

Dealing with the Past in Northern Ireland: Amnesties, Prosecutions and the Public Interest

Written Submission to Dr
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O'Sullivan and the Panel of
Parties in the NI Executive

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INTRODUCTION

The challenges associated with Dealing with the Past have proved one of the most difficult aspects of the Northern Ireland transition. Broadly, the approach to date has been a piecemeal one wherein a range of distinct agencies and processes have focused on discrete elements of the past. The most important of these have included the work of the Historical Enquiries Team, the Office of the Police Ombudsman, Inquests and related legal challenges (including to the European Court of Human Rights), the work of the Independent Commission for Location of Victims' Remains, a number of public inquiries into specific events, the De Silva Review, the Criminal Cases Review Commission and a range of grassroots or 'bottom up' initiatives.¹ The recommendations of the Consultative Group on the Past have not been actioned (due to a lack of political consensus) and in the absence of an overarching mechanism, the piecemeal approach has continued.

As academics who work in the fields of law and specifically transitional justice, we make this submission to the Haass Commission in the belief that our current project enables us to offer authoritative insight into key aspects of truth recovery and dealing with the past in the context of contemporary Northern Ireland (NI). This submission draws on the insights gained by the authors² through their work in an ongoing Arts and Humanities Research Council (AHRC) funded project *Amnesties, Prosecution and the Public Interest in the Northern Ireland Transition*. This project was designed and is being carried out in partnership with Healing Through Remembering, a key 'past-related' non-governmental organisation working across communities and sectors in Northern Ireland.

The project draws upon the findings from previous international research by McEvoy and Mallinder (with Brice Dickson) on the use and impact of amnesty and other leniency measures in Argentina, South Africa, Uganda, Uruguay and Bosnia-Herzegovina.

Through a range of multifaceted engagements across the NI political spectrum the project team has been able to listen to the priorities and concerns of those most directly affected by past violence, as well as those who will be involved in designing any future mechanisms to deal with the past.

We take the view, widely accepted in international scholarship and practice, that in legal terms, 'forgetting the past' is not a viable option. Nor will simply allowing

¹ For an overview of these processes, see *Making Peace with the Past: Options for Truth Recovery Regarding the Conflict In and About Northern Ireland* (Healing Through Remembering, Belfast 2006) and *Dealing with the Past in Northern Ireland: An Overview* (Healing Through Remembering, 2013) - both authored by Kieran McEvoy.

² The project team also draw upon an extensive knowledge of transitional justice and have conducted fieldwork in a number of post-conflict societies.

historians to investigate documents, as has been suggested by some, prove sufficient. This would, in our view, violate the investigative obligations under Article 2 of the European Convention of Human Rights. In addition, at a political level, Northern Ireland's history indicates that failure to address the past results in denial and renewed division allowing 'violence entrepreneurs' on either side to promote political violence through partial and mutually exclusive versions of the past. Current unrest should, we suggest, act as a warning that decisive action must be taken.

The state must balance demands from victims for truth and justice with the complex political and legal realities which may require the use of amnesties or similar measures. As the authorities in Northern Ireland are currently discovering, the absence of such an agreed balance can be profoundly destabilising during this period of transition.

The phrase 'dealing with the past' is rarely conceptualised and its requirements are deeply contested in Northern Ireland. Commonly accepted elements include the need to try to address the legacy of damage done by violence or repression, and the need to account for past human rights violations.

As in other international contexts, addressing the past in Northern Ireland has included measures such as releasing politically motivated prisoners, reviewing potentially unjust convictions, granting reparations and encouraging combatants to disarm and demobilise. It has also included efforts to prevent future abuses through establishing human rights protections and oversight bodies. As this submission will note, the measures adopted in NI were often facilitated by amnesties or other leniency measures. Precisely because such measures are always controversial, it is our considered view that no transition from conflict is possible without an informed debate about tensions and compatibilities between amnesties and prosecution. Our current project therefore aims:

- **To provide technical information on the; (a) international, (b) historical, and (c) legal context of amnesties, prosecutions and truth recovery in NI**
- **To enable informed debate to take place in NI on amnesties, prosecutions and the public interest**
- **To listen to the views of individuals, groups or institutions concerned with dealing with the past**
- **To participate in such debate**

To achieve this we have, since November 2012:

- Conducted over 25 briefings on the project themes with victims, former paramilitaries, serving and retired police officers, civil society organisations,

representatives of the British and Irish governments, directors of all of the key criminal justice agencies, and the political parties

- Organised and participated in roundtables in Belfast and Derry/Londonderry on the issues of dealing with the past in relation to investigations, prosecutions, amnesties and truth recovery
- Hosted a conference at the Europa Hotel in May 2013 with speakers including the Attorney General for Northern Ireland, the Director of Public Prosecutions for Northern Ireland, the Police Ombudsman for Northern Ireland, the Director of the Historical Enquiries Team (HET), the head of the investigation team of the Independent Commission for the Location of Victims' Remains, and a Commissioner from the Criminal Case Review Commission. The conference was attended by over 170 individuals from all backgrounds in Northern Ireland and received extensive broadcast and print media coverage.
- As discussed below, the speakers presented their perspectives on the issues of truth recovery, historical investigations and prosecutions, and legality of amnesties in dealing with the past in Northern Ireland³

