RELATIVES FOR JUSTICE

RESPONSE to the CONSULTATION "Addressing the Legacy of the Past"

OCTOBER 2018

RELATIVES FOR JUSTICE

The untold stories of Relatives, Victims and Survivors

'To look backward for a while is to refresh the eye,
to restore it, and to render it more fit for its prime
function of looking forward.'

Margaret Fairless Barber

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Opening Remarks by CEO

Relatives for Justice welcomes the opportunity to set out our views on the consultation "Dealing with the Past in Northern Ireland". Notwithstanding concerns raised in this submission about the draft bill we have endeavoured to remain positive and solution focused. Learning from other local and international transitional justice processes, and the universal application of human rights standards, has guided our submission. This is the only way forward. It is precisely why international legal standards exist.

In December 2014 we welcomed political agreement by all parties to the Executive and both governments at the talks in Stormont House that produced the four key mechanisms around dealing with the past. The agreed processes will in our view benefit the greater number of victims and survivors from across the community.

The origins of the Stormont House Agreement (SHA) can be traced back to the proposals by the Consultative Group on the past (CGP). It would be remiss not to recognize this vital contribution that engaged so many victims and conflict-actors from all communities, backgrounds, religions and none. It was groundbreaking and laid the foundation.

Much time has passed since Eames/Bradley, as the CGP is more commonly referred to, first made their proposals in 2009 until 2014 SHA, to today in October 2018. More time will pass before implementation. Time is uniquely precious for us all but especially so for those elderly bereaved and injured who have waited. In the intervening years they have waited patiently frustrated by inaction.

Many relatives have passed without resolution of their bereavement or injury and unfortunately more will pass in the time ahead. It is therefore incumbent that implementation is not delayed or further frustrated.

Dealing comprehensively with past human rights violations within a legally compliant human rights framework for all those bereaved and injured is a prerequisite to enabling those most harmed to heal, recover, and to play their part in reshaping and rebuilding not only their lives but society too. If got right it can also assist wider reconciliation. Crucially this is about upholding the primacy of the rule of law.

All of the bereaved and injured carry daily the human hurt and horrors of the conflict. For the bereaved the dead are never far from thought in the subconscious if not always consciously present.

Indeed the past is very much present in everyday life across our island and for those who suffered in our neighbouring islands and beyond; children, civilians, women, republican, loyalist and state participants whose grief, loss and pain is real and felt most by those closest to them. Their victimhood is equal in how it is lived and felt everyday, every moment. For those families for whom resolution remains outstanding and unresolved it can be sharpest.

Over 3,600 people were killed and many multiples of that figure sustained injury; some with horrific life diminishing physical injuries.

The collective impact of all these killings and injuries is immeasurable and further impacts wider society. We all benefit from addressing the past.

An absence of human rights underpinned the conflict that caused so much harm - events fuelled events and the conflict deepened and intensified.

All parties to the conflict are responsible for egregious violations.

Truth, justice, reparations and guarantees of non-recurrence must be made and we hope that these can emerge from this consultation. This should involve, as much as possible, all sides - including non-state groupings - in respect to reparations, which are not always financial but can also be symbolic.

Statements of goodwill and intent by all parties to the conflict which include a commitment to support and engage with the mechanisms would be an ideal way forward.

This could also involve non-statutory sectors. It is widely recognized internationally that doing nothing, failure to speak out or turning a blind eye, bears a related responsibility and this should be reflected upon by wider civic society as we move forward.

It naturally follows that the primacy of human rights must therefore underpin the processes of resolution as we confront the past.

Republicans were responsible for the greater number of killings and that is an inescapable fact that is constantly

broadcast; but so too is the collusive relationship between the state and loyalist paramilitaries that has spanned the entire conflict, yet this is never factored into account when quantifying exactly who did what to whom. Neither is the infiltration of republican organisations by the same agencies responsible for the policy practice of collusion with loyalists. Take for example the issue of Stakeknife - currently culpability rests only with the IRA. For victims and survivors affected in these circumstances vested interest has determined that truth thus far remains at best elusive.

367 people were killed by the state directly, the vast majority unarmed and uninvolved civilians; investigations were by and large perfunctory and only a handful of prosecutions were brought with four British soldiers convicted of murder in respect to three incidents that claimed the lives of four uninvolved civilians[1].

All four were released significantly early after being sentenced, reinstated back to their regiments. Some were promoted.

Hundreds of citizens survived shootings by state forces. Thousands more were brutalized and tortured and still bear the physical and psychological scars.

By contrast tens of thousands of non-state participants to the conflict went to gaol.

Extra-judicial killings, summary execution and excessive use of lethal force have characterized the majority of state killings. The other common feature is state impunity.

Following these killings state agencies disseminated misinformation.

This constituency of victims represents the greatest numerical percentage in terms of an accountability gap - a staggering 99 percent of these victims live with the loss and trauma, the deliberate vilification of their loved ones and the legacy of impunity.

Labeling uninvolved civilians, children, women, mothers and priests as gunmen/women and bombers in order somehow justify their deaths added grievous insult to injury.

The bereaved want the names of their loved ones cleared – they want the historical footnote corrected. They want official processes of acknowledgement of egregious violations. They want and are entitled to justice as a right not as a benevolent consideration.

The deficiency of investigation into killings by the state stands exposed. The demands for human rights compliant investigative processes of remedy are long overdue.

However, instead the official response is to use words such as balanced, fair and proportionate in a context that seeks to displace responsibility away from those state agencies culpable and onto the roles of non-state groups. Shifting the emphasis is not a legal defence argument. It has no legal standing in the application of the rule of law and upholding of rights; nor does playing a numbers game in terms of who did what to whom.

Equally, presenting British soldiers or former RUC officers who shot and killed people, or who witnessed killings, and who might for the very first time be asked in an independent process to account for their actions, as victims beggars belief. Relying on national security to protect agents involved in criminal wrongdoing and murder should not be countenanced.

Obnoxiously attacking and accusing those bereaved through collusion as pushing 'pernicious counter-narratives' is odious. Such statements ignore the systemic reality of collusion and counter-insurgency practices. It ignores the findings of Lord Stevens, Justice Cory, the late Sir Desmond de Silva QC, Justice Henry Barron, Judge Peter Smithwick, and Dame Nuala O'Loan. It flies in the face of admissions of collusion by former British premier David Cameron. Do they too stand accused?

To understand these actions is to know the counter-battle waged against families seeking accountability in order to protect a self-serving official narrative of the conflict – a narrative threatened only by truth.

It is here that the process of accounting - addressing the past - must narrow the permissible amount of lies restoring truth, dignity and hope for the future for all those bereaved and injured. It is in these very places that a light must be shone.

It is here that republicans and loyalists too must account to those they bereaved and harmed with genuine engagement with ICIR.

1 Pte. Ian Thain for the murder of Thomas Reilly; Lee Clegg, a member of the parachute regiment, for the murder of Karen Reilly, though Martin Peake was also killed in the same incident charges were dropped in respect of Martin's killing - following early release Clegg had his conviction overturned after a lengthy campaign by the political and military establishment. He was promoted to sergeant on release; & Scots Guards Mark Wright and James Fisher for the murder of Peter McBride and who were then sent to Kosovo on peacekeeping duties.

Republican engagement is crucial as building a New Ireland of equals means reaching out to those most hurt, harmed and alienated by their actions and who disagree with their politics. This constituency requires truth, accountability and answers, as do those within the nationalist and republican community also harmed by their actions. But most of all it is the right, moral and proper thing to do and in keeping with core ideological republican principles.

Large swathes of our society became separated and even entrenched. We need to untangle the past and build for the future. The IRG cannot ignore partition and decades of endemic structural discrimination and violence that promoted sectarianism, division and which was a backdrop to the conflict.

We cannot burden future generations with our failure to address the legacy of the past. The unsolved issues of the past will not fade, go, or be wished away. The past two decades alone have told us that much.

We must strive to leave future generations with a legacy of hope and a better understanding on reflecting back of what happened, who did what to whom without recrimination and where all of the institutions on the island learn from and ensure never again. Where no one section of society is diminished, vilified, or left behind. And where the primacy of human rights is upheld and respected.

Confronting our past openly and honestly is the only way forward. Resorting to walls of silence, closing ranks, lack of corporate memory by any of the conflict actors or relying upon national security as a smothering blanket is not the way forward.

Finally we would point out that failure to implement the SHA mechanisms for whatever reason still leaves a continuing situation in which the UK remains in violation of its Article 2 legal obligations involving investigations into killings by the state and where collusion exists.

In such a scenario it would be our contention that the HIU architecture must be advanced and implemented, as technically and legally this would not require consultation. It would merely be a matter of the UK finally adhering to its international legal obligations.

This is something wider society and all victims should be cognisant of as this could mean that only those killings that activate Article 2 would be examined. That is precisely why the process before us, which is inclusive, is in reality the only way forward for all victims and survivors.

We cannot make the perfect the enemy of the possible.

Mark Thompson
CEO
Relative for Justice

Introduction

Relatives for Justice has located its submission to the consultation against the core values of our organisation which are based on international best practice and human rights.

- Can the proposals demonstrate active commitment to universal human rights and social justice?
- Will the mechanisms lead to the promotion of equality and respect for the background, diversity and experience of **all** those bereaved and injured by the conflict?
- Do the proposals demonstrate the application and development of the highest standards of professional support programmes for victims and survivors of the conflict?
- And is the promotion of recognition and remedy for the specific gender harms and experiences of the bereaved and injured of the conflict evident?

Since publication of the consultation RFJ has held four regional meetings with relatives of people killed and individuals injured and their carers. Support and project workers have been engaged in supporting individuals and families to understand the consultation documents and to make individual submissions. A large recording project of video submission was also undertaken to facilitate families/ individuals who found visual media more accessible. There have also been organisational meetings with colleagues in other NGOs, academic institutions and statutory organisations and with representatives of the Northern Ireland Office and the Irish Dept of Foreign Affairs and political parties.

1.1 Relatives for Justice Vision

To support the empowerment of the bereaved and injured of the conflict to realise improved health and wellbeing, and full and equal participation at every level of our post-conflict society

1.1.1 Relatives for Justice Mission

- Building and providing access to safe, integrated and professional services and programmes of support for the bereaved and injured of the conflict
- Contributing to the health and wellbeing of victims and survivors
- Realising empowerment through building skills, confidence and self-awareness
- Encouraging the bereaved and injured to realise their role in peace building and processes designed to deal with the past
- Investing in Relatives for Justice through training and sustainable partnerships

1.1.2 Relatives for Justice Aims

- To provide a safe space for the bereaved and injured of the conflict
- To provide professional, appropriate and development-based individual, family and group support for the bereaved and injured in an holistic, integrated fashion
- To develop and deliver said support in partnership with other professional organisations where appropriate
- To support the bereaved and injured to tell their story and document their experiences
- To build awareness and foster an understanding of the specific experiences and needs of the bereaved and injured of the conflict in a transitional context
- To contribute to the search for truth, highlight injustice and contribute to a culture of human rights
- To support families engaging with relevant processes to deal with the past including legal processes
- To liaise with domestic and international human rights NGOs, government bodies and other international organisations in the furtherance of the realisation of the rights of victims and survivors of the conflict

1.1.3 Relatives for Justice Core Values

- An active commitment to universal human rights and social justice
- The promotion of equality and respect for the background, diversity and experience of all those bereaved and injured by the conflict
- The application and development of the highest standards of professional support programmes for victims and survivors of the conflict
- The promotion of recognition and remedy for the specific gender harms and experiences of the bereaved and injured of the conflict

1.2 Eligibility

Relatives for Justice **only** supports victims and survivors of the conflict in its work. Eligibility for services is determined at initial contact and evidence retained.

1.3 The Work of Relatives For Justice

Relatives for Justice (RFJ) was founded in April 1991 when a number of bereaved families affected by the conflict came together to support one another. Instrumental in the formation of the organization were key figures that had, on a voluntary basis, been active for the previous 2 decades such as Monsignor Raymond Murray, Clara Reilly, Peter Madden, and the law practice partner of the late Pat Finucane. RFJ is one of only a few organizations operating on a regional basis across the North and on an all island basis.

Relatives for Justice is a world recognised NGO working with and providing support to relatives of people bereaved, and injured, by the conflict across Ireland and individuals in Great Britain.

We assist and support families coping with the effects of bereavement through violence and the resulting trauma. We have offices in Belfast, Dungannon and 5 regional outreach centres. We are an accredited centre for counselling and psychotherapy with BACP.

RFJ identifies and attempts to address the needs of those who have suffered loss and injury; this is achieved through one to one contacts, self-help, group support, outreach and befriending, counselling support and therapy work, welfare and legal advocacy.

As relatives and survivors we all need to have our experiences heard and valued. In terms of conflict resolution this will also allow those most marginalised to realise the pivotal role and vital contribution that they bring to the creation of a new society based upon equality, respect and above all where human rights are secured.

This work highlights and attempts to address outstanding human rights abuses. Our primary objective in this area of work is to assist in the bringing about of a more human rights-based culture in order to safeguard and protect human rights for all.

2. Failing to Deal with the Past

It is well recognised that the processes to date have not met families' needs and are not compliant with human rights law. For the families who have lived through the initial violation and then multiple failed processes this consultation comes as another conversation about their needs without their rights or needs ever being met or addressed. There is a real fear that this will be another occasion where those who suffered codified and other multiple violations are asked to be persuaders for their own inalienable legal rights.

It is not without irony that this response is being written in the year of the 20th anniversary of the peace agreement. While the Good Friday Agreement (1998) [2] is based on human rights law it only makes cursory acknowledgement of the legacy of human rights violations and harms and makes passing reference to the "Northern Ireland Victims Commission" consultation which was then underway[3].
The legacy of the interminable failure to deliver rights to those who suffered harms serves only to compound and exacerbate the harm. This must be the final time that such an exercise is carried out. The legal requirements are clear. The required mechanisms are agreed. Legally compliant implementation is now the only option.

2.1 "Piecemeal" approaches to the past

The Bloody Sunday Public Inquiry into the deaths of 14 civilians killed by the British army in Derry January 1972 was established by then Prime Minister Tony Blair in **1998** following decades of campaigning by relatives.[4]

The Independent Commission for the Location of Victims' Remains was established by an intergovernmental agreement between the Irish and British Governments, signed on 27 April 1999, and by legislation enacted in the two jurisdictions. The purpose of the Commission is to obtain information, in confidentiality, which may lead to the location of the remains of victims who were killed and buried in secret. There were sixteen people who 'disappeared' during the conflict. The IRA admitted responsibility for thirteen of the sixteen, while one was admitted by the INLA. No attribution has been given to the remaining two. To date 13 bodies have been recovered.

