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Executive Summary

1. The following summarises the main points in our evidence:

- Members of the Stormont House Agreement (SHA) Model Bill Team have previously provided written and oral evidence to the Defence Select Committee (2017), the Northern Ireland Affairs Committee (2019), the Oireachtas Joint Committee on the Implementation of the Good Friday Agreement (2018), and the US Congress (2015). In April 2020, we published a report assessing all of the proposals for dealing with legacy issues placed in the public domain by legislators, legal officers and other key stakeholders in recent years.[1] This includes an assessment of the position set out by Government in the Written Ministerial Statement (WMS) of 18 March 2020.[2] All proposals considered in the report were benchmarked against the commitments made in the SHA, the Belfast/Good Friday Agreement (GFA) and international legal obligations that are binding on the United Kingdom, including those under European Convention on Human Rights (ECHR).
- Our position remains that implementing the SHA mechanisms in good faith, maximising their independence and appointing good staff remains the best way to finally deal with the past in Northern Ireland and deliver on the promises made to victims and survivors. The SHA was premised on a 'justice option' remaining open wherein historical cases would be properly investigated, prosecuted (if the prosecutorial test were met) and whereby anyone found guilty of conflict-related offences would be liable to serve a maximum of two years if convicted under the terms of the Northern Ireland Sentences Act 1998. However, in light of the significant political pressures for some form of an amnesty or statute of limitations that would shield armed forces personnel from prosecution, our recent report also contains two options that would allow trials to proceed, with the potential of reducing zero jail time for conflict-related offences. To be clear, both involve Article 2 compliant investigations, prosecutions and trials (where the prosecution tests are met) and are therefore not an amnesty but rather a post-trial sentence reduction.

[1] K. McEvoy, Daniel Holder, L. Mallinder, A. Bryson, B. Gormally and G. McKeown (2020) Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland. https://pureadmin.qub.ac.uk/ws/portalfiles/portal/203198685/Prosecutions_Imprisonment_the_SHA_LOW_RES.pdf

[2] https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-03-18/HCWS168/

- Until the WMS in March 2020, successive British governments had regularly committed internationally and domestically to the implementation of the SHA. Implementation legislation was confirmed in the Queen's Speech of December 2019 and reaffirmed as part of the *New Decade New Approach* (NDNA) agreement of January 2020. The sudden unilateral abandonment of these commitments in the WMS, without the agreement of the local political parties in Northern Ireland, the Irish government, or local civil society actors including victims and survivors, has significantly damaged trust that the Government will act in good faith on dealing with the past.
- Apart from the failure to build any political and civil society consensus around the vague and contradictory proposals contained in the WMS,[3] it is our view that what is contained therein is incompatible with binding legal obligations under the ECHR, as well as commitments made in the GFA and the SHA. In addition, it will not meet the needs of victims, survivors and their family members.
- In relation to the Committee's question as to 'what have been described as vexatious claims against veterans', our recent report concluded that the key arguments which have been deployed to support the 'witch-hunt' narrative against members of the security forces with regard to legacy investigations and prosecutions are neither factually nor legally accurate and lack intellectual credibility. Such claims in themselves consequently undermine the legitimacy of the criminal justice system in Northern Ireland.

Background

2. The authors of this submission have worked for many years on issues relating to dealing with the past in Northern Ireland. We are a team made up of academics from the School of Law at Queen's University Belfast and staff from the Belfast-based human rights NGO, the Committee on the Administration of Justice. In 2015, together with other colleagues, they produced a Model Implementation Bill for the legacy elements of the 2014 Stormont House Agreement (SHA).[4] The process of drafting the Model Bill involved wide and extensive stakeholder engagement over a number of years and the final text illustrated how the proposed SHA legacy institutions (the Historical Investigations Unit (HIU); Independent Commission on Information Retrieval (ICIR); Oral History Archive (OHA); and Implementation and Reconciliation Group (IRG) could be placed on a

[3] The WMS presents the government's new approach as a response to the 2018 consultation, but the NIO Analysis of Consultation Responses does not refer to any responses that requested a move to a single legacy mechanism, a speeding up of the investigation process, or a shift towards placing greater emphasis on information recovery than investigations.