The project is ongoing. While there are manifest disagreements on the appropriate methods for dealing with the past, a number of themes have permeated our discussions across the political spectrum to date. These include:

1. The belief that existing piecemeal measures to deal with the past are cumulatively no longer fit for purpose;
2. The reality that, for legal, political and moral reasons, it is not possible to simply terminate investigations;
3. A widely shared acknowledgement of the legal and practical difficulties associated with achieving successful prosecutions for conflict related offences.
4. A willingness to discuss at least the role that amnesty or other leniency measures could play in facilitating future truth recovery. This does not suggest a consensus that such measures should be introduced. Rather it is evidence at least of a readiness to explore what may be legally or politically feasible.

In our range of engagements with political, civil society and legal actors we have offered to provide technical guidance on any relevant issue requested by those we have met. To date, the themes on which further technical information has been requested have included:

- The legal position on amnesties and the duty to prosecute
- Amnesties, prosecutions and the right to justice
- Amnesties, prosecutions and the right to reparations

³ Videos of all conference presentations are available on the project website.

- The impact of amnesties on civil litigation
- The meaning of ‘the public interest’

The purpose of this submission is to give a brief overview of the key issues addressed to date by our project. We would be happy to discuss any of these issues further with members of the Panel and/or to provide additional written materials on the points listed above.⁴

KEY ISSUES

ARE AMNESTIES COMPLIANT WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

It is commonly accepted that the violence of the Troubles did not reach the threshold of international crimes. As a result, the duties incumbent on the United Kingdom are primarily regulated by the European Convention on Human Rights. The European Court of Human Rights has established clear jurisprudence on the procedural obligation on states to investigate violations of Article 2 on the right to life and Article 3 on freedom from torture, inhuman or degrading treatment or punishment. This jurisprudence has developed in part from a series of cases on Northern Ireland.⁵ The Court has found that an investigation into Articles 2 or 3 must be **prompt, effective, independent** and **transparent**. However, as discussed below, the court has declined to find that states have an obligation to prosecute those responsible for violations of Article 2.

⁴ Our written briefings on all these points will be freely available on our project website in the forthcoming weeks.

⁵ *Hugh Jordan v UK* involved the shooting by the RUC in Belfast 1992 of Pearse Jordan, who was unarmed at the time, (2003) 37 EHRR 2; *Kelly and others v UK*, involving the lethal shooting of nine men in Loughall in 1987, including one unarmed civilian and two unarmed members of the IRA, by the RUC and the SAS, (Appl No. 30054/96, May 4, 2001); *McKerr v UK*, on the shooting of three unarmed members of the IRA in Lurgan in 1982 (2002) 34 EHRR 20; and *Shanaghan v UK*, where the applicant’s son Patrick was shot dead in 1991 by the UFF with claims of police collusion (Appl No. 37715/97, May 4, 2001). See also *McShane v UK*, where the applicant’s husband, Dermot McShane, was killed by a police personnel carrier in Derry in 1996 during a riot (2002) 35 EHRR 23; *Finucane v UK*, where lawyer Patrick Finucane was shot in front of his family in 1989 by the UFF with claims of collusion (2003) 37 EHRR 29; *Brecknell v UK*, involving two men and one boy being shot dead and six others injured by the Red Hand Commandos in Silverbridge 1975, with claims of collusion with the RUC (2008) 46 EHRR 42; *O’Dowd v UK*, three catholic members of the same family were shot dead by masked gunmen, and a fourth member injured, again with claims of collusion by the RUC and UDR [2007] ECHR 247; *McGrath v UK*, where the applicant was shot twice by a reserve RUC officer as part of a loyalist attack on a bar in County Armagh in 1976, which involved other members of the RUC and UDR in the linked murders in the Brecknell, O’Dowd, McCartney and Reavey cases, as well as others, [2007] ECHR 249; *Reavey v UK*, where masked gunmen killed the applicant’s three sons [2007] ECHR 985; *McCartney v UK*, where two catholic men were shot dead by loyalists in South Armagh with claims of collusion with the RUC and UDR [2007] ECHR 994; *McCaughy and others v UK* [2013] ECHR 682, in which Martin McCaughey and Desmond Grew were shot and killed by the British soldiers in Loughgall in 1990; and *Hemsworth v UK* [2013] ECHR 683, where John Hemsworth was hit in the face and body with a police truncheon and kicked by members of the RUC, he died a few months later of a cerebral infarction.