The Weston Park Agreement in August **2001** was a negotiation on the implementation of the Good Friday Agreement. This Agreement recommended the two governments "appoint a judge of international standing from outside both jurisdictions to undertake a thorough investigation of allegations of collusion in the cases, of the murders of Chief Superintendent Harry Breen and Superintendent Bob Buchanan, Pat Finucane, Lord Justice and Lady Gibson, Robert Hamill, Rosemary Nelson and Billy Wright."[5]

Canadian Judge Peter Cory was appointed to carry out the investigations. He recommended public inquiries into all cases other than that of Lord Justice and Lady Gibson. All inquiries have now completed their work other than that of the case of human rights solicitor Pat Finucane.[6] This case was contentiously addressed by the British Government through a review of papers carried out by Sir Desmond de Silva in 2012[7]. The decision by the British Government not to hold an inquiry is still the matter of judicial challenge.

Of course these inquiries touched only a tiny percentage of all killings during the conflict.

Since 2001 the Police Ombudsman for Northern Ireland has carried out historical investigations of RUC and PSNI misconduct and wrongdoing. This is particularly for the period 1968-1998. This includes allegations of collusion by members of the RUC with non-state actors. Since 2010

2 The Agreement. 10th April 1998 < https://www.gov.uk/government/publications/the-belfast-agreement>
3 Ibid see section "RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY" pts 11. 12. And "We will Remember Them" Kenneth Bloomfield, April 1998
4 The report of the Bloody Sunday inquiry can be accessed at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279133/0029_i.pdf>
5 Agreement reached at Weston Park on the Implementation of the Good Friday Agreement August 2001 < http://cain.ulst.ac.uk/events/peace/docs/bi010801.htm>
6 The report of the Inquiry into the death of human rights solicitor Rosemary Nelson in March 1999 in a bomb explosion under her car can be accessed at < https://www.gov.uk/government/publications/the-rosemary-nelson-inquiry-report>
The report of the Inquiry into the killing of Robert Hamill by a sectarian mob which was alleged to have been observed by members of the RUC has not been placed into the public domain due to files sent to the Public Prosecution Service emerging from the Inquiry. Details can be access here: < https://www.gov.uk/government/publications/the-rosemary-nelson-inquiry-report>
The report of the Inquiry into the shooting dead of Loyalist Volunteer Force Commander and prisoner Billy Wright in 1997 in Long Kesh Prison allegedly with the assistance of prison or military personnel can be found here < https://www.gov.uk/government/publications/the-billy-wright-inquiry-report>
The report into the killings of RUC Chief Superintendent Harry Breen and Superintendent Robert Buchanon killed in an IRA ambush in March 1989 and alleged to have involved Garda agents working for the IRA can be found here < https://www.gov.uk/government/publications/the-billy-wright-inquiry-report>
7 "The Report of the Patrick Finucane Review" Rt Hon Sir Desmond De Silva December 2012 < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246867/0802.pdf>

these investigations have been carried out by the Historical Investigations Directorate. Currently over 420 cases reside in the PONI. This office has in the past faced significant interference, matters which meant significant delay to independent investigation of families' cases, including compromise of the integrity of the office. The failure of government to provide adequate resources has also hampered the ability of the office to carry out its work in a timely and adequate fashion. On its current limited budget the average estimation of completing its work is approximately two decades.

The Historical Enquiries Team was established in 2005 by the PSNI's Chief Constable Hugh Orde to re-investigate all conflict related killings, other than those falling under the remit of the Police Ombudsman, ie. killings by the RUC. This Team was been the subject of significant controversy in its practice and policy, particularly in relation to investigations of killings by state forces. It was disbanded in 2013.[8] The PSNI's Legacy Investigation Branch is responsible for police legacy investigations. It quotes a caseload of 1,118 cases. However because of the involvement of former RUC officers, and a chain of command of former RUC officers the PSNI's LIB is not independent and therefore incompatible with ECHR Article 2 obligations.

Currently there are scores of outstanding inquests into nearly 100 deaths. It is notable that the inquest system has ground to a halt but again this is a tiny percentage of the deaths of the conflict. Like the Police Ombudsman's Office the coronial system has the ability to meet families' needs and the state's legal obligations under Article 2. It is therefore not at all surprising that resources are deliberately withheld, preventing the coronial process from taking forward its caseload of outstanding inquests.

Additionally, many families have resorted to initiating civil proceedings against conflict actors responsible for and involved in killings of their loved ones. This private route is wholly in response to the lack of an adequate process and the deliberate hampering of PONI and inquests.

2.2 Comprehensive Proposals to Deal with the Past

In the absence of formal political engagement with the past until the Stormont House Agreement, there were two significant attempts by civil society to recommend processes for dealing with the past.

8 See 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team" accessed here < http://www.justiceinspectorates.gov.uk/hmic/publication/hmic-inspection-of-the-historical-enquiries-team/>

The first came from a group called "Eolas" (Irish for knowledge) in 2003 and the second from Healing Through Remembering in 2006.[9]

It was clear from both of these initiatives, alongside growing frustrations of victims and survivors that a more comprehensive approach was required.

The first significant set of proposals came from the British Government appointed Consultative Group on the Past which suggested a comprehensive range of measures which touched on areas of reparation, acknowledgement, investigation, ex-prisoners' reintegration, accountability and memorialisation.[10] Despite its thoughtful, wide ranging and responsive proposals the report was subject to sustained attack due to the publicity surrounding one proposal of an acknowledgement payment to all bereaved families.
The second set of proposals emerged from the internal political parties in the North of Ireland. The "Haass O'Sullivan" proposals, facilitated by Dr Richard Haass and Professor Meghan O'Sullivan, were agreed but not formally signed off when talks concluded on New Year's Eve 2013. While not as comprehensive or detailed, the proposals drew on many of the Consultative Group's recommendations on investigation, accountability and acknowledgment and also included for the first time the potential that incidents involving some of most serious injuries sustained in the conflict might also be investigated.[11] However the two governments were not involved in the process, a significant gap.

In December 2014 the Stormont House Agreement[12] provided an agreed four pronged approach to dealing with the past. Its emphasis on human rights, victims' needs and a multi-layered approach gave hope to many families.

The failure to agree implementation of the Stormont House Agreement at the Fresh Start negotiations in November 2015 was a blow to those who suffered. Once again it appeared that their rights had become subject to political negotiation.

9 Eolas "Consultation Paper on truth and Justice" Relatives for Justice <http://www.healingthroughremembering.org/images/j_library/lib/Eolas.pdf>
Healing Through Remembering "Making Peace With the Past" 2006 < http://www.healingthroughremembering.org/images/pdf/Making%20Peace%20with%20the%20Past.pdf>

10 Report of the Consultative Group on the Past January 2009 accessible here < http://cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf>;

11 Proposed Agreement 31 December 2013 - An Agreement among the Parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags and Emblems; and Contending with the Past Available at < http://www.northernireland.gov.uk/haass.pdf>

12 Stormont House Agreement December 2014 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf>

The impasse on implementation since then has been compounded by the scandalous refusal to release funding to those awaiting inquest. All families' suspicions in this regard were confirmed in the Hughes judgment in March 2018 when it became clear that the matter of funding for inquests was indeed subject to political interference[13] rather than the upholding of citizens' rights in accordance with the state's legal obligations.

Every process to date has sought to disenfranchise those who suffered the worst and most egregious violations during our conflict of their human rights.

Fundamentally at the core of every process is the protection and shielding of those involved in the violations rather than holding to account the perpetrators and upholding the rights of victims of violations. This needs to change.

13 "In the High Court of Justice in Northern Ireland Queen's Bench Division (Judicial Review) in the matter of an application by Brigid Hughes for Judicial Review and in the matter of the ongoing failure of the Executive Office, the Executive Committee, the Minister of Justice, and the Secretary of State for Northern Ireland to provide adequate funding for legacy inquests" Justice Girvan 08/03/2018 [2018] NIQB 30

3. Omissions and Other Areas

3.1 Outstanding Inquiries

In 2001 the British Government and Irish Government agreed to the establishment of inquiries concerning collusion[14]. Only one of these, the public inquiry into the killing of human rights solicitor Pat Finucane in 1989 has not been held. Indeed, this matter is one repeatedly commented on as a most grave matter that remains outstanding by all of those concerned with implementation of previous peace agreements and the application of human rights standards.[15]

This matter is unresolved and needs immediate remedy in a fully human rights compliant fashion. The matters raised by the killing of Patrick Finucane are recognised as some of the significant of the conflict.[16] Allowing the ongoing situation to continue would contaminate confidence in the wider mechanisms once established.

Further Relatives for Justice recognise and support the calls from the families affected by the Omagh Bombing in August 1998 for a fully human rights compliant public inquiry into the bombing and all matters that surround it.

It is incredulous that in both of these incidents carried out by illegal paramilitaries, involving state agents, the UK holds its current position of refusing public inquiries.

3.2 Human Rights Compliance

Suggestions of Statutes of Limitation and Amnesties

In its introduction to the section on "The Past" The Stormont House Agreement 2014 refers to

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

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

Human Rights compliance is not restricted to Article 2 of the ECHR as referenced in the Agreement's commitments to the Historical Investigations Unit.

The United Kingdom has ratified and is signatory to a suite of human rights conventions and statutes, not least the Statute of Rome, the International Covenant on Civil and Political Rights and Declaration on Human Rights, which will see the 70th anniversary of its signing as consideration of the responses to this consultation are finalised.

Recognising the UK government's commitment to the Statute of Rome, we respectfully point out that the state parties all affirmed that the most grave of crimes must not go unpunished and were determined to "put an end to impunity" and thus "contribute to the prevention of such crimes".[17]

This question is not one for tawdry political or media debate. It is a matter of law. The commitment to prevention of or ending of impunity is the single greatest signal to victims and survivors that society is committed to upholding their rights and willing to address their suffering.[18] For decades family members of people killed and those who have suffered gross violations, have lived with the impunity of the actors who caused them harm and systemic coverup of those crimes. That the introduction of formal impunity is being debated as a realistic option just at the moment when society has at last decided to "deal with the past" and afford victims and

14 "Implementation Plan issued by the British and Irish Governments" (now commonly referred to as the Weston Park Agreement) 1st August 2001. Pt 18

15 See International Covenant on Civil and Political Rights Human Rights Committee. Concluding Observations on 7th Periodic Report of the United Kingdom of Great Britain and Northern Ireland 17/08/2015 CCPR/C/GBR/CO7 pt 8
Also 2017 Pat Finucane Memorial Lecture, hosted by Relative of Justice in Belfast, delivered by Minister Charlie Flanagan T.D. 23rd February 2017 < https://www.dfa.ie/news-and-media/speeches/speeches-archive/2017/february/pat-finucane-memorial-lecture-by-minister-flanagan/>

16 Relatives for Justice "As Bad as it Gets" < http://relativesforjustice.com/pat-finucanes-murder-as-bad-as-it-gets/> also "Pat Finucane: The Campaign for an Independent Public Inquiry" Relatives for Justice December 2016 also Prime Minister David Cameron Statement on Patrick Finucane 12 December 2012 < https://www.gov.uk/government/speeches/prime-minister-david-cameron-statement-on-patrick-finucane>

17 Rome Statute of the International Criminal Court (1998) Preamble

18 Set of Principles for the protection and promotion of human rights through action to combat impunity United Nations Economic and Social Council, Commission on Human Rights (E/CN.4/Sub.2/1997/20/Rev.1, annex II)
See also
Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher. United Nations Economic and Social Council, Commission on Human Rights, 18 February 2005 (E/CN.4/2005/102)

survivors recognition of their rights is a deeply damaging development and one that should not be countenanced, not least by a government that has signed and ratified said conventions and treaties.

3.3 Definition of Victims – the 2006 Order

In his country report in 2015, UN Special Rapporteur Pablo De Greiff made the following observations:

> *Despite the consensus that the past should be addressed, no single narrative of the past is acceptable to all sides. Even certain words about the past are used by some "to continue the struggle through other means". Disagreement even relates to terms with a well-established legal definition, such as "conflict" or "victim", the latter being a term that remains, in particular, the subject of intense contestation. Indeed, the very notion of human rights, which by its universality should play a socially integrative function, is regretfully seen by too many as a banner for partisanship.*
>
> *The current statutory mechanisms alone cannot address this situation. The central mission is to liberate all parties from the sense that the uniqueness and greater sense of victimhood of the members of one community must be remembered and acknowledged before beginning any discussion about how to move forward. Once all parties are recognized as equal members of a shared, collective political project, it will be easier to manifest allegiances without once again recalling the many ways that one community has aggrieved another in the past.*[19]

While no doubt there is contest regarding our narratives of the past, there is no denying the deep suffering held by those who suffered violations across our community. Any move to change the definition of victim would be a move to diminish the suffering and pain of some within our community, this would be unacceptable.

Just as our community suffered together, it must heal together. The original definition, as agreed by the SDLP and UUP in the 2006 Victims and Survivors Order, was a positive and welcome step and was the only reasonable and logical way forward in dealing with the injured and bereaved and their needs. Since then that definition has served the interests and needs of the greatest number of victims and survivors of our conflict. The political drive to change it is very much part of the meta-conflict that continues through the prism of victims. Such a politicised approach has done nothing to lessen the burden for victims and survivors and indeed could be argued to have caused additional harm.

The current definition has supported many thousands to begin journeys of healing and thus has served us well. The definition must be above contest, be embracing and inclusive and support future generations to recover from our painful past.

3.4 Inquests

3.4.1 Funding of Lord Chief Justice Plan

It is with regret that this matter has become part of our submission. The plan by the Lord Chief Justice on inquests, for which he sought funding, had been hailed as a sensible and worthy way forward for the holding of legacy inquests and indeed in submissions to the European Council of Europe's Committee of Minsters from the UK government it is clear that this plan is presented as their evidence of complying with the execution of judgment in the McKerr group of cases[20].
It seems inconceivable that this plan, which is a direct result of a ruling in 2001 in the European Court of Human Rights is still being delayed, yet equally relied upon in submissions to the same court as regards the UK government's evidence of compliance with the ruling.

