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Executive Summary

- The lack of detail in respect of the Secretary of State for Northern Ireland's (SoSNI) legacy proposals makes effective engagement challenging. Given the intrinsic connection between truth recovery and reconciliation in Northern Ireland, if the proposal is to be taken forward then interested parties will need to be given an opportunity to respond to a much more detailed account of how it is to work. In particular, the relationship between the current proposal and the Stormont House Agreement (SHA) should be fully explained.
- To date, the absence of a coherent approach to truth recovery in respect of the Northern Ireland conflict has led to the development of a patchwork of official mechanisms and victim-initiated responses. Although the creation of a single body with a joined-up approach may circumvent the need for some of these mechanisms, without a holistic commitment to truth recovery, investigation and, where necessary, prosecution, fractured efforts towards truth recovery are likely to continue.
- We have significant concerns that the SoSNI's current proposals would not comply with the Right to Life under Article 2 of the European Convention of Human Rights. Consideration will need to be given to how a single information recovery and investigative unit can be Article 2 compliant and can furnish its findings in a manner which promotes reconciliation and the interests of the families. If not, these proposals will do little to stem the rise of legacy litigation.

Truth Recovery and Reconciliation

1. Truth is a right under international law and truth recovery is an essential part of conflict resolution. For peace to be sustainable, it must be accompanied by justice, and by extension, some form of truth recovery; understanding how a conflict developed is a prerequisite for preventing its re-emergence. Truth is also key to reconciling a conflict's protagonists and divided sections of society. It is central to victims' and survivors' efforts to come to terms with the past and can help them find closure, by revealing the details of the events they suffered, the fate of forcibly disappeared loved ones or explaining why certain people were targeted. Knowing the truth about past events enables mourning practices, which facilitate personal and communal healing and reconciliation.
2. Through truth, victims and survivors can attempt to challenge prevailing versions of history and compel authorities to investigate contested events. Crucially, truth recovery as a process and truth as a right belongs to all in the context of Northern Ireland, including victims of state and non-state violence. Truth therefore exists within a larger context of transitional justice and peacebuilding. It is viewed as both a right in-and-of-itself and as conducive to peace, contributing to national catharsis, facilitating the demands and rights of victims and helping to provide closure.
3. The salience of truth recovery is reflected in the statement of the SoSNI's speech to Parliament on 18th March 2020.¹ Mr Lewis outlined the UK Government's approach to addressing Northern Ireland's "Legacy Issues" as one of providing 'as much information as possible to families about what happened to their loved ones'. He proposed the establishment of one independent body that will, amongst other functions, "oversee and manage both the information recovery and investigative aspects of the legacy system, and provide every family with a report with information concerning the death of their loved one." The statement continues to note that '[t]he Government wants information recovery and reconciliation to be at the heart of a revised legacy system that puts victims first'. Putting truth recovery at the centre of the UK's approach appears, on its face, to reflect the requirements of international law and the significance of truth recovery for a sustained peace underpinned by reconciliation.
4. Nevertheless, the statement is wholly ambiguous as to how information retrieval and dissemination are to work in practice. The Stormont House Agreement, which the new approach outlined by Mr Lewis will replace, envisioned various mechanisms such as Historical Investigations Unit and the Independent Commission on Information Retrieval (ICIR) to facilitate truth recovery. Under the terms of the proposed ICIR, its objectives would be 'to enable victims and survivors to seek and privately receive information about the (Troubles related) deaths of their next of kin' (para. 41). The SHA also included relatively detailed provisions, based on cross-party agreement, on how to ensure an effective set of processes to achieve this objective. For instance, in order to promote engagement with its mechanisms, the SHA committed that the ICIR would not disclose information provided to it to law enforcement or intelligence agencies and stipulated that this information will be 'inadmissible in criminal and civil proceedings' (para. 46). These commitments prioritised effective information recovery.

¹ Brandon Lewis, MP, HC Deb., vol. 673, HCWS168 (18 March 2018).

5. The SoSNI's statement is something of a placeholder in light of the UK Government's inability to introduce legislation based on the SHA within 100 days of the *New Decade, New Approach* deal as a result of the corona virus crisis.² It provides few details regarding the replacement truth-recovery process. This omission is likely to have grave consequences for the truth-recovery process which will potentially undermine the obligations of the state under international law and which are contrary to the place of truth recovery as a key component of reconciliation, peace and justice. These issues are well-versed and are likely to form the basis of various submissions to the NIAC's present call for evidence. However, beyond these immediate impacts, there are likely to be additional consequences, which form the basis of this submission.

