures to redress their suffering. Compensation was not adequately provided to injured victims and those bereaved, with many victims having their awards unnecessarily reduced, and amounts provided an ‘insult’. We strongly recommend that thought is given to creating a comprehensive reparation package to those affected to relatives to those killed and not adequately redressed, those seriously injured, those who suffered torture and those who experience sexual violence. Many countries around the world create such reparation programmes to ensure that the violence of the past is not borne by victims and left more vulnerable, impacting their quality of life and dignity, as well as their children and grandchildren.

### **Statutes of limitations**

International law sets out that statutes of limitations are prohibited for international crimes (war crimes, crimes against humanity and genocide),<sup>26</sup> and for domestic crimes should not be ‘unduly restrictive’.<sup>27</sup> The UN Impunity Principles set out that such limitations are not effective against civil or administrative actions brought by victims seeking reparations.<sup>28</sup> The Geneva

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<sup>23</sup> Principles 15 and 16, UNBPG.

<sup>24</sup> Both states sponsored and voted for the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Economic and Social Council 61st Session, 19 April 2005, E/CN.4/2005/L.10/Add.11, p16-17.

<sup>25</sup> Principle 11, UNBPG.

<sup>26</sup> Article 29, Rome Statute of the International Criminal Court.

<sup>27</sup> Principles 6 and 7, UNBPG.

<sup>28</sup> Principle 23.

Conventions also set out requirements for belligerents to investigate and prosecute those who commit serious breaches. The failure to investigate and prosecute serious violations of human rights or grave breaches of the Geneva Conventions undermines morale in armed forces and the values in fights to protect its citizens. The failure to investigate and prosecute violations may also raise issues of command responsibility in allowing such crimes to be permissible. Indeed there is a general rejection for statutes of limitations that cover fundamental human rights violations, which would allow states to remove the personal responsibility of individuals who have committed summary and arbitrary killing, enforced disappearance and torture or similar cruel, inhuman and degrading treatment.<sup>29</sup>

### **Lessons from the ICLVR for the ICIR**

The Stormont House Agreement stated that the ICIR would build ‘on the precedent provided by the Independent Commission for the Location of Victims’ Remains’ (ICLVR).<sup>30</sup> The ICLVR was established in 1999 to locate the remains of those who were ‘disappeared’ during the conflict in and about Northern Ireland. It has been relatively successful to date, and the remains of 13 of the 16 ‘disappeared’ have been recovered and returned to their families for burial. In this response we draw on the findings of research on the ‘disappeared’ and the ICLVR carried out at Queen’s University Belfast between 2012 and 2016<sup>31</sup> to outline four key lessons which can be learnt from the experience of the ICLVR that are of relevance to this consultation.

#### **1. Trust is central**

Trust has been central to the recovery of the remains of the ‘disappeared.’ With regards the ICIR, the experience of the ICLVR is pertinent with regards both categories of individuals who are expected to engage with it: victims and survivors, and those who perpetrated violence.

From the perspective of victims and survivors, it is essential that their expectations are managed if they are to trust the process. With regards the ‘disappeared,’ early newspaper headlines suggested that remains would be recovered within days or weeks. In the majority of cases, the

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<sup>29</sup> *Marguš v. Croatia* (Application no. 4455/10), 27 May 2014, para.139; General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para.18. See also *Gelman v. Uruguay*, Merits and Reparations, Judgment, 24 February 2011, Series C No. 221, para.209-213.

<sup>30</sup> Stormont House Agreement, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/390672/Stormont\\_House\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf)> [accessed 4 April 2018].

<sup>31</sup> This research was funded by a Department for Employment and Learning Strategic Award awarded by Queen’s University Belfast.

location of remains took years. In three cases, families are still waiting. Given that trust is linked to expectation of outcome,<sup>32</sup> there is a risk that when claims are made that cannot realistically be met that this may create conditions for further mistrust to develop. In response to Question 7 of the consultation on the support that the ICIR could provide to families, the ICLVR experience suggests that one of the first steps should be managing the expectations of victims' loved ones, and being realistic about what is achievable. While one of the ICIR's functions as detailed in the Bill (41 (2)) is keeping the person who made the request informed about its progress, we would stress that an additional element of this communication function should be that the expectations of those making requests to the ICIR are carefully managed.

From the perspective of the perpetrators of past violence, the ICLVR experience demonstrates that information will only be brought forward if those providing the information trust the mechanism. The ICLVR came to be trusted in part as a result of the robustness of the legislation and guarantee of limited immunity it contained. This robustness has been proven over time. Central to its success was that it was 'hermetically sealed.'<sup>33</sup> With regards Question 8 of the consultation document, on whether the ICIR is structured correctly, with the right power and protections, one area which raises doubt is that, in the explanatory notes accompanying the Draft Northern Ireland (Stormont House Agreement) Bill it is stated (explanatory note 155) that '*policing authorities or a coroner, for instance, would not be prevented from pursuing lines of inquiry based on information disclosed by the Commission in a report to a family.*' This inclusion could lead some to believe that the ICIR process is less 'hermetically sealed' than the ICLVR, and this is likely to impact upon trust in the process, and therefore, participation. It is essential that the final Bill makes clear that information provided to the ICIR and provided to families in their reports cannot be used as a basis for the pursuit of evidence that may lead to prosecution.