It is equally of note that the barriers to the implementation of the LCJ plan, as highlighted in the recent Hughes' judgment[21], are neither fiscal nor legal but rather of a political nature. That the British government has not moved this matter forward expeditiously during the timeframe of this consultation, in light of the Hughes judgment adds to the scepticism of many families who see lip service being paid to the human rights or to the rule of law. This undermines their already brittle confidence in additional and new mechanisms that have yet to see the light of day.

Notwithstanding the deliberate failures to implement and fund the LCJ's corporate plan for inquests, the current state

19 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland. 17 November 2016. Presented to United Nations General Assembly, Human Rights Council, Thirty-fourth session 27 February-24 March 2017. (A/HRC/34/62/Add.1)

20 Committee of Ministers to the Council of Europe. 1318th meeting (June 2018) (DH) Item reference: Action plan (29/03/2018) Communication from the United Kingdom concerning the case of MCKERR v. the United Kingdom (Application No. 28883/95) 04/04/2018

21 "In the High Court of Justice in Northern Ireland Queen's Bench Division (Judicial Review) in the matter of an application by Brigid Hughes for Judicial Review and in the matter of the ongoing failure of the Executive Office, the Executive Committee, the Minister of Justice, and the Secretary of State for Northern Ireland to provide adequate funding for legacy inquests" Justice Girvan 08/03/2018 [2018] NIQB 30

approach to disclosure and discovery at inquests and civil proceedings is deeply problematic. The Ballymurphy Inquest being but one example where families are calling the approach of the state "dirty deeds" and an attempt to "humiliate the coroner and the families".[22]

Given that the HIU is being promised full statutory cooperation, to see such lack of cooperation currently in the courts undermines all such promises.

In addition to the statutory prevarication and delay, much of it a deliberate stalling tactic, families seeking accountability for the killings of their loved ones are being regularly vilified by sections of the press and former state combatants. So too are the lawyers and NGOs supporting them. For families this appears to be a combined and convenient strategy to undermine their legitimate attempt to seek accountability by the very people responsible for the taking of lives.

The LCJ's plan should be financed fully and full cooperation must be forthcoming immediately. Anything less will cripple not only the opportunities for the families currently at inquest but also the goodwill for the new mechanisms.

3.4.2 Future Inquests

While there is no doubt that the coronial system is currently being accessed and applied to by families in the absence of other more appropriate investigative mechanisms, there must be no question that access to future inquests should be closed down. Of course, the hope is that families will no longer be forced down this route of recourse as proper investigations become available.

However, Section 14 of the Coroner's Act allows families the full access of the interrogation of the circumstances of the killings of their loved ones when those circumstances were not previously considered, ventilated or heard appropriately and a different outcome to the inquest may have been considered. This is very important as for some families the official record of the inquest court was indeed very wrong in light of evidence that has since emerged. This legal avenue must not be closed down in an expeditious exercise.

There are also a number of inquests into controversial state killings that have never been heard. These inquests remain outstanding for decades and are set against a backdrop of a failure to properly investigate and to hold to account those responsible at the time. These inquests should be heard. Equally the Attorney General should retain the power to open future inquests under Section 14 should a family's experience be eligible under the Act and consider this to be the most appropriate route to secure accurate public record. Families need to retain the right to choose.

3.5 Investigation of Non-Fatal Violations and Injuries

In their proposals for dealing with the past during the 2013 Haass O'Sullivan negotiations, the parties had, in the wording of the draft document, agreed that there was potential for investigating serious injuries.[23] This did not make its way into the subsequent Stormont House Agreement.

The caveat in this proposal was that it might be funding dependent.

Once again this highlights the failure to meet international human rights standards regarding dealing with the past or for victims of violations.

The proposals in the consultation are restricted to investigations of deaths. Only Article 2 of the European Convention is mentioned to this end. However, if these measures are to be human rights compliant as the parties agreed in the introduction to the Stormont House Agreement there are multiple obligations to investigate the most serious of conflict violations.

Ignoring the rights of the most seriously injured has obscured the rights of those injured to fair and impartial investigation for the violations which caused their injury. In particular, it obscures the experience and rights of civilians, political prisoners, victims of torture in state institutions including holding centres and prisons, and those shot by non-state actors for "anti-social behaviours"[24]. Article 3[25] codified rights have not been championed and require remedy.[26]

The failure to examine injuries discriminates in particular against women and their experience of conflict. To miss this opportunity to include this part of our community would create yet another harm and would be a travesty.

22 "Ballymurphy families furious at 'last-minute' disclosure of MoD files days before inquest" Belfast Telegraph 01/09/2018 <https://www.belfasttelegraph.co.uk/news/northern-ireland/ballymurphy-families-furious-at-lastminute-disclosure-of-mod-files-days-before-inquest-37271900.html>

23 Richard Haas, Meaghan O'Sullivan "Factsheet on the Draft Agreement" 31 December 2013

24 Colm Campbell and Ita Connolly, Making Wars on "Terror"? Global Lessons from Northern Ireland. 69 Modern Law Review 6 (2006) 935-957

25 European Convention of Huma Rights 1950. Article 3 Prohibition of Torture

26 UN Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment 1984 Article 2

Relatives for Justice recommends a focussed commission to investigate injuries sustained during the conflict is established. We recommend that this is a branch of the HIU and that the HIU's mandate includes the development of a comprehensive approach to the investigation of injuries. This has implications for the lifetime of the HIU and this Commission should not interfere with the immediate commencement and work of the HIU's investigations into conflict related deaths.

Persons who were injured in incidents where fatalities occurred should have access to HIU reports as a matter of course.

There may well be incidents where injuries were sustained in incidents that link other cases where persons were killed. Ensuring that investigations into injuries and gross violation occur will undoubtedly contribute to the quality of investigations of linked/group cases or thematic investigations that may arise within the HIU.

The injured of our conflict are sovereign rights holders and should be treated as such by upholding their rights, and afforded the dignity they are entitled to and deserve. They should not be "additional" considerations or subject to political gratis or bargaining.

3.6 Reparations, Pensions and Restitution

In his country report to the UN Special Rapporteur De Greiff said that "The area of least achievement in the context of Northern Ireland remains reparations."[27]

Relatives for Justice concurs with this assessment. There is a legacy of inequity in relation to previous compensation schemes. These are multiple. Not least has been the provision of payments to some members of what is known as the "Security" family and the lack of provision to the rest of the population. Through Freedom of Information requests Relatives for Justice has estimated that £1.2Billion has been paid in various schemes to the members of the state organisations in the conflict and their families. The schemes were designed to benefit members of the RUC, RUC Reserve, UDR, RIR and Prison Service and their families. All were the result of political negotiation following successful lobbying by political unionism for these partial schemes which were then championed as delivering for "their own". This systemic partial approach of political bargaining, rather than a human rights compliant universal approach to ensuring reparations for all victims of conflict related violations is a significant matter of non-compliance with international legal norms, despite the British Government ratifying the Vienna Declaration and Programme of Action in 1993 and the 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 in 2005, when some of these schemes were being put in place and promoted.

The deep and lasting distress caused by these systemic inequities between civilians and state actors and indeed between civilians bereaved and receiving payments under differing compensation schemes is something referred to by the Report of the Consultative Group on the Past.[28] Compensation was paid dependent on a postcode lottery, if you wore a uniform, and who was responsible for the violation. The legacy of economic and structural violence was never a consideration for the large number of victims affected by the conflict across the community in working class area where generational unemployment was endemic. Payments were made based on the income of the person killed rather than on the loss of the family bereaved. Families who lost wives, mothers and children did not receive compensation as they were not wage earners.

The call for a pension for the injured, despite its evident justice, is a case study in political failure. But also, an indication of how the needs of victims and survivors have been viewed in a philanthropic manner, or a matter for political bargaining, rather than promoted and supported through the lens of human rights.

A step change of approach is required regarding reparations to victims and survivors.

RFJ calls for a Tribunal of Reparations, with a mandate based on the United Nations Right to a Remedy and Reparation. This should be a speedy process, running for no more than a year, which examines the impact all of the schemes to date, identifies gaps and inequalities and makes recommendations for a landscape of reparations for victims of human rights violations during the conflict.

Measures allowing for the pension for the injured based on the 2006 Order should be progressed immediately and the Tribunal would of course have a role in ensuring that this measure would be human rights compliant, meeting the needs of victims and survivors.

The issue of recognition payments to the bereaved as pursued by the Irish Government and recommended by the Consultative Group on the Past should form a significant part of the

27 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland. 17 November 2016. Presented to United Nations General Assembly, Human Rights Council, Thirty-fourth session 27 February-24 March 2017. (A/HRC/34/62/Add.1) 60

28 Report of the Consultative Group on the Past, January 23 2009. 90

consideration of the Tribunal.[29]

The recovery of systemic data on patterns and trends of reparations as suggested by the Special Rapporteur would be a key part of the Tribunal and an ongoing piece of essential work.

Specific attention is required to address the gender gaps in relation to reparations.[30] To date there has been no official initiative examining gender and conflict. This is a recurring concern within this response, however in relation to reparations there is no one area in which a gendered focussed approach is more critical.

3.7 Impact of Welfare Reform

The areas which suffered highest numbers of fatalities, injuries and imprisonment during the conflict were also areas that continue to suffer the highest levels of economic and social disadvantage. There has been no peace dividend in these areas where unemployment rates remain stubbornly high and housing stress is getting worse year on year. Victims and survivors of the conflict are therefore suffering multiple disadvantages on top of their conflict experience.

In June 2016 changes to the welfare system agreed in the Stormont House Agreement were introduced in the North of Ireland. These are the biggest changes to our welfare system in over 60 years and many of the current benefits will cease to exist and new benefits and payment systems will be introduced.

For those who were injured or unable to work as a result of their experience of conflict these measures have been just as important and require just as much focus as all of the other measures under consideration.

As part of these changes, people in receipt of Disability Living Allowance (DLA) have been reassessed for the Personal Independence Payment (PIP) benefit.

Originally, DLA was intended to cover the extra costs of disability but increasingly, as other benefits diminished, DLA is now needed to cover the cost of essentials. The consequence of all of this is that, for many people with disabilities in the North of Ireland, DLA is an important element in making ends meet.

There are rough comparisons between DLA and PIP however, PIP is a cut-down version of DLA and is harder to qualify for, mainly due to the new method of assessment and a points-scoring system to gain access to the benefit. PIP is made up of two components: the daily living component and the mobility component. In the assessment process claimants will be awarded points depending on what they can and cannot do. The magic number for both components is eight points to receive a standard award.

There is concern that this method of assessment does not fully capture the consequences for claimants in the North of Ireland who have experienced a conflict-related injury (CRI) or bereavement. For those who have suffered a psychological injury, especially those whose injury has resulted from a conflict related bereavement the system is unfair and exacerbates their condition. People who are making claims for PIP and who experience a CRI or bereavement are not receiving the recognition of their injuries.

In most of these cases people will have been diagnosed with a form or symptoms of Post-Traumatic Stress Disorder (PTSD) as a direct result of CRI(s). The associated life diminishing symptoms will include depression, generalised anxiety and social anxiety. They may have disrupted sleep, low motivation and chronic low moods. There may be significant mental health difficulties compounding their overall ability to function on a daily basis. Their daily difficulties may include hypervigilance, the inability to settle, withdrawal and intrusive memories. These are significant life diminishing symptoms that impact negatively on day-to-day functions and relationships. There are also severe social and economic implications for the individuals who suffer with these symptoms. Many will have accessed therapeutic and medical support for decades and still find basic function almost impossible.

Since the Fresh Start Agreement victims and survivors of the conflict have been promised that their experience of the conflict will be considered sensitively and appropriately in making an application for benefits. This has at best been patchy for many who have experienced CRI and bereavement. It was recommended by Eileen Evason and the Welfare Reform Mitigations Working Group that where claimants are judged to have received no entitlement to PIP but have scored at least four points in the reassessment process, should be awarded an extra four points for their CRI or bereavement. They should then qualify for a "conflict related supplementary payment", at the standard rate. This is only available to one component, not both and the payments and points will only be for a period of one year, then the application process will begin again for that claimant.

An area of concern with this is that the points are only awarded during the mandatory reconsideration stage and not during the initial assessment stage. This means that victims and survivors are

29 Ibid 92
30 Fionnuala Ní Aoláin, Catherine O'Rourke and Aisling Swaine, "Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice", Harvard Human Rights Journal, vol. 28, 2015, p. 97.

having to engage in the lengthy application and assessment processes before their CRI is recognised. There should be a clear indication for claimants who present with a CRI or bereavement from the initial phone call. A resolution for this would be for the Dept for Communities to ask questions during the PIP1 call with claimants.

As mentioned above, these points and payment will only be available for the claimant for the period of one year. They will be unable to use these points again. Therefore, in essence they are deemed 'pointless points'.

Claimants who are engaging in the Mandatory Reconsideration process are also faced with a financial loss as no payment will be received during this stage, which can take up to six weeks in some cases. This delay means that those people who suffer from PTSD/Depression/Anxiety will experience an increase in their symptoms.

Universal Credit (UC) was introduced in the North of Ireland in September 2017 under the Northern Ireland (Welfare Reform) Act 2015. It was introduced for new claims, on a phased geographical basis from 27 September 2017. The rollout will continue on a phased geographical basis until December 2018. As it reaches the respective geographical areas, people living in those areas will be able to make a new claim for UC.
The benefits that will be replaced are:

- (income-based) Jobseeker's Allowance
- (income-related) Employment and Support Allowance
- Income Support
- Child Tax Credits
- Working Tax Credits
- Housing Benefit (Rental)

For those who receive any of the six benefits being replaced by UC they will be transferred to UC between July 2019 and March 2023.

New claimants face a lengthy wait for initial payments as they can take up to six weeks to be processed. Sanctions have also been introduced for those with job seeking responsibilities. If there is a failure to meet each of responsibilities or commitment that has been agreed with a work coach, without good reason, there will be a cut in the benefit. This means UC payments will be reduced for a set period, and the period of reduction will increase the more times that there is a failure to meet responsibilities.

The matter of welfare reform impacts directly on the potential of the Stormont House legacy mechanisms. How are families living on benefits, threatened with chronic poverty and damaging change to their most basic needs meant to attempt to engage in these wider processes in an empowered way? There needs to be immediate recognition that people do not live their lives with a series of silos where their needs for truth and accountability are divisible from their need to heat their home or feed their children.

The concept of joining up the Department of the Communities with the Victims and Survivors Service and ensuring that victims and survivors receive mitigation from any adverse impact of welfare reform needs to be immediately reviewed and improved to make one streamlined system that is effective and meets the needs of victims and survivors.