Patchwork Approaches

6. To date, the failure to develop a holistic approach to truth recovery has led to a patchwork of approaches – legal and informal – towards some form of truth recovery. These approaches, which have included coroners' inquests, independent inquiries, the now defunct Historical Enquires Team, freedom of information requests, Police Ombudsman investigations and civil proceedings, have been used by victims to seek out information regarding traumatic incidents during the conflict. Notwithstanding a narrative that these avenues are utilised strategically to pursue members of security personnel, or as a precursor to 'vexatious' litigation, they are better understood as a direct response to the inadequacy of the steps taken by successive UK Governments to facilitate holistic truth recovery.
7. It is perhaps one of the great paradoxes of contemporary discourse around the legacy of the conflict that it is the UK Government's failure to prioritise truth recovery that has fostered the impression of one-sided processes focused upon state agents. Failing to adopt a comprehensive approach has ensured that the state has remained the primary target of truth recovery efforts. This is due, in part, to the nature of some of the alternative forums to a holistic truth recovery process being structured to hold the state, rather than non-state actors, to account. A more holistic approach to truth recovery, by contrast, could serve as the basis for the retrieval of information relating to the actions of non-state actors, thereby supporting the right to truth of those who have suffered at the hands of actors other than the state.
8. Alongside the ongoing use of established approaches to truth recovery, alternative avenues will continue to emerge for as long as the lack of an overarching process is not addressed. This can be seen in the increasing use of tort law as a method for truth recovery. Civil actions, supported by legal aid funding in Northern Ireland, provide a potential avenue for the discovery of information held by public bodies. Even unsuccessful actions can therefore contribute new information about the events in question. Many of the harms inflicted during the conflict were torts as well as crimes, and tort thus provides a potential means for bringing information about the Northern Ireland conflict into the public domain and this is reflected in the emergence of case law to this effect.³

² *New Decade, New Approach* (9 January 2020), Annex a, para. 16.

³ *Flynn v Chief Constable of Northern Ireland* [2017] NICA 13 and [2018] NICA 3.

9. While framing existing attempts to pursue truth recovery through a variety of legal avenues as strategic pursuance of security personnel, they are nevertheless irrelevant to the processes that emerge; judges have long denied that they take any account of ‘the motives of the parties in bringing or resisting what is, on the face of it, a well-recognised claim in tort’.⁴ Failing to address truth recovery will not stifle victims’ efforts to gain information. On the contrary, it is the UK Government’s delay in establishing an overarching mechanism that continues to inspire alternative truth-recovery processes.

The investigative proposal’s compatibility with the European Convention on Human Rights

10. Article 2 of the European Convention on Human Rights requires state parties to conduct an effective investigation into any alleged breach of the right to life.⁵ Amongst other circumstances, this obligation extends to any instance where an individual is allegedly killed by state authorities.⁶ This component is integral to the right’s operation as without a procedure for assessing the lawfulness of the state’s use of force, the protection of the right would be ineffective. An adequate investigation is also essential to ensure the effective implementation of laws which safeguard the right to life and to ensure accountability for wrongdoing.⁷ Although there is no single ‘check-list’ for what is required for an Article 2 compliant process a series of core principles have emerged from the case law of the European Court of Human Rights including their independence, transparency, adequacy and promptness.⁸
11. For an investigation to be effective, particularly where the use of force was by state agents, it must be capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible.⁹ This requirement in particular will pose significant challenges for the SoSNI’s proposals. The plan appears to limit any possibility of future police investigations to instances where ‘there is a realistic prospect of a prosecution as a result of new compelling evidence’.
12. There is an indication that the proposed independent unit will continue investigations and therefore it will have the opportunity to uncover the new evidence required for police investigation. Nonetheless, this framing implies that the unit itself will not have full police powers and that its ability to obtain new evidence will be restricted. As any case which does not meet the threshold of ‘new and compelling’ evidence would be closed, this would appear to effectively bar future investigations, suggesting that the proposal could impose a *de facto* if not *de jure* end to criminal justice processes.
13. It is likely that under the SoSNI’s proposal the vast majority of cases will be closed. It is therefore difficult to see how the investigations into these incidents will have met the standard required for compliance with Article 2. This is particularly due to a significant

⁴ *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962; [2008] UKHL 25, [4] (Lord Bingham).