The European Court of Human Rights has not had much opportunity to adjudicate directly on amnesties. In its *Tarbuk v Croatia* case, the Court held that

the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public.⁶

This restates the finding of the European Commission's admissibility decision in *Dujardin and Others v France*.⁷

For Article 2 violations, the European Commission and Court's jurisprudence suggests that amnesties can be permissible provided they are necessary to achieve the legitimate interests of the state and are balanced against the views of individual members of the public. This includes the views of victims in relation to finding the truth and an effective remedy for the harm they suffered, as well as more generally public confidence in the state's adherence to the rule of law. However, as noted below, victims do not have a veto over decisions to grant amnesty. At the conference associated with this project, the Attorney General for Northern Ireland recently cited the reasoning of the *Dujardin* case to argue that an amnesty could be possible in Northern Ireland to facilitate legitimate public interests and be compliant with the European Convention.⁸

In short, in line with the Attorney General for Northern Ireland, it is our reading of the obligations under Article 2 of the European Convention of Human Rights that the Article does not require prosecutions. Rather it requires a full effective and transparent investigation of alleged violations of the right to life.⁹

DO VICTIMS HAVE A VETO OVER DECISIONS NOT TO PROSECUTE?

The European Court has consistently stated that any transparent investigation has to involve the participation of the victim's family.¹⁰ However, in the *Öneryildiz v Turkey* case the Court affirmed that victims have no right to claim prosecution or punishment of those responsible:

⁶ *Tarbuk v Croatia*, Application no.31360/10, (ECtHR, 11 December 2012).

⁷ App. No. 16734/90; 72 D.R. 236.

⁸ John Larkin, *Summum Ius?* Presentation at the Dealing with the Past in Northern Ireland: Law, Prosecutions and Truth Recovery, 21st May 2013.

⁹ It is also worth mentioning another type of permitted and regularly used amnesty related measure, use immunities, which prevent any evidence given by an individual from being used in a criminal proceeding against them, but allow the person to be prosecuted if other evidence emerges. Use immunities have often been used in Northern Ireland to enable individuals to speak openly and honestly without threat of prosecution.

¹⁰ *Shanaghan v the United Kingdom*, App no 37715/97 (ECtHR, 4 May 2001) para.92; and *McKerr v the United Kingdom*, App no 28883/95, (ECtHR, 4 May 2001), para.115.

It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence.¹¹

This position was restated in *Brecknell and others v UK*, where the court found ‘There is no absolute right ... to obtain a prosecution or conviction’. Thus Article 2 does not give victims a right to prosecution or to veto decisions not to prosecute.

HOW HAVE AMNESTIES BEEN USED HISTORICALLY IN NORTHERN IRELAND?

Amnesties have been used at several junctures during the conflict and transition in Northern Ireland to facilitate public interest issues of the day. In some instances these measures were designed to facilitate peace-making efforts or to uncover the truth about past acts of violence. While these measures touched on specific issues, their use and acceptability under the broader notion of public interest, is instructive for the possible future construction of an amnesty to address the past in Northern Ireland more comprehensively. There have been five instances of amnesties or related measures being used in Northern Ireland, with two further measures suggested in recent years.

The 1969 Amnesty

In May 1969, the Northern Irish Prime Minister, James Chichester Clarke, decided with the support of the Attorney General and his cabinet at Stormont to introduce a general amnesty for ‘events associated with, or arising out of, political protests, utterances, marches, meetings, demonstrations occurring between 5 October 1968’ and 6 May 1969.¹² This amnesty was an executive decision rather than enacted legislation. According to the Attorney General, it applied to criminal proceedings that were pending, any future proceedings, the collection of fines already imposed, and provided for the remission of sentences for those already convicted.¹³ The amnesty was introduced within a context of growing civil unrest and was designed to de-escalate the conflict, or, in the words of the then Prime Minister, to ‘wipe the slate clean and look to the future’.¹⁴ It had a wide application to all criminal offences associated with the demonstrations, including attacks on civilian homes, but excluding ‘acts of sabotage’.¹⁵ It was designed to cover both civilians and members

¹¹ *Öneryildiz v Turkey*, Application no. 48939/99, 30 November 2004, para.96. A similar position is found by the Human Rights Committee, *Arhuaco v Colombia*, Views on Communication No. 612/1995, CCPR/C/60/D/612/1995, 29 July 1997; and *Brecknell et al v United Kingdom*, paras.65-66.

¹² Northern Ireland Information Service Press Release, 6 May 1969.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

of the Royal Ulster Constabulary, and was unconditional. Among those released from prison in accordance with the amnesty were Major Ronald Bunting and Ian Paisley (NI's First Minister from 2007-08).