3.8 Mechanisms' resources

The dedication of £150million to the establishment of the mechanisms is to be welcomed. Ringfenced additional monies, independent of local budgetary decision making, are critical to the success of the SHA architecture.

There is a significant concern that £30million pa as currently promised will not be enough.

These concerns have been highlighted in comments by PSNI Chief Constable, George Hamilton that the current costs of policing the past alone, in the very limited approach that they take, are in the region of £25million pa.[31]

The commitment to support for families engaging with the processes was enhanced by measures under the Peace IV programme to fund health and wellbeing workers and advocacy workers who can support victims and survivors who will/might be engaging the emerging mechanisms.

The significant organisational and project resources required are funded under the current Victims and Survivors Programme. Funding for this critical arm of support to the mechanisms will run out in 2020/21.

It is essential that the support services for those who will be engaging with the mechanisms is extended for the lifetime of the mechanisms at the very least. Planning for this will need to begin in the very short term with uncertainty surrounding future peace funding and the political vacuum that exists in Stormont. In reality, those engaging will require extended support that will be required long after the mechanisms close.

31 "PSNI chief tells of frustration as policing the past costs soar" Belfast Telegraph 12/01/2018 < https://www.belfasttelegraph.co.uk/news/northern-ireland/psni-chief-tells-of-frustration-as-policing-the-past-costs-soar-36480743.html>

Both the Irish Government and British Governments will need to engage with this as a matter of priority.

3.9 Therapeutic Care

"Long after the danger is past, traumatised people relive the event as though it were continually recurring in the present. They cannot resume the normal course of their lives for the trauma repeatedly interrupts."[32]

Relatives for Justice advocates an holistic approach to supporting victims and survivors. Our learning is that for those engaged in the recovery of truth and justice therapeutic healing support is an essential and integrated part of the journey. If individuals are expected to engage in the mechanisms to deal with the past they will require sustained safe therapeutic support both during and after this process. A safe system of therapeutic support requires professional regulation and should be bound by ethical frameworks that promote best practice and a duty of care.

Trauma survivors for many years have availed of therapeutic support through grassroots NGO's at community level often working in partnership with statutory agencies in mental health. These resources have come from Peace funding, and dedicated funding for victims and survivors. It has not come from the health budget.

For those who wish to engage in the mechanisms to deal with the past, it is vital their journey is supported by access to agencies equipped with advocates who can signpost individuals to the appropriate areas where their needs can be met.

Grassroots organisations have developed outstanding professional models of intervention for victims and survivors of traumatic incidents and meet the highest of professional standards despite the limited resources on which they operate. The trauma survivor's world is not and has not been safe for a very long time. Herman advocates before any meaningful work can be done towards recovery, the individual needs to feel safe and trust is crucial.[33] Establishing safety and trust takes time with an empathic approach that bears witness to the trauma story and facilitates the individual to have a voice in whatever form that may take. Resources cannot be timebound where the individual may be at risk of losing vital therapeutic support whilst engaging in this process.

Self-care is paramount when working with trauma survivors, professionally psychiatrists/psychologists/psychotherapists and counsellors are bound by the ethical principles of clinical supervision. Regular supervision and self-awareness for those involved within this process who are working closely with trauma survivors cannot be underestimated. Adequate resources should be a pre-requisite for sustaining self-care and where needed appropriate training should be delivered. This training must be extended to all of those interfacing with victims and survivors. Too many processes have been undermined in value by the approach of "professionals" who simply did not understand trauma and have further harmed vulnerable people, or who were not supported and suffered vicariously themselves.

Ultimately training and support for victims and survivors engaging with the mechanisms, and likewise for all of those staffing the mechanisms' structures can only benefit all concerned and add to the potential for success.

Any society emerging from conflict holds a legacy of pain and suffering. To hold on to the notion it is over, is simply folly. Life's chances for trauma survivors were diminished the moment the traumatic incident occurred. The least trauma survivors can be afforded is an acknowledgement of their hurt and pain with the proper structures in place to offer them a safe therapeutic system of support.

Relatives for Justice recommends that the Victims and Survivors Service and the groups that are funded to deliver services to victims and survivors are officially recognised within the processes from the outset.

That dedicated resources are made available to extend this provision for the lifetime of the mechanisms and beyond. And that, drawing on the recommendations of the Special Rapporteur, that systemic data on the delivery of trauma services is retained and learned from.[34]

With joined up and linked provision this is an opportunity to provide gold standard community led effective trauma support to those who engage and work for these mechanisms. The potential for international learning if this is achieved properly could be immense. Planning at an early stage would facilitate this.

We recommend that all of those who will be working in the new mechanisms be engaged in compulsory and regular trauma training and receive professional offline supervision where appropriate.

32 Herman, J.L. (1992) Trauma and Recovery: *the aftermath of violence-from domestic abuse to political terror*. Basic Books

33 ibid

34 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland. 17 November 2016. Presented to United Nations General Assembly, Human Rights Council, Thirty-fourth session 27 February-24 March 2017. (A/HRC/34/62/Add.1) 67

3.10 Gender Lens

In Relatives for Justice we have mainstreamed a gender analysis to all of our work. We have made concerted effort to apply the idea and promise of UNSCR1325[35] and CEDAW General Recommendation 30. The promise is that societies will encourage participation of women most hurt by conflict and put in place support that is appropriate to their experience of conflict.

The North of Ireland enjoys the unenviable position where we live in a post conflict state but the UK, a permanent member of the Security Council, refuses to acknowledge the relevance of UNSCR1325 in the local context due to contest over the status of the conflict. The UK government refuses to accept that there was a conflict here. We have proposed mechanisms to deal with the past which mirror any initiative in a post-conflict context yet there is a refusal to acknowledge the remit of UNSCR 1325 for women living here.

This refusal has not been replaced by a commitment to ensuring substitute measures which would guarantee that women who experienced conflict harms are recognised and supported. In fact, the complete silence in these proposals regarding gender, despite extensive lobbying of both governments and all parties to this end, is nothing short of shameful.

Where the governments have failed to act on these international obligations Relatives for Justice has created a shadow framework to demonstrate that even in the absence of political will, with dedication and awareness, much can be achieved with very little resources.

We all know, and it is recognised in international doctrine, that women experienced conflict differently, and indeed that women experience trauma differently. In our context in the North of Ireland women from every community founded support groups and saw the necessity for peer support, group work, talking and gentle solidarity. With 91% of those killed being men there was a particular experience of violation that belonged to women. Women recognised this themselves and gave expression to it through grassroots support organisations. That is not for one second to say that hard issues were not grappled with.

RFJ most certainly could not be accused of avoiding difficult conversations. RFJ's founders are case examples of this. Eleanor McKerr, wife of the late Gervaise, stood as a stalwart against the cover up of Shoot to Kill before her untimely death, Emma Groves herself blinded by a rubber bullet travelled the world to end their use, Eilish McCabe whose brother Aidan McAnespie was killed by the British Army spoke out on policies of state impunity. Clara Reilly, who lost two brothers, and a founder of RFJ, and the United Campaign Against Plastic Bullets has travelled the world exposing state impunity and advocating for inclusive models of holistic support for all victims of our conflict. There is certainly no essentialising of women's role or voices in favour of soft options.

The Good Friday Agreement gave tacit recognition to that work when it talked about the value of and need to resource community and voluntary self-help groups. But now that work is undervalued. Instead we have seen concerted moves to individualised support programmes, cutting the funding for group activities. Women promote group activity and safe space for recovery and healing. The promotion of individualised "interventions" over long term processes of recovery and reconciliation impacts women disproportionately. Individualised approaches discriminate against women, and their place in family and community, and disregards the role that family and community, with women at their centre, play.

This is linked and applies to the issue of reparations and to the matters of truth recovery and pursuit of justice.
As previously explained none of the processes mentioned in the consultation have benefitted from a gender lens. There is a grave danger that any emergent process will have the ignominious status of being one of the very few international examples of where gender did not figure.[36]

This will serve to exclude women from participation in the very processes designed to address their experiences. All societal barriers which women face are compounded by trauma and violent loss. A lack of gender lens will compound this even further.

Relatives for Justice commends the publication "Gender Principles for Dealing with the Past"[37] to the consultation and much of the narrative in this submission reflects the recommendations contained therein.

An immediate working group on gender, should be established, to apply a gender lens to the entire proposed legislation and any operational documents.

35 United Nations Security Council Recommendation 1325 on Women Peace and Security (31 October 2000)

36 "Dealing With the Past: Where Are the Women?" Relatives for Justice February 2015
< http://relativesforjustice.com/wp-content/uploads/2015/02/Dealing-with-the-Past-Where-Are-the-Women.pdf>
"Gender Principles for Dealing with the Past" September 2015
< http://relativesforjustice.com/wp-content/uploads/2015/09/genderprinciples.pdf>

37 ibid

4. Historical Investigations Unit

RFJ welcomes the commitment to implementation of the institutional architecture agreed by all parties and the two governments as part of the Stormont House Agreement. This includes the Historical Investigations Unit (HIU), the key element of the SHA in terms of the UK's international human rights obligations. These require the British government to carry out Article 2-compliant investigations into all state-caused deaths during the conflict, including where there are allegations of state complicity, either direct or indirect. In effect, the decision to carry out investigations into all conflict-related deaths is an indication that the HIU caseload will meet the principles agreed to underpin the SHA institutions in terms of balance and proportionality.

Notwithstanding this broad welcome for the purpose of the draft legislation, RFJ has a number of concerns about the way in which the HIU is to be established as well as proposals that, we believe, will enhance community confidence, not least from those affected by state and state sponsored violations.

4.1 Sweeping powers of the British Secretary of State

We are disappointed that the legislation will establish a limit on the independence of the HIU director in respect of the "national security interest of the United Kingdom" (clause 7(2)). The effect of this will be to allow the British Secretary of State, on the advice of intelligence organisations such as MI5, to inhibit a truthful account being given by the HIU to families of those bereaved during the conflict. Rather than establish a properly independent investigative body, the British officials and drafters of the legislation have instead undermined the promise of the SHA by inserting the Secretary of State as a block on any information which might be embarrassing or shows the commission of criminal offences by state operatives.

In this way, the British state is seeking to protect itself from negative publicity, proper accountability and legal liability, and protect its operatives from criminal liability. The promise was for a properly independent HIU with a director who would be able to make determinations on the basis of the evidence, without interference. The political veto inhibits and undermines this promise despite the various elements which seek to dress up the sanction.

These mechanisms established are the most elaborate in the whole draft bill. They involve the establishment of new appeals arrangements along with the wholesale importation to legacy litigation of secret courts (which are now routine in respect of immigration appeals in England) where so-called "national security" considerations are at issue. These secret courts will include the use of "special advocates" who - it is claimed – will represent family interests but are not allowed to discuss the proceedings during hearings with those they are "representing"; incredibly, this includes their lawyers. Such arrangements create a legal environment where certain lawyers are seen as trustworthy and others not, where a circle of intimates are given sight of "sensitive" information while those affected – particularly victims' families – are asked to trust those in government who have never had their interests in view. The very government responsible for the violations under investigation, and against whom other serious allegations of wrongdoing are levelled.

These arrangements are inimical to the principles of transparency and fairness agreed to underpin the SHA, and which are placed in the draft legislation at Clause 1(f). They also violate the principle that the rule of law should be upheld (Clause 1(b)) by setting up a situation where families cannot have their preferred lawyer arguing their case but have to accept on trust that a stranger not answerable to them – or even able to speak to them or their lawyer – will argue their interests behind closed doors.

The notion of victim-centred arrangements was central to the SHA; by the arrangements put in place, victims' interests are far behind those of the British state.
The suspicion is that this arcane architecture is designed to hide wrongdoing by the state and its agents. The desire to prevent the HIU director from disclosing what s/he finds without political interference is a direct breach of the spirit of the SHA.

Relatives for Justice does not accept the sweeping powers of the British Secretary of State on the grounds of national security, in withholding information from families and restricting the independence of the HIU Director.

4.2 Pre-Eminence of National Security Post-Devolution of Justice to the Devolved Institutions

With the devolution of policing and justice powers in respect of this jurisdiction to a local assembly in Belfast, in 2010, the framework of the pre-eminence of national security was enshrined and protected through a series of Memoranda of Understanding and written protocols, not legislation. Most notably, however, there is no statutory definition of national security.

> *"The term 'national security' is not specifically defined by UK or European law. It has been the policy of successive governments and the practice of Parliament not to define the term, in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances"*[38]

At the time of the devolution of policing and justice in April 2010, the British Government produced a protocol setting out 'Handling Arrangements for National Security Related Matters', and remarkably therein, sought to re-designate the entirety of the history of the previous 40 years of conflict as a national security matter.

> ***"****The NIO will retain ownership and control of access to all pre-devolution records … DOJ officials will have no access to pre-devolution NIO records that relate to matters that remain the responsibility of the UK government, including records that relate to matters of national security****"***[39]

The Protocol further sets out that the UK Government will 'determine what information pertaining to national security can be shared and on what terms' with the devolved Minister of Justice[40]. The Protocol is clear that it 'is not legally binding and does not give rise to legal obligations', yet it is a statement of policy intent to restrict the disclosure of information. Similarly an NIO Memorandum of Understanding with the Policing Board on National Security Matters, made it clear that the Chief Constable would not answer Policing Board questions which 'indirectly touch upon' National Security matters if there is a risk of damage to the interests of this undefined concept.[41]

In preliminary observations following a country visit to the jurisdiction the UN Special Rapporteur on Truth, Justice, Reparations & Non-Recurrence, Mr. Pablo de Greiff said[42],

> *'Although everyone must acknowledge the significance of national security concerns, it must also be acknowledged that particularly in the days we are living in, it is easy to use "national security" as a blanket term. This ends up obscuring practices which retrospectively, it is often recognized (unfortunately, mostly privately), were not especially efficient means of furthering security. In particular, national security, in accordance with both national and international obligations, can only be served within the limits of the law, and allowing for adequate means of comprehensive redress in cases of breaches of obligations.'*

The Fresh Start Agreement[43] of 20th November 2015 abandoned the legacy mechanisms; the core crux of this being the UK government's insistence of a 'national security' veto seeking to trump victims' rights to know the truth concerning the killing of their loved ones.

For their part the Irish government, through Minister Charlie Flanagan, described the insertion of a national security veto as a '*smothering blanket*' and that it was completely *'unacceptable'*[44].