[4] K. McEvoy, A. Bryson, B. Gormally, D. Greenberg, J. Hill, D. Holder, L. Mallinder and G. McKeown, 'Stormont House Agreement: Model Implementation Bill' *Northern Ireland Legal Quarterly* Spring 2016 *NILQ* 67(1): 1–36. https://pureadmin.qub.ac.uk/ws/portalfiles/portal/53315971/NILQ_67.1.1_MODEL_BILL_FINAL.pdf

statutory footing in a human rights compliant manner that would answer the needs of victims and broader society.

3. The UK government has significantly delayed the implementation of the SHA, but in the summer of 2018, an NIO public consultation on draft legislation finally took place. We produced a lengthy response to that draft legislation.[5] The NIO published a summary of the views of consultees (but not a Government response) in July 2019.[6] Earlier a bilateral implementation treaty had also been concluded with Ireland in relation to the ICIR.[7]

4. The international community, including the Committee of Ministers of the Council of Europe, has regularly iterated serious concerns about the UK delay in establishing the HIU and other SHA legacy institutions in an ECHR compliant manner, including in a formal Decision in December 2019.[8] The UK has in response given undertakings to implement the SHA. The United Nations Committee Against Torture has also expressed its serious concern and encouraged the UK to take urgent measures to advance and establish the SHA mechanisms and has requested further information from the UK on this as part of its follow-up procedure in May 2020.[9] Following the General Election in December 2019, the Queen's Speech committed to the 'prompt implementation' of the SHA 'in order to provide both reconciliation for victims and greater certainty for military veterans'.[10]

5. On 9 January 2020, the Government published the *New Decade, New Approach* agreement (NDNA) which committed to the introduction of the SHA legacy bill into the UK Parliament within 100 days, and an 'intensive process with the Northern Ireland parties' in the interim.[11] This 'intensive process' was however never initiated. Instead, through the WMS of 18 March 2020, the Secretary of State signalled what appeared to be a unilateral abandonment of the SHA. A firm commitment to bring forward enabling legislation within 100 days was downgraded in the WMS to a vague aspiration to 'remain true' to 'the principles' of the SHA.

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[5] McEvoy, K., Bryson, A., Mallinder, L., & Holder, D. (2018). Addressing the Legacy of Northern Ireland's Past: Response to the NIO Public Consultation. QUB Human Rights Centre https://pureadmin.qub.ac.uk/ws/portalfiles/portal/157360621/MODEL_BILL_TEAM_RESPONSE_TO_NIO_LEGACY_CONSULTATION_FINAL_PDF_COPY_THAT_WAS_PRINTED_ON_MONDAY_27_AUG_2018.pdf

[6] Northern Ireland Office 'Addressing The Legacy Of Northern Ireland's Past: Analysis of the consultation responses', July 2019

[7] Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland establishing the Independent Commission on Information Retrieval (signed 15 October 2015, not yet in force) https://ptfs-oireachtas.s3.amazonaws.com/DriveH/AWData/Library3/FATRdoclaid210116_100026.pdf

[8] See in Committee of Ministers December 2019 CM/Del/Dec(2019)1340/H46-30, paragraphs 4- 6.

[9] See UNCAT Concluding Observations on the sixth periodic report of the UK, 7 June 2019, CAT/C/GBR/CO/6, paragraphs 40-41 and 66.

[10] The Queen's Speech 2019, Background Briefing Notes, Prime Minister's Office 19 December 2019, page 128

[11] Northern Ireland Office 'New Decade New Approach' 9 January 2020, UK Commitments Annex A, paragraph 16.

6. The WMS coincided with the introduction of the Overseas Operations (Service Personnel and Veterans) Bill, with the WMS explicitly stating a purpose of the new approach was 'to ensure equal treatment of Northern Ireland veterans and those who served overseas'.[12]

7. The Committee's terms of reference specifically ask whether the proposals in the WMS will promote reconciliation in Northern Ireland. It should in the first instance be noted that the announcement that the government plans to fundamentally revise the structures agreed in the SHA, has already had a significant detrimental impact on trust that commitments will be implemented in good faith. It is also very difficult to see how reconciliation can be achieved without a human rights compliant approach to dealing with the past.[13]

8. While we welcome the Committee's attention to promoting reconciliation, which is a principle of the Stormont House Agreement, we would also like to the note that the Agreement committed the parties to abide by several other principles, namely upholding the rule of law; acknowledging and addressing the suffering of victims and survivors; facilitating the pursuit of justice and information recovery; is human rights compliant; and is balanced, proportionate, transparent, fair and equitable. The appropriateness of the Government's new approach should be considered against each of these fundamental principles.