Decommissioning

The decommissioning of arms held by paramilitary groups was provided for in the Good Friday Agreement. This was based on the Northern Ireland Arms Decommissioning Act 1997, which, under section 4 entitled 'Amnesty', is designed to ensure that prosecutions do not hinder the process of decommissioning. The amnesty was limited to one year, but was repeatedly renewed by the Secretary of State.¹⁶

In effect those involved in the process (e.g. in the movement of weaponry or armaments) could not be criminally prosecuted if they were acting in accordance with the decommissioning scheme. In addition, any weapons or munitions recovered as a result of the scheme could not be forensically tested or used in criminal proceedings.¹⁷ All the main paramilitary groups decommissioned arms under this scheme.¹⁸

Early Release of Prisoners

The early release of prisoners was a key part of the negotiations of the Good Friday Agreement. It stipulated that those who qualified would be released within two years of legislation being passed. The Early Release Scheme was enacted in the United Kingdom through the Northern Ireland (Sentences) Act 1998. Under this scheme, qualifying prisoners have to apply to the Sentence Review Commissioners for early release.¹⁹ All prisoners have to satisfy three conditions in order to be eligible:

1. he or she must have been convicted in Northern Ireland for a qualifying offence;²⁰ and imprisoned for life or at least five years;

¹⁶ The amnesty period was originally due to end on the first anniversary of the passing of the act in 1997, but it was extended every year, with it finally expiring on 9 February 2010. The Northern Ireland Arms Decommissioning Act 1997 (Amnesty Period) Order 2009 SI 2009/281 and The Northern Ireland Arms Decommissioning Act 1997 (Cessation of Section 7) Order 2011 SI 2011/977.

¹⁷ Northern Ireland Arms Decommissioning Act 1997, s 5.

¹⁸ This included IRA, the UVF/RHC, the UDA, the South East Antrim group of the UDA, the OIRA and the INLA.

¹⁹ The Sentence Review Commissioners are an independent body made up of currently an international Chairman and eight other commissioners, amongst whom must be one lawyer and one psychiatrist or psychologist. The commissioners are appointed by the Secretary of State.

²⁰ Qualifying offences for early release are those scheduled offences committed before 10 April 1998, section 3(7)(a). A scheduled offence is a crime, such as murder, arson or possession of a firearm, which requires a non-jury criminal trial, termed a 'Diplock' trial, introduced in the 1970s to prevent witness and jury intimidation.

2. he or she must not be a supporter of a specified organisation;²¹ and
3. that upon release he or she would not be likely to become a supporter of a specified organisation or become involved concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.²²

Life prisoners have to satisfy a fourth condition; that is, that if released they would not be a danger to the community.²³ As the IRA, UVF and UDA were all maintaining a ceasefire at the time of the Good Friday Agreement, their prisoners were eligible under the Act for early release.²⁴

The early release scheme does not erase a prisoner's conviction, nor assert that a crime was not committed. Instead, the Northern Ireland scheme is more like a conditional pardon, as the release of a prisoner can be revoked for non-compliance with certain conditions.²⁵

As of March 2013, 640 applications for release were made by prisoners, the majority around 1998-1999. Of these applicants, 482 have been released (314 fixed term and 168 life sentence prisoners).²⁶ Only 21 have had their licence revoked (4 fixed term and 17 life sentence prisoners)²⁷ which represents 4% - a fraction of the normal 47% reoffending rate in Northern Ireland within two years.²⁸ In transitional justice terms, this scheme was a conspicuous success.

²¹ A specified organisation is one which is involved in terrorist activities connected to Northern Ireland and is not established or maintaining a complete and unequivocal ceasefire (section 3(8)). Such organisations are kept under review by the Secretary of State, based on their commitment to democracy; cessation of committing, directing or promoting acts of violence; and co-operation with the Decommissioning Commission. Specified organisations currently include: the Continuity IRA; the Loyalist Volunteer Force; the Orange Volunteers; the 'Real' IRA; the Red Hand Defenders; and Óglaigh na hÉireann (ONH). This list of specified organisations is in effect from 23 July 2008 under the Northern Ireland (Sentences) Act 1998 (Specified Organisations) Order 2008 and has not been changed as of April 2013.

²² Section 3(3)-(5), NI (Sentences) Act 1998.

²³ Section 3(6), NI (Sentences) Act 1998.

²⁴ Other paramilitary organisations including the INLA, and the Red Hand Commandos later declared ceasefires, thus ultimately making their prisoners eligible under the Act, and the Official IRA had been on ceasefire since 1972.

²⁵ Namely: that he or she does not support a specified organisation; that he or she does not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland; and in the case of a life prisoner, that he or she does not become a danger to the public.

²⁶ Sentence Review Commissioners Annual Report 2012/13.

²⁷ Most of these were revoked as the individual committed a serious non-scheduled offence and were deemed a danger to the community. See *Re McLean* [2005] UKHL 46.

²⁸ Adult Reconviction in Northern Ireland 2005, Research and Statistical Bulletin 1/2011, Department of Justice.