⁵ *Ergi v Turkey*, 40/1993/435/514, ECtHR, § 82.

⁶ *McCann and others v UK* (Application No. 18984/91) ECtHR, § 161.

⁷ *Jordan v United Kingdom* (Application no. 24746/94) ECtHR, § 105; *Nachova v Bulgaria* (Application no. 43577/98) ECtHR, § 110; *Al-Skeini and Others v the United Kingdom* (Application No. 55721/07) ECtHR, § 163.

⁸ *Velikova v Bulgaria* (Application No. 41488/98) ECtHR, § 80.

⁹ See *Giuliani and Gaggio v Italy* (Application No. 23458/02) ECtHR, § 301, and *Mustafa Tunç and Fecire Tunç v Turkey* (Application No. 24014/05) ECtHR, § 172.

number of institutional hurdles that victims' families have faced since the death of their loved ones, including but not restricted to: the destruction of evidence, withholding of information, wilful failures to keep records, excessive delays in investigations and a cultural of obstruction. While the decision to close these cases may not be litigated in domestic courts, the European Court of Human Rights would remain a venue for their resolution, and so the cycle of litigation could continue notwithstanding these proposals being acted upon.

14. Article 2 compliance is also connected to the emerging use of tort for truth recovery. While the proposed bar on criminal investigations would prevent further prosecutions, it would not limit civil actions and so an avenue would remain open for families to attempt to continue litigation through tort. Through this process, it is possible that after a criminal investigation was barred in respect of an event, further information would come to light in the course of tortious proceedings which implicate particular individuals or state authorities in deaths. There would therefore be the real possibility that information was in the public domain implicating individuals in deaths, without any legal means being available for their further investigation and prosecution.

An independent body for truth recovery

15. Beyond the challenges listed above for the proposed independent body to *effectively* investigate incidents, Article 2 requires that investigations are also:

- a. *Independent*

It is imperative that any unit established under these proposals be independent of anyone whose responsibility could be implicated by an investigation. Particular care thus needs to be taken as to how it is to be staffed.¹⁰ Independence is not merely assessed by hierarchal or institutional connection; human rights law requires a body's practical independence. For that reason, the proposed body may benefit from the participation of experts with no previous involvement in the administration of Northern Ireland.

- b. *Transparent*

The public must be afforded an opportunity to input into the system and investigation processes must be accountable. There must also be a sufficient degree of public scrutiny and participation of victims' next of kin.¹¹ For this reason, consideration will need to be given to the contributions of family members in the preparation of the proposed individual reports.

16. In respect of the preparation of family reports by the independent body, it is essential that information provided is adequately presented with a blend of both context and discovery. As the SoSNI's statement notes, these families have been waiting decades for the relevant information. Care should be taken to provide all necessary information, such as contemporary police reports, witness statements, interview transcripts and detailed decisions as to why an incident was not investigated further, alongside a contextual framing of events during the relevant time-period of the death.

¹⁰ *Mustafa Tunç and Fecire Tunç v Turkey* (Application No. 24014/05) ECtHR, § 223.

¹¹ *Jordan v United Kingdom* (Application no. 24746/94) ECtHR, § 109.

17. The proposal appears to decrease the importance of justice for victims on the basis of the years that have passed since the tragic events took place. This is the principal reason given for non-prosecution of offences. The state must accept considerable responsibility for the failures in obtaining justice so far. From an inability and unwillingness to investigate incidents in their immediate aftermath, to a failure to create an adequate system for the retention of existing evidence, state failings have contributed to the trauma suffered by victims, veterans and the wider community.

18. A final caution is to be noted with regards to the creation of an individual investigative unit. Recent experience of the closure of Iraq Historic Allegations team (IHAT) and Operation Northmoor (regarding operations in Afghanistan) has demonstrated that there are forces within the British Government who are willing to use prevailing political circumstances in order to prematurely close investigations. A BBC Panorama and Sunday Times investigation into their closure heard from a number of detectives working within both units who said they had found credible evidence that war crimes had been committed by UK Armed Forces, and yet no soldiers were ever prosecuted and the investigative units were disbanded. There is thus cause for concern that if an opportunity is presented for a similar approach to the Northern Ireland legacy cases, then any further investigations would be closed, presenting considerable challenges for reconciliation in Northern Ireland.

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