9. As noted above, in April 2020, we published a report titled *Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland*.[14] This report reviews all of the main proposals put forward on legacy in recent years, benchmarking each against binding human rights obligations, the GFA, and SHA. The report examines in depth eleven distinct proposals on dealing with the past, including those set forward in the March 2020 WMS.

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[12] Secretary of State for Northern Ireland, Addressing Northern Ireland Legacy Issues: Written statement - HLWS163 (18 March 2020) https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2020-03-18/HLWS163/

[13] As the Catholic Bishops of Northern Ireland have argued in response to the WMS: 'Reconciliation can only come about if the nature of the violence perpetrated is acknowledged, and conditions for its recurrence are removed. Real reconciliation means that we cannot forget the past. We must face the past, no matter how costly or painful that encounter may be, before real reconciliation can flourish… It is deeply concerning that the proposed legislation for Northern Ireland, which is stated to mirror the provisions of the Overseas Operations (Service Personnel & Veterans) Bill, will not honour some of these principles, in particular the human rights compliance provision, the commitment to uphold the rule of law, the commitment to facilitate the pursuit of justice, and the pledge to devise a modality that is inter alia, transparent, fair and equitable'. See 'Catholic Bishops in Northern Ireland criticise UK Government's approach to legacy of the past' (8 April 2020) https://www.catholicbishops.ie/2020/04/08/catholic-bishops-in-northern-ireland-criticise-uk-governments-approach-to-legacy-of-the-past/

[14] Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland (Model Bill team, April 2020) https://www.dealingwiththepastni.com/news/2020/4/8/drive-to-lbz66

Meeting the needs of victims, survivors and families and compatibility with the ECHR, SHA and GFA

10. The Terms of Reference for the Committee's inquiry seek evidence as to whether the Government's new proposed approach will meet the needs of victims, survivors and their families; and on compatibility of the proposals with the GFA and, ECHR and differences with the SHA.

11. We believe that the answers to these questions are interdependent. The needs of victims, survivors and their families will clearly not be served by a system that will inevitably be challenged in the courts and that is likely to be found to be unlawful. In particular, the provisions of the ECHR, the incorporation of which are an integral and explicit part of the GFA, require independent and effective investigations into deaths. Nor will arrangements premised on the dismantling of key rule of law justice reforms of the peace settlement that flowed from the GFA – in particular, those relating to the independence of the office of the Director of Public Prosecutions deliver reconciliation and meet victims' needs. The SHA has to date secured more consensus amongst civil society and politicians concerning dealing with the past than any other proposals that have been made to address legacy issues.

12. At the time of writing, no document beyond the brief WMS that sets out the Government's new proposals has been made available. The proposals are therefore significantly lacking in detail. They commit the Government to shifting 'the focus of our approach to the past' to information recovery, whilst stating there will be a route to justice in a small number of cases. It is proposed that 'one independent body' will carry out, 'oversee and manage' the information recovery and investigative aspects of the legacy system, providing 'every family' with a Family Report for each death. This suggests that the work of intended to be carried out by the HIU and ICIR would now be subsumed into this single institution. Furthermore, as this single body will be tasked with functions previously attributed to the Implementation and Reconciliation Group (namely oversight and promotion of reconciliation), it seems that the IRG would also be subsumed into this body.

13. The WMS also contains the concerning line that 'The Government is committed to the rule of law but…' This formulation is particularly troubling given that it is followed by proposals that would significantly raise the threshold for investigations of conflict-related deaths. The WMS distinguishes between 'investigations which are necessary' - which are defined as cases in which there is 'a realistic prospect of a prosecution as a result of new compelling evidence would proceed to a full police investigation and if necessary, prosecution' - and other cases which would be subject only to a swift desk based review before a family report is issued and the case is permanently closed. Given that the WMS asserts that justice can only be expected in a small number of cases, this

proposal would set up a two-tier approach in which the majority cases are handled only by a desk-based review.