Location of Victims' Remains

The UK and Irish governments, on the basis of advocacy by families of persons who were disappeared by the IRA (and one by the INLA) between 1972 and 1981, established a process to recover their remains.²⁹ Under the Northern Ireland (Location of Victims' Remains) Act 1999 and the Criminal Justice (Location of Victims Remains) Act 1999 (in the Republic of Ireland) the British and Irish governments established a Commission to assist in the task of recovering the bodies.

This legislation provided that no evidence gleaned by the Commission would be admissible in criminal proceedings, including evidence provided by those involved in the commission of the offence (section 3), that forensic testing could only be carried out to facilitate identification (section 4), and that the information could only be passed on to other authorities for the purpose of assisting with locating the remains (section 5).

As with other processes which utilised use immunities, the Acts do not prevent the prosecution of those responsible for disappearances if other evidence arises from other sources. Information gained from this process helped lead to the discovery of the remains of ten of the disappeared.³⁰

At the conference associated with this project Mr Geoff Knupfer who heads up the Commission confirmed that, in his view, those former IRA members who had engaged with the Commission in order to assist with the location of remains had done so in good faith.

Immunity for Evidence to Public Inquiries

The Bloody Sunday Tribunal chaired by Lord Saville was established in 1998 to investigate the deaths of 13 civilians on Bloody Sunday. It was considered essential that, in order to discover the truth of what happened, witnesses should not refuse to co-operate on the grounds that they may incriminate themselves.³¹ **This led the Attorney General to stipulate that any written material or oral evidence provided by a witness cannot be used to incriminate that witness in any later criminal proceedings.**³² This does not rule out the possibility of future criminal proceedings against an individual, only that their own evidence to the Bloody Sunday Inquiry

²⁹ Loyalist paramilitaries were also responsible for at least five disappearances during the conflict, though their bodies were found within a number of months. See CAIN Details on 'the Disappeared', available at: <http://cain.ulst.ac.uk/issues/violence/disappeared.htm> Accessed 23/08/13.

³⁰ Although at least seven other individuals remain to be found. Joe Lynskey has been added to the list and it is understood that others may be in future.

³¹ Bloody Sunday Inquiry website, 'Questions and Answers' <<http://www.bloody-sunday-inquiry.org.uk>>

³² K. McEvoy, *Making Peace with the Past: Options for Truth Recovery Regarding the Conflict In and About Northern Ireland (Healing Through Remembering, Belfast 2006)* 42-3.

could not be used against them.³³ The inquiries into collusion in the cases of Billy Wright, Robert Hamill, Rosemary Nelson and the Smithwick Inquiry into the murder of Harry Breen and Robert Buchanan, have similarly used immunities for witnesses giving evidence before the tribunals.³⁴

Proposed Amnesty for the 'On-The-Runs'

The Northern Ireland (Offences) Bill 2005 was introduced by the then Labour government following sustained pressure from Sinn Féin to ensure that individuals who had outstanding charges or convictions, when they absconded or escaped from prison, could return to the United Kingdom without fear of prosecution or imprisonment. The proposed legislation consisted of two elements (a) a body to establish eligibility for the scheme, and (b) a special judicial tribunal to hear cases. Applicants who qualified would be put on trial and sentenced by a special judicial tribunal with one senior judge. Following conviction they would be subject to a modified early release scheme with a minimum term of zero years, meaning individuals could be released the same day on licence.

The scheme ultimately collapsed for a number of reasons, in particular when it became clear from proposed government changes that it would also be available to members of security forces who had not been prosecuted for direct involvement in serious crimes or related collusive activities. Although Unionist and Conservative opposition to the scheme was predicted from the outset, once the SDLP and then Sinn Féin withdrew their support, the initiative became politically untenable.

Amnesty, Protected Statements and the Consultative Group on the Past

The Consultative Group on the Past (CGP) was set up in 2007 by then Secretary of State for NI, Peter Hain, to carry out a broad consultation. In its 2009 report it made a number of recommendations. For our purposes, the CGP noted the number of advantages of amnesties in facilitating truth recovery, namely, 'an amnesty would remove some of the anomalies and inconsistencies in the handling of historical cases', 'avoid some of the expense of a new mechanism', 'allow greater focus on information recovery', reflect the 'fact that the chances of successful prosecutions in historical cases are fast receding', 'avoid problems arising from criminal case reviews', and may 'encourage society to move on'.³⁵ The CGP also noted that

³³ Ibid.

³⁴ As a result of the recommendations made by Justice Cory (2004) who was appointed as part of the Weston Park Agreement between the UK and Irish governments in 2001. See the Attorney General undertaking for witness immunity in Robert Hamill inquiry available at: www.roberthamillinquiry.org/the-public-hearings/witnesses/immunity accessed 20/09/2013; and Rule 6, Smithwick Tribunal Rules of Procedure.