## **2. Period of operation**

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<sup>32</sup> See e.g. Morton Deutsch, 'Trust and Suspicion,' *Journal of Conflict Resolution*, 2:4, (1958), 265-279; Geoffrey Hosking, *Trust: A History* (Oxford: Oxford University Press, 2014); Herbert W. Kee and Robert E. Knox, 'Conceptual and Methodological Considerations in the Study of Trust and Suspicion,' *Journal of Conflict Resolution*, 14:3, (1970), 357-366.

<sup>33</sup> Personal interview with a former diplomat who has been engaged in efforts to deal with the past in Northern Ireland, June 2015.

While the legislation that established the ICLVR provided a legal foundation upon which trust could develop, that the Location of Victims' Remains legislation was introduced almost 20 years ago and remains continue to be recovered would suggest that the legislation alone was insufficient. The length of the search process is in part a result of the practical and logistical challenges of locating burial sites several decades after these events were perpetrated. However, arguably what is also a factor is that while the legislation provided the required legal guarantees, what has been equally – if not more – important is that trust has developed in that legislation, and that relationships of trust can be said to have been built between those working for the ICLVR and those providing information. This has taken time. With regards to the conclusion of the ICIR's work, the Draft Bill (49 (6)) allows for, in addition to the period of five years' operation, 'any other period which is agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland as the period during which the Commission's functions are exercisable.' While this indication that there is scope for expanding the period of operation for the ICIR is welcome, the experience of the ICLVR indicates that the five-year period defined could be insufficient. Within the first five years of operation of the ICLVR, the remains of only four of the 'disappeared' were recovered. It was almost 10 years after the establishment of the ICLVR that the rate of retrieval gained some momentum, with the remains of other victims recovered in 2008, 2010, 2014, 2015 and 2017. This is of relevance with regards a number of the Questions contained within the consultation document. In terms of Question 2, on ensuring that all groups can effectively engage with the institution, the ICLVR experience suggests that increasing the period of operation might increase opportunity for all groups to engage effectively. With regards Question 7 on support for families, a longer period of operation may allow more families to come forward, and may provide more scope for families who want to engage with the HIU process before moving to the ICIR.

### **3. The Importance of Leadership**

Related to the role of trust is the importance of leadership. With regards the ICLVR, leadership has been essential for Republicans engaging with the search process. On the side of the ICLVR, a number of those interviewed for the research on which this response is based referred to Senior

Investigating Officer Geoff Knupfer specifically. He was described as “an impressive character,”<sup>34</sup> and “a very successful appointment.”<sup>35</sup> One Republican ex-combatant interviewed suggested that Republicans “were able to rely on Geoff Knupfer to the same extent that they were able to rely on their comrades.”<sup>36</sup> This, he said, has been “crucial.”<sup>37</sup> In terms of both Questions 7 and 8 of the consultation document, with regards support for families and the structure of the ICIR, this element of the ICLVR experience is instructive. It indicates the importance of selecting the right personnel to lead the various legacy mechanisms, as this can influence the extent to which individuals engage. This need is indicated by the inclusion in a model bill produced by a group of academics and practitioners of a list of qualities and experience that the ICIR Commissioners should have. These include being independent, impartial – and being perceived as such – and being able to handle sensitive information.<sup>38</sup> The Draft Bill provides little information on the appointment of the ICIR staff. I would suggest that more detail should be provided on this, as the ICLVR experience has shown that the appointment of the correct personnel is key.

#### **4. Limitations of ‘truth’ and the ICLVR**

As per the ICLVR’s remit, the information collected solely relates to the location of burial sites. While the ICLVR provides a useful and important precedent for the ICIR, the ICIR should aim for a broader and more comprehensive level of information recovery. This is of relevance with regards Question 8 of the consultation document, on the structure of the ICIR. While the ICLVR mechanism can be instructive, it should not be constraining. One of the Bill’s general principles is that ‘the recovery of information should be facilitated.’ The ICIR should be legislated for and operated in such a way as to facilitate the maximum possible information recovery for relatives of those killed – while of course working within the boundaries set by stipulations regarding inadmissibility of information.

For the ICIR to be effective, it is essential that the expectations of victims and survivors are managed, that it is trusted by those who are expected to pass on information, that the correct

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<sup>34</sup> Personal interview with veteran human rights activist, October 2014.

<sup>35</sup> Personal interview with community activist with over 20 years’ experience working with ex-combatants, October 2015.

<sup>36</sup> Personal interview with Republican ex-combatant, April 2015.

<sup>37</sup> Personal interview with Republican ex-combatant, April 2015.

<sup>38</sup> Stormont House Agreement, Model Implementation Bill. Available at <<http://www.caj.org.uk/contents/1289>>.

personnel are selected to lead it, and that it is designed in such a way so as to maximise information recovery. Central to this will be the provision of assurance that information provided to the ICIR will not feed into any prosecutorial process.



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