14. It is difficult to see how permanently closing the majority of cases after a desk-based review would meet the standards required under Article 2 of the ECHR for an effective investigation. This would be appear to be in direct contravention of the Article 2 duty to reinvestigate as detailed by the ECHR in Brecknell v UK.[15] **We would ask the Committee to also note that the recent Dalton case in the Northern Ireland Appeal Court specifically ruled that the ECHR Article 2 obligation to provide an effective investigation also applies in cases where there is no prospect of a prosecution.**[16]

15. There is also no mention of grave or exceptional security force misconduct being investigated. This is a serious omission. There is present provision for this in the legal framework for the Police Ombudsman (in relation to the police) which was to be duly replicated within the legislation for the HIU.

16. Key benchmarks in assessing whether such a process could be Article 2 compliant would be: (a) the independence of those involved in the process; (b) its effectiveness: e.g. whether investigators had access to all of the relevant information in order to make an informed decision regarding which route to take; (c) whether full police powers would be available to those involved in the information gathering phase (e.g. powers to search, seize documents, computer records, arrest etc); and (d) whether there was a sufficient element of public scrutiny of the investigation or its results.

17. It is therefore far from clear that proposals contained in the WMS would provide for an Article 2 compliant process. The apparent threshold for the use of police powers to investigate is too high. It is also difficult to see how an obligation to close cases forever once the process is completed regardless of the emergence of new evidence would be compatible with Article 2. In addition, the process would not adequately expose human rights violations and thus would not facilitate guarantees of non-recurrence, justice or

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[15] Brecknell v United Kingdom (2008) 46 EHRR 957, para 71. 'The Court (ECtHR) takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures.'

[16] R v Dalton [2020] NICA 262015/061110/A01 https://judiciaryni.uk/judicial-decisions/2020-nica-26 Mr Justice Maguire delivered the unanimous judgment on behalf of the Northern Ireland Court of Appeal (including Lord Chief Justice Morgan and Lord Justice Stephens). The Court made clear that Article 2 obligations to an effective investigation can apply to cases involving both state and non-state actors and regardless whether or not that investigation is likely to lead to a prosecution of the alleged perpetrators. Maguire J notes in para 102 'the court is inclined to the view that there is value in looking at cases in which the "effective official investigation" requirement within Article 2 attaches to the State even though the object of such an investigation is not to identify and/or punish perpetrators but is to consider State responsibility more broadly. These are cases where commonly there is no suggestion that the State itself has directly brought about the death in question.' He continues at para 110 'The court therefore is of the view that the doctrine of revival [of an article 2 investigation] can apply in this case, notwithstanding that it is not the object of the investigation to identify and punish those who are the direct perpetrators'.

truth recovery.[17] There is also no indication of how family members would be involved in the process. Finally, the prospect of no investigation into grave and exceptional security force misconduct, in a context whereby evidence of official criminal wrongdoing will likely have been destroyed therefore precluding investigation, also falls short of EHCR duties.

18. As regards the Article 2 obligation for a 'prompt' investigation, the WMS laments that 'many families have waited too long to find out what happened to their loved ones' and suggests the 'cycle of investigations' has undermined attempts to come to terms with the past. The WMS fails, however, to acknowledge the Government's responsibility for these delays, as a result of its failure to implement the SHA agreed in 2014 and, indeed, its failure to implement relevant European Court judgments dating back to 2001.

19. In our view, therefore, the Government's proposals are incompatible with the ECHR and consequently its GFA-mandated incorporation through the Human Rights Act 1998. In relation to broader compatibility with the GFA, the proposals appear to dispense with the post-GFA justice reforms in relation to the test for prosecution and the independence of the Public Prosecution Service. It is also possible, given the ECHR-incompatibility of aspects of the proposals, that enabling legislation would seek to amend the Human Rights Act to dispense with procedural obligations tied to the right to life. This would in turn breach the GFA obligation to fully incorporate the EHCR into Northern Ireland law. Any such amendment would only have effect in UK domestic law. The UK cannot retrospectively state that the ECHR does not apply with respect to the Strasbourg Court.