4.2.1 Civil Litigation and Closed Material Procedures

In the absence of state initiated mechanisms to give effect to the State's obligations under the European Convention on Human Rights, many families have sought recourse to civil litigation as a means to access truth recovery and accountability.

Deprived of the opportunity of a criminal trial or an Inquest, the Chief Constable has sought disproportionate recourse to applications that disclosure obligation be heard in arcane circumstances whereby families lawyers are excluded during a *Closed Material Procedure.*

Almost all criminal and civil matters are held in open court, which means that the press and public are entitled to be present, and where they might be excluded (for example where it is necessary to protect children) the impugned citizen and their legal representative are present to hear and challenge the evidence presented.

However Part 2 of the Justice and Security Act 2013, which came into effect in July 2013, introduced fundamental changes to British law, in any civil case involving national

38 www.mi5.gov.uk/about-us/what-we-do/protecting-national-security.htm
39 Para 10 and 11 of NIO Protocol – see at Hansard WPQ 15th March 2010 : Column 254W
40 NIO Protocol 'Handling Arrangements for National Security Related Matters' Annex A paragraphs 10-11

41 The Policing You Don't See : Covert Policing and the Accountability Gap – CAJ 2012.
42 In a speech delivered on November 18th as talks concluded for implementation of the SHA
Full statement of Preliminary Observations and Recommendations on the country visit to the UK: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16778&LangID=E

43 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479116/A_Fresh_Start_-_The_Stormont_Agreement_and_Implementation_Plan_-_Final_Version_20_Nov_2015_for_PDF.pdf
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security by creating an extraordinary alternative to the Public Interest Immunity (PII[45]) procedure.

The 'Closed Material Procedure' (CMP), represents a *'carve out from basic principles of equality of arms and open justice"*[46] by allowing courts to consider any material, the disclosure of which would be "damaging to the interests of national security".

The shifting dynamic behind the legislation was the response to the MI5/MI6 involvement in 'War on Terror' practices such an 'extraordinary rendition' and orders for disclosure in civil cases, arising therefrom, most notably in the case of Binyam Mohamed[47], who was a victim of rendition.

The Justice and Security Green Paper cited the complex and long series of cases[48] concerning Binyam Mohamed[49] as a crucial event in the preservation of sensitive intelligence material. In February 2010, the Court of Appeal (CA) ordered that several paragraphs previously redacted from the Divisional Court judgment in 2008 should be restored and made part of the open hearing. On three separate occasions prior to the CA case the then Foreign Secretary of State, David Miliband signed PII certificates to supress publication of the paragraphs of a Divisional Court reasoning that they contained summarised interrogation techniques used by the CIA against Binyam Mohamed.

The radical significance of CMP's from a rule of law perspective cannot be over-estimated, however infrequently Parliament's intention is, that it be used. Indeed during the final debate in the House of Lords, Lord Brown, himself a retired Law Lord, and former Intelligence Services Commissioner, warned that the legislation involved such a:

> *"radical departure from the cardinal principle of open justice in civil proceedings, so sensitive an aspect of the court's processes, that everything that can possibly help minimise the number of occasions when the power is used, should be recognised."*[50]

The intention of Parliament on review of Hansard was that this repressive anti-terror legislation, was the new world order response to the 'War on Terror'.

However the facts of the matter in practice are somewhat different to the lofty Parliamentary intentions, and as is often the case, repressive measures are often invoked immediately in this jurisdiction to preserve the interests of the State in concealing their involvement in murder and other crimes. It is a fact that in the 5 years since the inception of this legislation, only 41 such applications have been made anywhere in Britain, yet 15 relate to matters in the north, and NONE of them relate to the War on Terror.

4.2.2 Closed Material Procedures

The facility for an application for Closed Material Procedure came into law in July 2013. On 22nd July 2014 Justice Secretary Chris Grayling submitted the first annual report to Parliament on how often closed material procedures (CMPs) had been sought under the Justice and Security Act 2013 (JSA), as he is required to do annually under the Act. Critical analysis by the Laurence McNamara and Daniella Lock, for the Bingham Centre for the Rule of Law in the report *"Closed Material Procedures Under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State"* published in August 2014, noted that the report was lacking in details and was merely a statement of numerical facts. Subsequent reports have provided more details and from review, a startling pattern emerges with specific relevance to the preponderance of applications made in the Belfast High Court.

45 Public-interest immunity (PII) is a principle of English common law under which the English courts can grant a court order allowing one litigant to refrain from disclosing evidence to the other litigants where disclosure would be damaging to the public interest. This is an exception to the usual rule that all parties in litigation must disclose any evidence that is relevant to the proceedings. In making a PII order, the court has to balance the public interest in the administration of justice (which demands that relevant material is available to the parties to litigation) and the public interest in maintaining the confidentiality of certain documents whose disclosure would be damaging.

46 Turning out the lights? The Justice and Security Act 2013 – Tom Hickman. . http://ukconstitutionallaw.org/2013/06/11/tom-hickman-turning-out-the-lights-the-justice-and-security-act-2013/

47 [2011] QB 218

48 The case originated in the US in the case of Farhi Saeed Bin Mohammed v Barack Obama (Civil Action No. 05-1347 GK) 2009, where Binyam Mohamed sought disclosure of information necessary to assist his defence before a US Military Commission and in particular to show that the prosecution case consisted of evidence obtained through torture.

49 R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No.1) [2008] EWHC 2048 (Admin) [2009] 1 WLR 2579 and (No.2) [2009] EWHC 152 and 2549 (Admin) [2009] 1 WLR 2653 (Divisional Court) and [2010] EWCA Civ 65 and 158 [2011] QB 218 (Court of Appeal).

50 House of Lords - 26th March 2013, Col 1032.

TOTAL APPLICATIONS MADE RELEVANT TO THE NORTH OF IRELAND		
2013-2014[51]	5 applications made	2[52]
2014-2015[53]	11 applications made	4[54]
2015-2016[55]	12 applications made	5[56]
2016-2017[57]	13 applications made	4[58]

15 out of the 41 applications have been made in relation to the British Government's intelligence interests in relation to their role in the conflict in Ireland. This represents 36% of the total number of CMPs, a disproportionately high figure. This already high figure exists before any new mechanisms are implemented and despite two previous secretaries of state seeking to assure both families and the public that there would be very limited and rare use of secret courts or CMPs in proposed legacy mechanisms.

4.2.3 Neither Confirm Nor Deny Policy

The United Kingdom Government has a general policy that there can be no confirmation or denial of whether an individual was or is an informant. The issue of whether, and in what circumstances, it is appropriate to depart from that policy and to issue a denial that a person was an informant was considered by the High Court in a case called "In the matter of an application by Freddie Scappatticci for Judicial Review" in August 2003.

In his judgement Carswell LCJ described Government policy (commonly called the NCND [neither confirm nor deny] policy) as it was articulated to him in affidavit evidence by the Permanent Under Secretary at the Northern Ireland Office. The Permanent Under Secretary had stated,

"the identity of agents is neither confirmed nor denied as

- to confirm that a person is an agent would place that person in immediate and obvious danger;
- to deny that a person is an agent may place another person in immediate and obvious danger; and
- to comment either way in one case raises a clear inference [if] the Government refuses to comment in another case that it has something to hide in that case, ie the inference will be that the individual is an agent and may be subject to reprisals (and his life may be at risk) as a result".

Carswell LCJ went on to quote the Permanent Under Secretary as saying that:

"It has been accepted within Government that the policy [not to confirm or deny the identity of an agent] does not automatically trump every request for a comment on the identity of agents: it may be departed from in a particular case if there is an overriding reason to do so…"

The Permanent Under Secretary also went on to say that the Government was of the view that the policy should not be departed from "*in anything other than the most exceptional circumstances".*

In addressing the application before him the Lord Chief Justice talked about the fact that *"the Minister can depart from the NCND policy .. if there is good reason to do so to meet the circumstances of the individual circumstances of the Applicant's case."*

He went on to say that "*A decision maker exercising public functions who is entrusted with a discretion may not, by the adoption of a fixed policy, disable himself from exercising his discretion in individual cases."*

If an agent is involved in a criminal act, for instance in the killing under investigation, national security should not be used to cover these actions or to hide the culpability of the state.

The Neither Confirm nor Deny policy should not be applied or used in circumstances where an agent was involved in the killing under investigation or criminal activity surrounding the killing under investigation. If an HIU investigation finds that an agent was involved, and they have since died, then there is no legitimate or legal reason for not disclosing the identity of that agent/s under Article 2. As the right to life no longer pertains. Families have a right to know the extent of the role that agents played.

51 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/342224/moj-report-closed-material-procedure.pdf

52 1. Terence McCafferty (NI SoS). 2. Martin McGartland (Home Secretary)

53 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468375/closed-material-procedure-report-2015.PDF

54 3. Margaret Keeley (MOD). 4. Margaret Keeley (PSNI Chief Con) 5. Michael Gallagher (NI SoS) 6. Simone Higgins (PSNI Chief Con).

55 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/568767/report-on-use-of-closed-_material-procedure-25-june-2015-to-24_june-2016_.pdf

56 7. Eilis Morely (MOD) 8. Anthony Lee (PSNI Chief Con) 9. Roddy Logan (PSNI Chief Con) 10.Higgins (linked to 6/8 PSNI Chief Con) 11. Gerard Hodgins (MOD)

57 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664979/use-of-closed-material-procedure-2016-17-report.pdf

58 12. Gabriel Magee (PSNI Chief Con) 13. Ryan Hegarty (Plaintiff) 14. Elizabeth Monaghan (Plaintiff) 15. Mary Heenan (Plainiff)

4.3 Disclosure

To great fanfare at the time of the SHA, it was announced that the HIU would be given access to all official, governmental, police, military and intelligence material. This indication of goodwill was supposed to build confidence that the HIU would be different from the Historical Enquires Team (HET) - a more *ad hoc* entity without the same level of access. Instead the HIU would have full police powers to interview people under caution and access all relevant information.

Indeed, in the legislation, this promise appears to be legislated for at Clause 25. In discussions with officials, it has been pointed out that the legislation is, in effect, a statutory requirement on all government departments and official bodies to co-operate with HIU requests for information. This is fine insofar as it goes.

However, it is reasonable for RFJ and the families we represent to be sceptical for the following reasons:

- The draft legislation draws a distinction between information which "must" be made available if the HIU "reasonably requires" it and information which the organisation "may" make available if it considers the HIU "may" need it. This places the responsibility on the organisation to make known information that the HIU may not know exists. For reasons outlined below, RFJ and the families it represents are entitled to be sceptical that the organisations concerned will make the HIU aware of relevant material not asked for. It would build confidence if the organisation was required to make all of the information available and let the HIU decide its relevance.
- The legislation also allows the organisation and the Secretary of State to have a say over how the information is held. This suggests that information can be withheld if the Secretary of State and her intelligence operatives dispute the record-keeping of the HIU.
- These distinctions and caveats suggest that the HIU's access can be limited in all sorts of ways.
- We have already outlined our concerns about the Secretary of State's powers to veto whether information can be passed by the HIU director to the family and the objectionable secrecy surrounding so-called appeal safeguards.
- The experience to date by families seeking disclosure in civil cases has been extraordinarily poor. The courts have, again and again, made orders requiring the police and the MoD to disclose material to families' lawyers. The response of these authorities has been lamentable: prevarication is blamed on lack of resources, the volume of material, the scope of discovery orders and so on. The courts are clogged up, lawyers and judges are frustrated, and families are further traumatised.
- It is extraordinary that the Chief Constable continues to resist orders of the court for disclosure. If ordinary citizens ignored court orders, the same Chief Constable would have a duty to impose sanctions on them.
- Perhaps the best example – at least currently the most legally advanced – is the case of John Flynn whom the Mount Vernon UVF tried to kill on three occasions in the 1990s. Informers – including at senior levels within the UVF – reporting to RUC Special Branch handlers were involved in these assaults. The PSNI has acknowledged its culpability but does not want to make information and material available, arguing that they wish to make financial settlement without further examination and transparency. The courts have consistently refused to allow this, saying that the level of misfeasance cannot be computed unless the level of offence is known. This entirely logical – and legal – position is simply being resisted by the Chief Constable. In these circumstances it is hard to have confidence that the HIU director will be given adequate co-operation.
- The chain of events surrounding previous examinations of contentious issues and cases is instructive. Firstly, look at the example of the Stevens Inquiries during the 1990s. In 1990 after his first "look", John Stevens said collusion was "neither wide-spread nor institutionalised". After his third "look" in 2003, he stated that there had collusion between members of all British security organisations and the UDA over the loyalist murders of many innocent people in the 1970s and 1980s. He itemised the Force Research Unit of the British army and the RUC - in particular its Special Branch - as being central to this collusion. The level of obstruction he experienced was considerable. At paragraph 4.8 of his final report he said: "The failure to keep records or the existence of contradictory accounts can often be perceived as evidence of concealment or malpractice. It limits the opportunity to rebut serious allegations. The absence of accountability allows the acts or omissions of individuals to go undetected. The withholding of information impedes the prevention of crime and the arrest of suspects. The unlawful involvement of agents in murder implies that the security forces sanction killings."

- John Stevens recommended that 24 individuals within the state intelligence network should be prosecuted. The then Director of Public Prosecutions, Sir Alasdair Fraser, took four years to consider the matter before deciding, on the grounds of "public interest" not to prosecute. It is known that John Stevens was confident that the evidence existed to ground successful prosecutions for criminal offences in respect of all 25 cases.
- Given this context of failures in accountability and cover-up of criminal wrongdoing, on an industrial scale, on the part of the state, we are not persuaded that the statutory duty of disclosure contained in the draft legislation can address these systemic difficulties.
- Former Deputy Chief Constable of PSNI and the recently appointed Garda Commissioner, Drew Harris gave evidence in the autumn of 2014 to the inquests into the shoot-to-kill incidents in Armagh in November and December 1982. During the course of his evidence, he was asked to comment on remarks made at meetings of former RUC personnel that senior PSNI officers were "determined to play our part in the defence of " the RUC. Part of this defence strategy has been to prevent and prolong disclosure by creating ever more arcane processes and procedures, such as the Legacy Support Unit (LSU) designed and staffed by former RUC Special Branch, which delay inquests and other legacy court hearings - hearings that are examining the role of RUC Special Branch and other RUC officers. We have seen nothing to suggest that the HIU will experience any greater co-operation.