³⁵ Consultative Group on the Past Final Report (2009), p132.

amnesty 'may not necessarily contravene rights under the European Convention on Human Rights'.³⁶

Nonetheless, the report mentioned that a general amnesty 'would not be appropriate in the present situation' in Northern Ireland.³⁷ This position appears to have been arrived at as a result of the views expressed by politicians and some victim representatives during the CGP consultation. The CGP did note that some persons who engaged in the consultation 'privately felt that drawing a line in some way might be the best way forward' but they could not express this publicly as members of their community still wanted to pursue prosecutions of the 'other side'.³⁸

The CGP report proposed that the Legacy Commission make recommendations 'on how a line might be drawn at the end of its five-year mandate', which could include amnesty.

In relation to removing obstacles to offender testimony, the CGP maintained that if any truth recovery process is 'to succeed, it is essential that persons providing information are able to do so without fear of that information being used in criminal or civil proceedings against them'. The CGP therefore proposed that

Statements could be made to the Information Recovery Unit and the Thematic Examination Unit which would not be admissible in criminal or civil proceedings against the person making them. This would apply to both primary and secondary evidence: in other words, information provided in the Statement itself, or any information or evidence which could be obtained or deduced as a consequence of that Statement, would not be admissible in criminal or civil proceedings.

The CGP asserted that such protected statements offered protection to the statement but not the individual. If any evidence emerged outside of this process that the individual committed a crime it could still be brought before a court.³⁹

The recommendations contained in the CGP's report have not been implemented. On publication, the report immediately became embroiled in controversy in particular concerning the issue of recognition payments to all of those who lost loved ones during the conflict and appears to have been shelved.

WHAT ARE THE CHALLENGES FOR HISTORICAL INVESTIGATIONS AND PROSECUTIONS?

There are a number of difficulties in historical investigations and prosecutions related to the conflict in Northern Ireland owing to the lack of sufficient and reliable

³⁶ Consultative Group on the Past Final Report (2009), p132.

³⁷ Ibid.

³⁸ Ibid p 58.

³⁹ Ibid. p 129-130.

evidence to secure a conviction, the strain on current investigative agencies, and the small number of likely prosecutions.

Evidence

Sir Hugh Orde, former Chief Constable of the PSNI, has given a vivid account of the difficulties of investigating historical crimes. Speaking about the recovery of evidence by the Historical Enquiries Team (HET) he said:

the likelihood of solving cases was clearly going to be slight. Witnesses would be old or dead. Exhibits, if still available, could be contaminated or inadmissible. Informants and agents would be in the mix; the original paperwork incomplete or missing... At the height of the Troubles, 497 people were murdered in one year. The forensic laboratory was blown up twice. Numerous police stations were blown up, stations housing much of the investigative material. ... The fact that evidential opportunities lost at the time would be hard to recover did not render the initiative worthless. We had to shift the focus to ensure that, mindful of our primary role as investigators, the driving force behind this initiative would be to deliver a meaningful outcome for the families.⁴⁰

Controversy surrounds the gathering of evidence in relation to conflict related crimes in NI. The Royal Ulster Constabulary was not trusted by many nationalists, and there was for a time a practise of allowing Military Police to investigate alleged crimes by British soldiers. There is mounting evidence of collusion between security forces and paramilitary organisations and therefore reason to suspect that the gathering of evidence in such cases may be compromised.⁴¹ For a range of reasons, in many cases dating back to the earliest years of the conflict, only very rudimentary investigations appear to have been carried out.

The passage of time in any case is likely to diminish evidence. Witness testimony can become unreliable. The physical environment may have changed. Forensic evidence may not have been adequately preserved nor a secure chain of custody maintained. Other evidence may be unavailable as a witness can pass away or be untraceable. During the Northern Ireland conflict the police were at times unable to recover bodies for a number of days for forensic investigation in case the bodies had been booby trapped, or enter a crime scene due to a security threat.⁴²

⁴⁰ Sir Hugh Orde, War is easy. Peace is the difficult prize, Longford Lecture, London, 2 December 2009. Available at: http://www.longfordtrust.org/lecture_details.php?id=6 Accessed 20/09/13.

⁴¹ See eg. D. De Silva (2012) Independent Review into the Murder of Patrick Finucane. Available at <http://www.patfinucanereview.org/report/index.html>

⁴² Testimony of Raymond White (NIRPOA), House of Commons Select Committee on Northern Ireland Affairs, 2 April 2008.

These evidential issues can make it nearly impossible to present a prosecution case which would have a reasonable success of a conviction.⁴³

Although the HET continues to review a number of deaths related to the conflict and to pass on files to the PSNI for investigation, as of July 2013 only 39 have been referred to the Public Prosecution Service. As of September 2013 only three individuals have been convicted of murder as a result of such investigations.

Owing to the limitations of evidence those cases where individuals are convicted tend to relate to offences in which they could have only been an accessory, such as the driver,⁴⁴ or the person who supplied the weapon, instead of the person who pulled the trigger.