Finally, we point to the example of the murder of Pat Finucane in February 1989. This remains the subject of an inter-governmental agreement with the Irish government to hold a full judicial public inquiry into the murder, an obligation yet to be fulfilled by the British government.

The murder has, however, been examined in some detail by two individuals who - it was promised – would be given full access to information, Judge Cory and Desmond De Silva. Previously, John Stevens had examined the murder as part of his inquiries into collusion, in particular his third report Stevens 3 examined the killing of Pat Finucane. On each occasion, further revelations emerged and the level of collusion became more egregious and compelling. The most recent examination by de Silva was ordered in the face of on-going negotiations with the Finucane family. The De Silva review undercut the Finucanes' understanding that an arrangement for a public enquiry was about to be announced. Despite the fact that the information De Silva made public was untested by family lawyers, the revelations he put in the public domain were still remarkable. But they had not been made available to previous investigations. De Silva himself acknowledged that there is further information to which he had no access, further undermining confidence that the HIU will, indeed, be given all the information it seeks and needs to carry out its Article 2 compliant investigations into state and state-sponsored killings.

In all these circumstances, we remain to be convinced that the legislation is sufficiently robust to ensure that the HIU will be able to access all relevant information and, when it has examined it, put it into the public domain in a manner that will meet the underlying principles of the SHA that: "the pursuit of justice and the recovery of information should be facilitated" (Clause 1(d)); "that human rights obligations should be complied with" (Clause 1(e)); and that "the rule of law should be upheld" (Clause 1(b)).

It follows that we believe the failure to disclose to, or co-operate with, the HIU director should be made a criminal offence with appropriate penalties put in place. Experience has shown that, where vested interests are in play, the tendency is to prevaricate, make excuses and deny victims accountability. Without the threat of criminal sanction, the dark forces determined to hide direct and complicit British state involvement in murder and other criminal activity will continue.

It should be open to the HIU director to outline her/his assessment of the level of co-operation received from the various authorities in respect of disclosure. Thus, as well as individual culpability for failure to co-operate with or disclose to the HIU, the public shaming of organisations should also be an available power to the HIU director.

4.4 Staffing

The HIU is to be an independent investigative body with sufficient powers and access to information to carry out its duties without fear or favour. It follows that the staff must be of sufficient independence and integrity to win public confidence, particularly from those who bore the brunt of the bias and discrimination of British and Unionist security policy. It follows that we have a number of issues that we wish to outline regarding the staffing of the HIU.

The heavy emphasis on policing backgrounds for all investigators skews the skillsets required overall. By virtue of saying the HIU can only be staffed by police officers the HIU will be limited in capacity and independence. International best practice demonstrates that the best outcomes are

achieved with a multi-disciplinary approach which embraces a range of relevant skills sets and experience when brought to investigative work. This is best illustrated with the work of the International Criminal Court in the Hague where the Prosecutor leads the team of investigators who have the following minimum skill sets.

- A minimum of 5 years (7 years with a first level university degree) of professional experience in criminal/financial investigations, investigations of serious human rights violations or investigative analysis, with a special focus on complex, large-scale cases;
- Or same level of professional experience working with NGO/IGO or International Commission of Inquiry, with a special focus on complex, large-scale cases; experience in working with police and justice organizations.
- Significant experience conducting investigative interviews of victims, witnesses and suspects.

The HIU will require a high number of staff. A focus only on police officers to staff the HIU narrows the scope for recruitment. Adopting international principles of best practice regarding recruitment with a wider skill set will address concerns regarding potential challenges to recruitment to the HIU.

The leadership/senior teams/investigators of the PONI have not been exclusively police officers. HIU recruitment should be modelled on this learning.
There should be no place for former RUC personnel in the HIU given that the RUC will be a major focus of investigation for the HIU.

PSNI personnel who have been in any way involved in investigations into conflict-related cases should also not be eligible for recruitment – or secondment – into the HIU. This includes any current or members of the PSNI's Legacy Investigation Branch, C2, C3 and individuals involved in the LSU in registry, "managing" disclosure to legacy inquests and other court processes.

Former or current British military personnel should not be recruited onto - or seconded into – the HIU staff complement. This should of course apply to any members of the Royal Military Police.

Current and former operatives in British internal or foreign intelligence organisations should not be eligible for recruitment or secondment into the HIU.

There should be robust vetting arrangements to ensure that prior employment in the RUC, PSNI, British military and/or intelligence organisations is known to HR personnel in the HIU so that contamination of the staff and processes of the HIU is prevented.

Concerning the recruitment of former police officers calls for application should be posted on professional recruitment outlets in countries where English is widely used e.g. Scandinavia, Holland etc. Active recruitment/secondment from An Garda Siochana should be undertaken. One of the failings of the HET was that it was predominantly of English/ Welsh police formations.

Former HET officers and support staff should also be barred from applying.

Non-policing disciplines as referred earlier should be prioritised in the search for personnel. In the same way that the Police Ombudsman uses a mix of backgrounds, the same should hold for the HIU. The key is to ensure that the canteen culture that develops in the HIU is not imbued with a British policing ethos, tolerant of past RUC failings and disposed to be biased against victims of state and state sponsored violations.

As was required for a new beginning to policing in the north after the Patten Commission report, a clear and consistent focus on human rights must be a major prerequisite for the HIU and its staff. This should start from the top with a human rights expertise and awareness built in to the appointments process for senior staff.

Another major issue is the question of training for HIU personnel. We are aware that the Police Ombudsman has offered to carry out training for HIU personnel. This is a welcome idea. Given the fact that the Ombudsman has managed to win back confidence after the debacle that occurred under Al Hutchinson, staff experience in that organisation should be an invaluable asset from which the HIU could learn. On-going training in human rights understanding should also be built in to the staff development plan for the organisation. All staff must be under a commitment to a human rights based approach to their work, understanding that the organisation they are working for was established directly out of rulings by the European Court of Human Rights and exists in order to fulfill UK obligations arising from them. However, as well as benefitting from the experience of Police Ombudsman, orientation for staff should also include an understanding of the impact of conflict-related trauma on victims. As referred earlier, compulsory ongoing trauma

training is essential for all staff, including particularly frontline staff.

Formal recognition of the victims' sector, and particularly NGOs working on legacy issues and with victims should be inculcated through working relationships with the various support organisations, as well as an understanding that many families will wish to be supported throughout the HIU process by locally based support and advocacy groups such as RFJ.

Unless the appropriate safeguards are in place to ensure that the staffing of the HIU is not contaminated by a pro-state view of the conflict, there is no doubt that the organisation will struggle to win the confidence of the Catholic, nationalist, republican community. By way of example, we point to the fact that recent figures show that the PSNI is struggling to get recruits from the Catholic community as confidence in that body dwindles – largely due to the vested interest that institution holds over dealing with the legacy of conflict. It would be unfortunate if the same process happened in the HIU.

Recruitment to the HIU needs to ensure gender equality in all roles and levels. Ensuring a multi-disciplinary recruitment process will:

- contribute to ensuring equal female recruitment;
- ensure that the HIU is reflective of the society it will serve;
- will not fall into male or macho policing stereotyped approaches;
- will reach out to the women who have suffered violations who have found engagement in previous processes difficult.

Finally, HIU staff should be made aware of the gendered impact of conflict, that 91% of those killed were male and therefore the impact was, overwhelmingly, on female relatives who had to cope with living on, poverty, family responsibilities while also enduring the trauma of loss. Gendered harms must be recorded by investigators as these will be uncovered while investigations progress. This previously hidden information will be vital to the IRG as it examine gendered harms during the conflict.

4.5 The Appointment of the HIU Director

We do not believe the arrangements for the appointment of the HIU director are sufficient to enhance public confidence, particularly in the circumstances where the devolved institutions are not in place and the appointment could be signed off by the Policing Board or the Executive Office. As a way of mitigating concerns over the appointment, we believe in particular, that international involvement in the appointment process is necessary. There are individuals with knowledge of the North of Ireland and international transitional norms, whose contribution to the appointment of the HIU Director would enhance the credibility and integrity of the position, and the HIU overall.

We believe individuals such as former UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff, or Paul Seils, Vice President of the International Centre for Transitional Justice have the international credibility and experience to be involved.

Other prominent members of the international human rights community who have shown sensitivity to the ramifications of the conflict in Ireland include: Professor Fionnuala Ní Aolain, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Professor Bill Schabas, former *amicus curiae* of the Special Tribunal in Sierra Leone established by the UN as part of transitional justice mechanisms ending years of conflict, and currently professor of international law at Middlesex University in London; and Michael O'Flaherty, director of the European Union Fundamental Rights Agency, and formerly Chief Commissioner of the Human Rights Commission here in the North of Ireland, Dr Dubravka Simonovic, UN Special Rapporteur on Violence Against Women, its Causes and Consequences and Monica Pintó, former UN Special Rapporteur on the Independence of Judges and Lawyers.

As things currently stand, the proposed make-up of the appointments panel does not inspire confidence. Far better to enhance confidence by seeking the involvement of prominent international experts.

4.6 Caseload

The intention of the HIU was to complete the review of all conflict-related deaths initiated by the HET and take on the legacy caseload of the Police Ombudsman. However, this bald calculation has been overtaken by a number of issues. Firstly, the "cut-off date" – the end date – has moved from the date of the Good Friday Agreement in 1998 to the end of March 2004. The rationale appears to be one of police bureaucracy rather than consideration or concern for the rights of victims. We believe this will add perhaps 120 deaths to the HIU caseload.

This proposal is complicated by the fact that the relatives of victims of the Omagh bombing do not want to be included on the HIU caseload, preferring to pursue their demand for a cross-jurisdictional public inquiry.

Adopting a victim-centred approach tends to support the notion that deaths that are clearly conflict-related – even if they occurred after the notional end of conflict – should benefit from the article 2-compliant investigation promised by the HIU. Accordingly, we do support the extension of the cut-off date to 31st March 2004.

However, this does not prevent us from continuing to support the Omagh families' demand for a public inquiry, particularly given the way in which full disclosure has been denied them and the then Police Ombudsman, Nuala O'Loan, when she was carrying out her own investigation.

Another issue related to the caseload concerns the fact that the HIU is supposed to complete the review of all cases initiated by the HET. The logic has been that, only cases uncompleted by the HET will be carried forward. The draft legislation gives the Chief Constable a role in identifying whether completed HET reports can be taken on to the HIU caseload. (Schedule 3). We do not believe that the Chief Constable should have a role on this. It should be solely up to the HIU director to decide which cases s/he can take on.

While we agree that the starting point should be the uncompleted cases on the HET list, any family which is unhappy with the report they received from the HET – and there are many of them – should be entitled to have the HIU re-open their case.

The HET was a discredited organisation. It is now accepted that it was not capable of carrying out Article 2-compliant investigations. The HIU will be the first organisation – as long as it is established as agreed by all the parties to the SHA – that is able to carry out such an investigation. It follows that, in principle, all cases should be looked at with the requisite independence, thoroughness, (practical) promptitude and with appropriate family contact and liaison. However, there will be families who are content with what they received from the HET and do not wish for the case of their lost relative to be re-opened. That position should be respected.

We therefore believe that, rather than the complicated criteria set out in Schedules 3 and 4, the HIU director should have a wide margin of discretion to re-open cases "completed" by the HET, where families approach her/him expressing dissatisfaction.

The HIU remit should extend to all deaths in all jurisdictions where conflict related deaths occurred. For example, in England it is perfectly possible for the HIU to conduct independent investigations and liaise with local police authorities where appropriate. Similarly investigations of killings that occurred south of the border and on mainland Europe should be carried out by the HIU under the EU Criminal Justice Mutual Assistance Act 2008 "police to police support and co-operation with external criminal justice agencies".

As the Irish government legislates for the IRG it should also legislate for the HIU, this should operate on the same cross jurisdictional basis as the Independent Commission on the Location of Remains of the Disappeared and IRG. It is vital that the Irish Government are involved in recruitment of director of the HIU and its senior staff as well as having a role in oversight.

As previously mentioned RFJ supports the call by the families affected by the Omagh bombing for an independent cross-jurisdictional public inquiry. Similarly, we support the Finucane family to realise the promise of a full judicial public inquiry as part of the international agreement with the Irish government. The failure to implement this promise reflects poorly on the integrity and credibility of the British government and undermines confidence in the wider Irish nationalist community. The words of one of then prime minister David Cameron's closest advisers bear repetition in this regard.

Sir Jeremy Heywood sent a message concerning the promise of a public inquiry into the Finucane case to the prime minister's private secretary, Simon King, ahead of a ministerial meeting in July 2011. He asked: "Does the prime minister seriously think that it's right to renege on a previous government's clear commitment to hold a full judicial inquiry? This (the murder of a solicitor with the active collusion of state forces) was a dark moment in the country's history - far worse than anything that was alleged in Iraq/Afghanistan. I cannot really think of any argument to defend not having a public inquiry. What am I missing?"

Simon King replied that the prime minister "shares the view this is an awful case, and as bad as it gets, and far worse than any post 9/11 allegation".

Given this extraordinary exchange, responsibility for the refusal of a public inquiry must be laid at the door of entities with more executive control than a British prime minister.

4.7 Appeals

In response to vigorous objections raised by Relatives for Justice and the Pat Finucane Centre concerning sweeping powers vested in a Secretary of State, enabling them to withhold information from family reports by the HIU, Theresa Villiers and James Brokenshire stated that in such circumstances families would have an automatic right of appeal.

In joint meetings secretaries for the North reiterated to us that the exercise of such powers would be extremely rare; and that in any such event families would (a) not have to make a leave application to the High Court by way of an Order 53 Statement thereby allowing an application to go directly to a High Court judge for a full hearing to challenge a decision of non-disclosure and (b) that resources would be made available for such challenges i.e. legal aid.

Notwithstanding our continued objections to these powers the current draft legislation omits these mitigating promises altogether.

We also do not believe that such powers would be exercised on rare occasions. One only has to note the ongoing withholding of information in ongoing legacy civil cases, the past application of PIIC, and even the unprecedented situation in which the Police Ombudsman had to seek leave to challenge the previous PSNI Chief Constable around the failure to make disclosure.

Coupled with the extent of legacy related cases overall within the courts through civil litigation, judicial review and appeals, this highlights both the demand for resolution of legacy and the resistance from state agencies and government. Indeed failure to fund the legacy inquest plan by the Lord Chief Justice (LCJ) is but one example where withholding resources becomes the tactic.

Much of this delay is contrived as part of a policy by some official bodies that are directly responsible for deaths or that may be implicated and where varying degrees of vested interest exist.

4.7.1 Solution

It is not at all uncommon that countries emerging from conflict and implementing a series of transitional justice mechanisms to address the past have also created specialised chambers and courts primarily for these functions.

Some have been by international interventions involving the UN and the International Criminal Court (ICC) and in differing circumstances; each situation being unique but nevertheless the principle that this assists in rebuilding and reestablishing trust and confidence in the rule of law, the courts and human rights, administration of justice, reconciliation, and rebuilding society.[59]

Whilst every situation requires it own bespoke process there is nevertheless some important principles and learning. The wave of people coming forward post-conflict that hitherto remained silent or felt they were unable to address the circumstances relating to the killing of a loved one for a variety of reasons, the inability of the criminal justice system given legislative restrictions placed upon it, a de-facto form of impunity experienced by sections of community, the pressures on the system given the amount of killings and violence occurring etc. all add to the growing volume of cases emerging versus the capacity to meet such demand.

Therefore there is arguably a case for the appointment of dedicated high court judges and associated administrative support staff for the specific purpose of the draft legislative proposals, requiring amendment, within the Stormont House Agreement (SHA). A chamber within the current judicial system.

Legacy judges would also enable the operational function of the courts to be better placed to address the large, existing and growing legacy case list and to discharge the state's legal obligations in a timely and compliant manner. Such appointments would draw on the learning from other jurisdictions and be unique to our own situation. It would be an appropriate response to current and projected need.

These posts would be additional and funded as part of the creation of the legacy mechanisms by the UK Treasury and under the remit of the LCJ. Appointments would follow the existing norm for judicial appointments.

The draft legislation surrounding the powers as vested in the secretary of state permitting withholding information from families and others is a serious departure from the administration of justice and rule of law.

Appeals adjudicated upon by High Court Legacy Judges would be binding and final and accepted by all parties. Findings must be enforceable and not merely a judgment, as determined in the draft legislation, to be reflected upon by a secretary of state who is not bound by the court and who has the final say.

The proposed current draft legislative scenario as per the above role of a secretary of state would serve only to render the entire process void of any credibility whatsoever if such checks and balances are not put in place. Indeed it would act as de-facto form of amnesty and continuing impunity.

4.7.2 Legal Aid

In terms of families having the ability to challenge the withholding of information by a Secretary of State, resources must also be made available to the Legal Services

59 https://www.ictj.org/sites/default/files/ICTJ-Legal_Frameworks_for_Specialized_Chambers-Final-EN.pdf

Commission, or an alternative appropriate body, and should be ring-fenced for these purposes.

Application should not be means tested. Numerous bereaved families would not necessarily be eligible for legal aid and if such funds are not made available accordingly then a huge disadvantage – an inequality of arms weighing very much in the favour of the state – would befall families and the state would benefit from a lack of judicial scrutiny by going unchallenged. Indeed such an accountability gap would further erode public trust and confidence and could be cynically abused.

4.7.3 Criteria for appeal

Families that have information withheld should not be required to complete leave applications; there should be an automatic right straight to hearing once a family is informed of non-disclosure in the killing of a loved one.

RFJ proposes the creation of a chamber consisting of three High Court Legacy Judges, including the necessary administrative staff, for the specific purpose of hearing appeals associated with the withholding of information by a secretary of state; a HIU Director; non-disclosure, withholding and failure to provide material evidence, intelligence, suspects and witnesses associated with violations by state agencies; criminal prosecutions resulting from HIU investigations; and any other matters arising that would ordinarily be open to judicial challenge by all interested parties. The chamber would also address the existing legacy caseload within the judicial system.

A similar proportionate approach is required in the South when concerning any failure to disclosure in respect to killings examined.

4.8 Public Prosecution Service (PPS)

We would also recommend that the PPS recruit a reserve pool of experienced independent prosecutors from which to rely in addition to existing staff for the purposes of taking forward cases from the HIU where prosecutions and potential of arise. A small specialised and dedicated team of prosecutors could liaise with the HIU and maintain continuity essential in any such outcomes. Additional resources for this should also be budgeted for.

4.9 Forensic Science

Similarly resources must be afforded to the NI Forensic Science Laboratory proportionate to the caseload going forward including for any specialised work that may be required to include external forensic and ballistic work.

4.10 Set up of the HIU

In seeking to protect the independence of the HIU and build confidence in it, we point out how important it will be that set up arrangements should not precede the appointment of the HIU director and her/he taking up that role. S/he should be in full control from the start. Asking civil servants from the Department of Justice to secure premises, set up operating procedures, and so on, in advance of the director's appointment would not be wise. The culture and operating approach should be entirely a matter for the HIU Director and the senior staff s/he appoints. Sequencing in planning should take this into account and ensure that the director is appointed (even if on a provisional basis) as soon as practicable while the legislative process is being completed.

By way of an example of how setting up a new organisation in the wrong way can undermine its effective operation we cite the Victims and Survivors Service. Civil servants from other departments, with no understanding of or sensitivity to the concerns and anxieties of the new organisation's supposed beneficiaries, secured premises, put in place operating procedures, agreed policies and appointed staff. These caused years of dysfunction and led to prolonged controversies and skirmishes until organisations such as our own felt that they could recommend the VSS as fit for purpose. In the meantime, many of our clients had been re-traumatised and made to feel inadequate.

If this is to be avoided with the HIU, seconded civil servants should not be allowed to shape the new organisation and how it approaches its important tasks.

4.11 Official Secrets Act

We remain concerned about the inhibiting effect of the Official Secrets Act (OSA) on former operatives who may wish to come forward to the HIU and disclose past wrongdoing by military, police or intelligence personnel in respect of conflict-related incidents and policies.

We do not see how individuals bound by the OSA can co-operate with the HIU unless they are freed from the threat of prosecution for breaching the OSA. We are aware of cases where individuals have come forward to lawyers and NGO's with important evidence confirming collusion between policing/military/security service led operations and non-state groups. This information cannot be used, as things currently stand due to the fear of the individuals concerned about prosecution for a breach of OSA. It would be unfortunate if this situation persisted when the HIU is established.
The safety of whistle-blowers is a matter which should be put into place for the effective operation of the HIU as a

mechanism seeking to establish truth and accountability for families. It makes sense that people who spent their careers genuinely trying to solve many of these issues, and for a variety of reason were prevented or are afraid to reveal what was going on, should openly be encouraged by the HIU to cooperate safely. We therefore believe that a whistleblowers' charter that encourages members of state organisations with information to come forward and cooperate voluntarily providing information to assist the HIU with information to assist in its investigations should be legislated for and promoted.

Equally the Official Secrets Act cannot be an impediment to persons of interest to investigations, whether witnesses or suspects, being questioned by HIU investigators, where the individuals concerned may rely on the OSA in order to shield evidence, facts and culpability. In line with the promise of "full disclosure" the OSA must not become another national security barrier to investigations.

The legislation should enable the HIU to carry out its work free from any impediment by Official Secrets Act.

4.12 Oversight

In respect of oversight, RFJ is content with the arrangements in place involving the Police Ombudsman, Criminal Justice Inspectorate NI and the Policing Board. Provision needs to be made for oversight by the Irish government in respect to our proposals that the HIU has cross-jurisdictional powers of investigation on the island. This may be achieved via the Anglo-Irish secretariat in Belfast.

Should the need arise, it must be possible for families to formally complaint about the conduct of HIU staff via a robust complaints procedure. We are aware that a number of staff in the previous body (the HET) were discourteous to, and politically-insensitive (not to say naïve) in their interactions with the families of those killed in circumstances suggestive of RUC/British army wrongdoing, connivance or official collusion. There seemed an attitude of bias in respect of official conduct during the conflict. Properly independent investigators will have to be able to countenance the notion of RUC and British army involvement in criminality and murder in order to properly to investigate it.

Only by having robust complaints procedures and oversight mechanisms can people have confidence in the HIU carrying out its task without fear and favour.

4.13 Concluding Remarks

Finally we would point out that failure to implement the SHA mechanisms for whatever reason still leaves a continuing situation in which the UK remains in violation of its Article 2 legal obligations involving investigations into killings by the state and where collusion exists.

In such a scenario it would be our contention that the HIU architecture must be advanced and implemented, as technically and legally this would not require consultation. It would merely be a matter of the UK finally adhering to its international legal obligations in line with the European Convention and complying with court judgments including the supervision role as set out by the Committee of Ministers through the execution of judgments.

It is important to also note that it has now been over 17 years since the European Court judgement in respect of the McKerr group of cases. Ongoing supervision of the UK by the Committee of Ministers of the Council of Europe continues; the CoM has to date refused to sign off on this supervision, having not been fully satisfied that the UK has remedied its domestic investigative procedures through the package of measures. In particular, the HET having been disbanded, there are no independent investigations into state killings taking place. The proposed HIU would however meet these requirements and irrespective of the consultation should be implemented.

5. Independent Commission Information Retrieval

Relatives for Justice supports the proposal for a mechanism that provides information to families. We understand the principle that this process will involve confidentiality and protection of evidence and those who provide information. This process is not unique or unknown as similar processes, not least the local Independent Commission for Location of Victims Remains, have been an integral part of examining disappearances and violations over the previous decades. However, this proposal will have far more reach, touching the lives of thousands of survivors of the conflict and similar numbers of those who were actors to the conflict. As such it needs to hold the confidence of all of those who will potentially be engaging with it.

5.1 Confidence

As they stand the draft legislative proposals may not gain the confidence of those who might potentially provide information.

Currently the information given in reports to families by the ICIR could be used for further investigation by the HIU. If this proves to be a barrier to engagement by conflict actors with the ICIR, then families of victims will be unsure and disinclined to participate in another difficult and emotional process which may not work. This double layer of distrust of the proposed ICIR will mean it potentially works for no one.

To this end RFJ recommends the idea of sequencing between the HIU and ICIR.

5.2 Sequencing

Should a family receive information from the HIU or other sources then this information can be used by families to raise questions of those responsible for killings and by the ICIR to test any accounts given in response to those questions. ICIR should not provide reports on any individual killing to the family concerned until after the HIU has completed its investigation into the killing.

This will protect all families' right to proper and effective investigations.

This should also maximise the opportunity for families to gain information from a body designed to provide truthful accounts and answers to families who have exhausted every investigative opportunity. It is not an amnesty. It is a place where questions might be answered with mutual respect and confidence.

To that end it is essential that the ICIR has a life after the HIU finishes its work. This will allow families to exhaust the HIU process first, meeting statutory investigative obligations, and then support the families who have questions and opportunity to engage the ICIR process with full receipt of all available investigative reports.

Provision must be made in the Bill to extend the lifetime of the ICIR.

5.3 Non-fatal violations and duty to investigate

While the draft Bill[60] is very clear about information which relates to deaths it is not clear what it will do with information it receives relating to other violations which would trigger obligations to investigate. These would include Article 2 violations that did not result in death or Article 3 violations. As both states will be bound by treaty to the ICIR, it is essential that both states make clear how they will meet their ECHR obligations regarding non-fatal violations, not least torture or other codified violations.

We propose that such instances are referred to the serious non-fatal violations and injuries section of the HIU, as proposed earlier.

5.4 Reports to Families and "national security"

The facility for the British Secretary of State to see all reports before they are given to families and to redact information to families in ICIR reports is unacceptable.

Given the confidential nature of the entire process it is inconceivable that such blatant interference is warranted or justifiable.

Neither the Police Ombudsman nor the Chief Constable nor the judiciary are subject to such irregular measures and restrictions.

Similar issues are addressed in detail in the section regarding the HIU. However at least there are some measures in place regarding the HIU. That there are none for the ICIR is of genuine concern. That there is no procedure for a family even to be informed that the ICIR has withheld information by

60 Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and NI establishing the Independent Commission on Information Retrieval, 15 October 2015

direction of the Secretary of State must be remedied. Families must be informed where information is withheld. Similarly, a family must have the right to appeal any such decision. A transparent and legally compliant appeals process which is fully funded, as per the RFJ proposals re the HIU appeals process (see 4.7) with an appeals court chamber, could also be used.

5.5 Appointments

In the absence of an Executive it is unclear who carries out the appointments to the ICIR. The appointees will be critical in developing the trust and confidence of the entire community. Appointees must be rigorously independent and international expertise would be a valuable bonus in engaging and testing actors' accounts in a truth telling, albeit private setting. If the Executive is still not in place we recommend that the two appointments be made by the Intergovernmental Conference with the ambition of appointing two international figures.

5.6 Official Secrets Act

There needs to be explicit assurance that restrictions on providing information as a result of the Official Secrets Act will not apply to those former or serving members of state forces engaging with ICIR, reflected in legislation.

5.7 Destruction of Evidence

Proposals regarding the destruction of information retrieved by the ICIR after 5 years are unacceptable. This is an unprecedented approach to information retrieval and bears no scrutiny in value. This information should be retained securely.

5.8 Themes and Patterns

ICIR should provide in depth information to the IRG on themes, patterns etc for their reports. Doing so would provide meaningful outcome ensuring that IRG reports on conflict themes and patterns, the experience of how the conflict unfolded overall, including contextual information, would more accurately be reflected.

There is a real risk that the lack of formal reporting will mean crucial information gleaned during the ICIR process will be missed by the IRG. If the information is destroyed before the IRG has completed its work then the value of the IRG's work will in turn be impacted as it will be denied information and data central to its objective.

5.9 Reports

We recognise that the ICIR will carry out annual reports and a final report.

Genuine and tested participation of the armed groups to the ICIR process is key. We recommend that there be quarterly interim reports which indicate the levels of participation and cooperation of the groups, and the veracity of their information. This would provide a measure of accountability of the armed groups[61], and confidence building to victims and survivors engaging.

5.10 Powers of the Secretary of State

It is unacceptable that the Secretary of State holds power to wind up the ICIR. This body must be supported to function without fear or favour. Fear of being shut down due to the whim of the British Government would prove catastrophic. It must not be subject to a British veto.

5.11 Gender

As with all of the structures it is essential that a gender lens is applied to the workings of the Commission, i.e. awareness and central composition to include those with a demonstrated international understanding of gender, and similarly to the recovery of information.

As with all aspects of the SHA architecture UNSR1325 should be a guiding tool. Such an inclusive approach ensures the safe participation of women in the structures and the process overall. It also ensures that the ICIR can report on gendered themes that arise during the course of its work allowing the IRG to examine gander as a central theme of its work. To this end we recommend the work on Gender Principles to Deal with the Past.