It should also be noted that any paramilitary defendant convicted of pre-1998 conflict related offences who met the criteria outlined above (re belonging to an organisation now on cease-fire etc.) would only serve a maximum of two years under the terms of the Good Friday Agreement. Indeed, if a suspect is held on remand during their trial they could effectively be released within a few weeks or months of their conviction under the early release scheme.

Truth and justice are not, of course, synonymous. The criminal justice system is premised upon prosecuting and punishing those responsible for crimes, rather than exploring the broader causes, context and consequences of such crimes. In a context where many defendants might well choose to stay silent during the interrogation and/or trial, the potential for such trials to provide a mechanism for truth recovery (as has happened in other jurisdictions) is probably quite limited in Northern Ireland.

This position is supported by the findings of the European Court of Human Rights, which has held that a prosecution following a violation of the right to life may not always be possible in practice. The European Court in *Finucane v UK*, involving the murder of solicitor Pat Finucane by loyalist paramilitaries, determined that while an effective investigation should be commenced into a violation of Article 2, in this case, and others like it, an investigation conducted years after the murder is unlikely to be effective. As the Court stated:

It cannot be assumed in such cases that a future investigation can usefully be carried out or provide any redress, either to the victim's family or to the wider public by ensuring transparency and accountability. The lapse of time and its effect on the evidence and the

⁴³ See Denis Boyd and Sean Doran, *The Viability of Prosecution based on Historical Enquiry: Observations of Counsel on Potential Evidential Difficulties, Healing through Remembering* (2006).

⁴⁴ As in the case of Robert Rodgers, a UVF member who was convicted in March 2013 for the murder of 19 year old Eileen Doherty in 1973. An HET investigation led to his hand print being identified on the taxi used in the murder.

availability of witnesses inevitably render such an investigation unsatisfactory or inconclusive, by failing to establish important facts or put to rest doubts and suspicions.⁴⁵

While the passage of time, the antiquity of evidence and other setbacks are 'not necessarily fatal' to investigations and prosecutions,⁴⁶ the prospect that significant numbers of persons will be convicted for historical crimes during the NI conflict is unlikely.

Strain on Investigative Agencies

Fundamental flaws have previously been highlighted in the work of the Historical Enquiries Team and the Police Ombudsman.⁴⁷ The historical work of the Office of the Police Ombudsman has been significantly reviewed and reformed as a result of the crisis in public confidence in its management and practices under the tenure of the previous Director Al Hutchinson.

The fate of the HET remains unclear. Other investigative agencies such as the PSNI and the inquest system are under both resource and capacity strains.⁴⁸ These public institutions are caught between legal obligations to investigate the past while at the same time trying to maintain current public services. For the PSNI this is most acute as public confidence in the ability of reformed police service to investigate historical crimes has been impaired by the revelation that former RUC officers have been involved in historical investigations. Furthermore, the HMIC report into the HET dramatically undermined confidence in the HET's impartiality. Particularly damaging was the revelation that investigators had not cautioned soldiers in pursuing questions to which families required answers.⁴⁹

⁴⁵ Finucane, para.[89]. See Denis Boyd and Sean Doran, *The Viability of Prosecution Based on Historical Enquiry: Observations of Counsel on Potential Evidential Difficulties, Healing Through Remembering* (2006).

⁴⁶ Boyd and Doran p6.

⁴⁷ See Patricia Lundy, *Research Brief: Assessment of the Historical Enquiries Team (HET) Review Processes and Procedures in Royal Military Police (RMP) Investigation Cases* (2012); *Relatives for Justice* in their February 2012 submission, *Communication from a NGO (Relatives for Justice) in the McKerr group of cases against United Kingdom (Application No. 28883/95) - Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*, DH-DD(2012)244E; See *Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) & the Pat Finucane Centre (PFC) in relation to the supervision of Cases concerning the action of the security forces in Northern Ireland*, (2012); and *Inspection of the Police Service of Northern Ireland Historical Enquiries Team, Her Majesty's Inspectorate of Constabulary* (2013); and *Criminal Justice Inspectorate in Northern Ireland, An inspection into the independence of the Office of the Police Ombudsman for Northern Ireland* (2011).

⁴⁸ *Criminal Justice Inspectorate in Northern Ireland, Matching human resources with priorities in the Police Service of Northern Ireland* (May 2013); and *Policing The Past, Present and Future: Examining the Past and Keeping People Safe Today and in the Future*, (2012).

⁴⁹ *Inspection of the Police Service of Northern Ireland Historical Enquiries Team, Her Majesty's Inspectorate of Constabulary* (2013) p81.

It is important to note that across the leadership of all of the criminal justice agencies with which we have engaged, it is agreed that the current piecemeal approach to dealing with the past is not delivering satisfactory outcomes. All of the agencies have told us that in the absence of a viable overarching alternative they will continue to conduct their past-related activities within their respective statutory frameworks to the best of their abilities. However, each of them is also willing to explore what alternative approaches might look like.

CAN THE PUBLIC INTEREST TEST FOR PROSECUTIONS BE MODIFIED TO EXCLUDE HISTORICAL PROSECUTIONS?

Even where there is sufficient evidence to secure a conviction of a suspect, the Public Prosecution Service (PPSNI) has discretion on whether or not to prosecute in the 'public interest'. The PPSNI Code for Prosecutors lists public interest factors to be taken into account when exercising discretion including whether national security issues are raised, and whether the defendant is elderly, in ill-health or has tried to put right the harm caused.⁵⁰ Victims' interests are also an important consideration in such decisions, but they are not the only factor. Prosecutors have to balance the interests of victims and the public interest in reaching decisions on whether or not to prosecute.

As the current Director of Public Prosecutions in Northern Ireland, Barra McGrory QC, has said, the decision not to prosecute in the public interest where there is sufficient evidence requires 'exceptional' reasons. However, he emphasised that any decision not to pursue prosecutions for historical cases in general should be what he called a 'political decision'.⁵¹

In short, the Directors view appears to be that the discretion not to pursue historical conflict related prosecutions 'in the public interest' cannot and should not be used as a substitute for a broader political decision regarding such matters, duly enacted in legislation.

WHAT ARE THE KEY DESIGN CHALLENGES IN A TRUTH RECOVERY MECHANISM?

There are a range of technical issues in relation to devising and managing a truth recovery mechanism, detailed consideration of which are beyond this submission. However, we can identify broad themes which must be considered when planning the construction of such a mechanism.

1. In relation to **trust**, if a truth recovery mechanism is established and empowered to hear testimony from offenders, it may raise concerns regarding how to

⁵⁰ PPSNI, Code for Prosecutors, (2008).

⁵¹ Barra McGrory seminar on 'The Role of the Director of Public Prosecutions in Transitional Justice', Transitional Justice Institute, 30/1/2013.

determine whether these individuals are truthful. One response to such challenges would be to grant the mechanism powers to compel testimony, requiring it to corroborate offender statements using victim and witness testimony and written documents, and imposing penalties for perjury.

The experience of the Independent Commission for the Location of Victims' Remains (ICLVR) suggests that where amnesty measures are available to incentivise individuals to tell the truth it is possible to design a mechanism where those responsible do actively engage. As noted above, the lead investigator of the ICLVR has publicly stated his belief that those former members of the IRA with whom the commission has engaged on this issue have done so in good faith. Corroborating evidence using written materials can be challenging where disclosing state documents could risk revealing national security information or identifying individuals whose lives may be put at risk. Again, evidential rules, such as confidentiality measures or closed sessions could be used.

2. The **type of truth** pursued by a truth recovery process is also important to a range of actors. Some groups strongly support the idea that truth has to go beyond the forensic facts as to what happened. They emphasise the importance of personal narratives to reflect individuals' experiences, as well as information about the wider political and social forces that shaped lives and choices. Members of the security forces told us that they wished to highlight the difficulty of their role in investigating crimes while trying to police communities during the conflict. They felt that this context is often overlooked when cases are dealt with on an individual case by case basis.

A number of individuals suggested that a comprehensive mechanism that was independent and international would serve better than the current piecemeal, individual case investigations through the HET, OPONI and the inquest system, which, they felt, failed to take into account the wider social context, overlap in different cases, and exclude the truth needs of those who were injured.

As in a range of Truth Commissions in different international contexts, such a body would have to examine the causes, context and consequences of historical violations.

3. One issue which has been raised by a number of interlocutors has been the question of whether **state and non-state actors** could be treated differently by any amnesty like mechanism linked to truth recovery. Simply put, some former security force members and Unionist politicians are reluctant to accept any one structure that would treat state actors and those convicted of terrorist offences as equivalent to each other. As noted above, differential treatment by the HET of state and non-state actors is the key issue which undermined political confidence in the HET process and was determined as in breach of Article 2 obligations by

the HMIC investigation. That said, it may be possible to create parallel processes for state and non-state actors in a truth recovery mechanism in order to avoid moral equivalence between the two, distinguish the stricter human rights obligations imposed on state actors and to more comprehensively address issues of collusion.

While we are continuing to work on some of the technical issues involved, we are of the view at this stage that these challenges can be overcome by carefully crafted legal and evidential rules.

CONCLUSION

No one we have encountered on this project has claimed that the current unstructured approach to dealing with the past is working for Northern Ireland. Of course, individual cases dealt with through the Inquest system, the OPONI, the ICLVR, the HET, or the courts may bring some degree of comfort to some families. However, we contend that the current system is incapable of dealing with the past and that the development of comprehensive strategy must be initiated as a matter of urgency.

We continue to be willing and available to provide (without charge) technical assistance to the Haass team, the All-Party Panel or any civil society or community organisation with an interest in these issues. Although our project was initially scheduled to end in November 2013, we have recently agreed with the funding body to extend the project for a further six months. Our work on these issues will, of course, continue thereafter.

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