61 This includes state and non-state groupings

6. The Oral History Archive

RFJ welcomes the focus on storytelling that is raised by the proposal for an Oral History Archive (OHA). We believe that storytelling and oral history work is essential as part of the broader architecture of dealing with the legacy of the conflict.

6.1 Existing Archives

A core element of RFJ's work with bereaved families has been work on assisting them to record their own personal testimonies and experiences in a range of ways. One of our most significant initiatives has been the Remembering Quilt made up of squares dedicated to individuals who have died as a result of the conflict, that have been designed and made by family members and friends. The quilt now has 10 panels representing over 500 individuals. RFJ also has created an archive in collaboration with Professor Christian Davenport at the University of Michigan which contains recorded oral history interviews and the digitised records of the Association for Legal Justice.

RFJ is also aware that there are many other archives of personal experiences of the conflict that have been created by a wide range of groups and organisations in Ireland and beyond.

The proposal for an Oral History Archive does not take account of this extensive body of work nor the other archives that are currently emerging or likely to be created in the future. We believe that as it stands the proposal for an OHA would marginalise existing, emerging and future archives and the personal stories they contain.
The risk of displacement of existing stories is most evident in the OHA report to the Implementation and Reconciliation Group (IRG) on patterns and themes. This report would only be able to use the material in the OHA and therefore all the other material in existing archives would not be admissible thereby depriving those contributors of a voice.

The consultation proposes that the OHA would collect new oral history records but also be able to receive oral histories that have been collected by others. This however does not address the issue of the marginalisation of other archives and the stories and testimonies they contain. The inclusion of existing oral history records is described passively rather than these been actively sought out and indeed it is clear that the OHA can reject records that are offered. Moreover, there is no apparent awareness that the process of receiving existing oral histories is a challenging process that needs to be thought through and resourced.

A much more relevant and ethical model would be one which engaged all existing and emerging archives in equal partnership. This would be more consistent with the widely acknowledged value of oral history work in enabling a broad range of personal experiences of the conflict.

6.2 Disposal of Records

The statement about the procedure for disposal of records raises alarming questions about the selection of interviews that would be retained or excluded within the archive. This also raises the possibility that some records might be excluded from the report on themes and patterns to the IRG.

6.3 Public Records Office

It is proposed that the OHA will be established by the Public Record Office of Northern Ireland (PRONI) although the Stormont House Agreement does not specify this. RFJ cannot see this model of ownership working for a number of reasons: RFJ's negative experience of working with PRONI, the lack of independence in the proposed structure and the restricted scope of the OHA in the proposed structure.

Over the last six years RFJ have experienced a steady and systematic decline in the provision of records to families and the introduction of obstacles to obtaining records. This began with the introduction of the pilot scheme in 2012 and subsequent privileged access scheme. Under the latter scheme, which requires applicants to complete an 8 page form accompanied by photographic ID, no files have been delivered to families. Whereas before 2012 families were receiving the court and inquest files pertaining to the deaths of their relative, this information flow has now stopped and obstacles have been put in place that have caused great distress and frustration.

The gathering and storing of oral history interviews about personal experiences of the conflict requires trust to be built between contributor and archive. The families that have interacted with PRONI do not have this trust. It is not even the case that PRONI would be starting from a position of neutrality - because of the experience of the last six years there is now a situation of active mistrust. Therefore, to proceed with an OHA established by PRONI would discriminate against the participation of the families who have been failed by PRONI to date.

The model proposed in the consultation is unfit to meet the declared aim of ensuring the independence of the OHA. Under the proposed model the Deputy Keeper of PRONI would make decisions on criteria for inclusion, destruction of records, publication of records, handover of records and

selection of records informing a report to the Implementation and Reconciliation Group (IRG) on themes and patterns.

The proposed model therefore gives the primary powers governing the OHA to the Deputy Keeper of PRONI who is a career civil servant accountable to the Minister of the Department of Communities. The proposed steering group for the OHA has an advisory function only and could not deliver on the aim of independence.

6.4 Scope of the Oral History Archive

The restricted scope of the OHA is also of concern. While there is reference to contributions from the north Ireland and elsewhere this is not reflected in the proposed establishment and governance of the OHA in PRONI. The recognition of the value of personal stories, expressed through the proposal for an OHA should be an opportunity to reflect the three strands of the Good Friday Agreement incorporating institutional expertise and existing and emerging archives across Ireland, Britain and the diaspora.

RFJ believe that the proposed model for an OHA cannot deliver on the potential to incorporate personal experiences of the conflict into a legacy process which would be greatly enhanced by these records. There is international guidance which can inform a more effective and ethical model. For example, United Nations guidelines (Rule of Law Tools for Post-conflict States) advocates the respecting of histories, testimonies and evidence gathered by communities and NGOs and recommends that states find ways to resource the retention and preservation of this material rather than interfere or assume the materials.

6.5 Conclusion

RFJ believe that it would be a grave mistake to proceed with the OHA under the proposed model of an archive established, governed and housed in a government body. The oral history component of the SHA can only work through engagement with existing archives that have been created through trusted relationships. There should be an immediate dialogue with existing and emerging archives and a process set up to engage with these archives that can also include emerging and future archives.

7. Implementation and Reconciliation Group

The Implementation and Reconciliation Group (IRG) is tasked with three main functions: (i) the promotion of reconciliation, (ii) a review and assessment of the implementation of the Stormont House Agreement, and (iii) commissioning of research on patterns and themes identified by the HIU, ICIR, OHA and the Coroner's Court.

7.1 Truth an essential requirement for reconciliation

Conceptualising what contribution the other mechanisms will make to a societal move towards reconciliation is important. Priscilla Hayner has spoken optimistically in this regard,

> ***"By speaking openly and publicly about past silenced or highly conflictive events and by allowing an independent commission to clear up high profile cases, a commission can ease some of the strains that can otherwise be present in national legislative or other political bodies. An official accounting and conclusion about the facts can allow opposing parties to debate and govern together without latent conflicts and bitterness over past lies. This is not to suggest that the knowledge of past practices should not influence current politics, but if basic points of fact continue to be a source of conflict and bitterness, political relationships may be strained."***[62]

Previous significant programmes towards building reconciliation such as the EU Special Peace and Reconciliation Programmes and Towards Building United Communities have had many worthwhile and essential ingredients but have been hampered by our failure to deal with the past.

Victims' Right to Truth[63] is and should be recognised as a contributor to building peace and towards the goal of societal reconciliation that has been missing to date and it is a welcome development that truth will now be considered an important part of building reconciliation. It is a necessary element in the objective of achieving reconciliation that has to date been missing.

62 Priscilla Hayner, "Unspeakable Truths" 13 Reconciliation and Reforms 183 2 Ed Routledge

63 UN Commission on Human Rights, Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights, 8 February 2006, E/CN.4/2006/91, at para 57

However, that link should be made explicit in the mandate and mission statement of the IRG to ensure that no further attempts are made to gloss over uncomfortable truths, doubly silencing victims and missing the unique opportunity that moment will offer.

7.2 Functions of the group

The remit and functions of all appointees need further clarification. Given their role in review of the other mechanisms there might be a danger of political appointees interfering in other processes. The meaning of "review" requires complete clarity and clear mandate to ensure that this mechanism does not become a spoiler for the difficult work undertaken by the HIU or ICIR.

7.3 Access to Documentation

It is with surprise that we note the restrictive approach of the draft legislation to source materials for those undertaking the thematic research. No restriction should be placed on this research and documentation. Quite obvious public source material needs to be a part of the work, including reports such as those by John Stalker, and John Sampson into the allegations of an RUC policy of shoot to kill, the Stevens I,II,III reports on collusion, the Cory reports and reports of the Cory Public Inquiries, the De Silva Report, the Barron Report on the Dublin, Monaghan Bombings, the report of the Swithwick Inquiry and others.

Contemporaneous archive materials such as those of the Citizens Defence Committee and the Association for Legal Justice, the extensive archive in the Linenhall Library and the Cardinal O'Fiaich Library are also a wealth of information vital to the consideration by the group. Notwithstanding the common sense that this makes, international legal standards demands an open approach to information recovery and consideration.[64] Compromising the scope of information available to the Group will compromise the potential of the value of its work and confidence in its ability to deliver meaningful contributory outcomes.

7.4 Appointments

The political appointments made to the Group should be reviewed to reflect d'Hondt representation following 2017 Assembly election.

7.5 Themes and Patterns

If this group is to contribute positively to building a reconciled society it is vital that it examine areas of contest, which are often avoided and not discussed at other times. For those

64 CCPR/C/GC/34, 'General Comment No 34: Article 19 - Freedom of Opinion and Expression', 12 September 2011, at para 12.

families affected by policies, practices and systemic silences the work of the IRG and its findings will be a key element contributing to their journey through the mechanisms to deal with the past. Their individual experiences will contribute to the examination of thematic areas.

The expected themes will for example include collusion, the use of informers/agents, shoot to kill, the use of lethal force, "punishment" shootings/attacks, forced exiles, economic and structural violence, Diplock courts, attacks on family homes, sexual violence, use of torture and systemic impunity. There are of course other areas which require attention from all communities.

The identification of those themes to be examined requires transparency.

7.6 Gender themes

It would be expected that the experience of women during our conflict should be examined as multiple key themes by the IRG. However, without a clear mandate for all of the mechanisms to apply a gendered lens to their work and glean the required information, identifying gendered experiences, and previously hidden experiences as they do their work, it is very possible that this strand will not receive the necessary information to make such a report meaningful. Specific attention to gender needs to be included in the mandate of the IRG.

7.7 Statements of Acknowledgement

These statements, coming at the end of meaningful processes, of investigation and truth recovery could make meaningful difference to individual victims and to society as a whole.

The process that leads to these statements needs to be taken with the gravity they deserve, without being compromised by political interference or convenience.

On the other hand, if they come following failed processes, where information has been held back, contested issues avoided and victims treated poorly, any such statements will be deemed meaningless.

Recommendations

1. A full independent international public inquiry into the killing of human rights solicitor Patrick Finucane in February 1989.
2. A cross-border public inquiry into the Omagh bombing
3. No statute of limitations on conflict related killings
4. Retention of the current definition of victims as per the 2006 Order
5. Immediate release of funding for the full implementation of the Lord Chief Justice plan on inquests
6. Retention of provision for future inquests into conflict killings
7. Provision for a Commission of Investigation into serious non-fatal violations and injuries as part of the Historical Investigations Unit
8. The establishment of a Tribunal of Reparations based on the UN Right to Remedy and Reparation with a mandate to progress a pension for the seriously injured
9. Review of the mitigations from negative impacts of welfare reform on victims and survivors of the conflict
10. Commitment to sustainable and realistic funding for all of the legacy mechanisms.
11. Commitment to resources for the support services for victims and survivors who engage the mechanisms.
12. Commitment to support the groups who provide advocacy and support services to victims and survivors
13. Compulsory trauma training for all staff employed by all of the legacy mechanisms
14. Implementation of the Gender Principles for Dealing with the Past
15. The establishment of a working group on gender participation and the principles of UNSCR1325
16. Definition of national security in relation to the North and past conflict
17. Removal of the sweeping powers of the Secretary of State on the grounds of national security
18. National security not applied when an agent or employee of the state has been involved in a criminal act
19. Policy of Neither Confirm Nor Deny should not apply to agents involved in killings or criminal activity surrounding killings
20. Families have a right to know identity of agents involved in the killing of their loved one and other actions should the agent be now deceased
21. HIU should not be reliant on persons with policing backgrounds
22. Multi-disciplinary skills and experience should be embraced in HIU investigation teams
23. There is no place in the HIU for the following:
    - Former RUC; PSNI involved in conflict related investigations; Former or current British military personnel; Former or current British Intelligence Services personnel; Former HET officers
24. All HIU staff should undergo human rights training
25. HIU recognition of and working partnerships with victims organisations and NGOs working with victims and survivors
26. HIU ensure gender equality in recruitment
27. Recorded specific gendered harms and impact in work of HIU
28. HIU Director recruited by a panel which includes international human rights figures
29. HIU caseload should include cases where families are dissatisfied with previously received HET reviews
30. HIU remit extended to all conflict related deaths in all jurisdictions where conflict related deaths occurred
31. The HIU is established as a cross-jurisdictional investigation body

32. A chamber of appeals is established within the court system with three High Court judges to hear appeals of decisions regarding family reports and disclosure

33. Public Prosecution Service recruits a team of independent prosecutors to liaise with the HIU

34. Resources be made available for the Forensic Science Laboratory carrying out legacy work

35. Non-means tested legal aid be made available for families needing to engage the courts regarding the legacy mechanisms

36. The HIU should not be established in advance of a HIU director being appointed

37. Official Secrets Act should not impede any stage of any investigation

38. ICIR should not conclude or provide reports to families in advance of the completion of HIU investigations into those killings or related killings

39. ICIR should have a longer life than the HIU so ensure families have access to both mechanisms

40. Where information arises through ICIR process relating to non-fatal violations and injuries giving rise to duty to investigate these should be referred to the proposed HIU injuries investigation commission (as per recommendation 7)

41. Secretary of State should not have sight of ICIR reports or ability to redact reports to families

42. In the absence of Executive appointments to the ICIR should be made by the Inter-Governmental Conference with the ambition of appointing two international figures

43. There should be no destruction of evidence by the ICIR

44. ICIR should provide in-depth information to the IRG re themes and patterns of findings

45. ICIR should report quarterly indicating levels of participation and cooperation by the armed groups

46. Secretary of State should not have the powers to wind up the ICIR during the lifetime of the process

47. Focussed attention to UNSCR1325 should be applied to the ICIR

48. An alternative model to the Oral History Archive must be considered with the aim of developing an archive which engages all existing and emerging archives in equal partnership

49. There should be no destruction of any records

50. The remit and functions of the IRG require clarification

51. No restriction on public records, or materials, that might be considered should be placed on IRG researchers

52. Appointments to the IRG should be reviewed to reflect d'Hondt following 2017 Assembly election

53. Need for transparency regarding the process of identification of themes to be examined by IRG researchers

54. Specific attention needs to be paid to gender in the mandate of the IRG

55. A statement of intent to engage constructively and positively with all of the mechanisms should be made by all of the conflict participants

56. Statements of acknowledgement should follow from the completion of the other processes if they have been thorough, positive and meaningful

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