The differences between the Government's new proposals and the draft SHA Bill

20. The proposals explicitly depart from the SHA with the WMS stating that the 2014 SHA was an important 'milestone' that 'did not stop the debate continuing'. It suggests that the proposals have evolved in alignment with the 'principles of the Stormont House Agreement', rather than the Agreement itself.

21. The SHA Principles[18] (which are on the face of the SHA) include 'upholding the rule of law', which the WMS explicitly seeks to qualify, being 'human rights compliant' and 'promoting reconciliation'. The lack of human rights compliance and departure from post-GFA justice reforms undermines the rule of law. Furthermore, by abandoning an existing international and multi-party agreement, itself the result of many years of

[17] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the UK, UN Doc A/HRC/34/62/Add.1 (17 November 2016), 21-24.
[18] Stormont House Agreement (2014) p 5. In full the SHA principles are 'promoting reconciliation; upholding the rule of law; acknowledging and addressing the suffering of victims and survivors; facilitating the pursuit of justice and information recovery; is human rights compliant; and is balanced, proportionate, transparent, fair and equitable.

negotiations, the proposals obstruct reconciliation and run the obvious political risk that no agreed legacy mechanisms will be established, which will in turn see the burden of legacy facing work returning to the existing criminal justice agencies, in particular the PSNI and the Office of the Police Ombudsman for Northern Ireland.

22. As noted above, the WMS proposes that 'one independent body' will carry out, 'oversee and manage' the information recovery and investigative aspects of the legacy system 'to ensure the most efficient and joined-up approach'. This suggests that the HIU, ICIR, and IRG will be subsumed into the new unnamed institution. The WMS is silent on the fate of the proposed Oral History Archive. In the press statement that accompanied the WMS there is a vague commitment to create 'a central resource for people from all backgrounds – and from throughout the UK and Ireland…to share experiences and narratives related to the Troubles'. This would appear to be a significant dilution of the commitment in the SHA to 'establish an Oral History Archive' that would both collect new narratives related to the Troubles and 'draw together and work with existing oral history projects'. We have previously called attention to the vital importance of ensuring that (as per para 24 of the SHA) this Archive is 'independent and free from political interference' and have suggested ways in which the Archive could be primed to make a meaningful contribution to reconciliation. Concerns about independence and the related challenge of garnering cross-community support will only be heightened if the collection of oral history is folded into a new centralised body.[19]

23. It should also be noted that the relationship between 'investigation' and 'information recovery' was already addressed in the proposed structure of the HIU. The HIU provides for a two-stage 'review' and full 'investigation' where there are evidential leads, which could lead to prosecutions. The thresholds for which cases proceed from review stage to investigation stage were tied to the ECHR. However, it was always envisaged that the bulk of the work carried out by the HIU would be focused on providing information to families via the family reports. Given the small number of successful prosecutions anticipated, it is acknowledged that the key outcome for the vast majority of victims and survivors would be the HIU family reports. However, the key added value of the HIU was what we have termed '**information recovery with teeth**'– an independent investigative mechanism with full police powers and with access to all relevant open and closed source material.

24. The ICIR was to provide a 'firewalled' separate route to information recovery through protected statements. This was intended to enable investigations and information recovery to be conducted in parallel. In contrast, the WMS emphasises the creation of a 'joined-up' approach, without clarifying what this actually means. It implies that the

[19] See A. Bryson (2015) *The Stormont House Oral History Archive, PRONI, and the Meaning of Independence* http://rightsni.org/2015/10/the-stormont-house-oral-history-archive-proni-and-the-meaning-of-independence-guest-post-by-dr-anna-bryson/

intention is to rapidly review outstanding cases and, once these cases are closed, to facilitate 'a swift transition' to information recovery, with the assumption that the prior closure of investigations would provide 'all participants the confidence and certainty to fully engage with the information recovery process'. However, it is not clear that the move to a sequenced approach would address concerns that information provided in relation to one death could also inadvertently provide possible evidential leads in other cases which are not yet closed. Given these ambiguities, institutional independence between information recovery and investigations continues to be crucial and it is unclear how this will be managed in a single body. Without sufficient independence, the information recovery process may not be able to secure sufficient buy in from former republicans, loyalists and state actors, to enable it to deliver on its envisaged information recovery commitments for victims and survivors.

The 'equity' of the proposed approach and the question of 'vexatious claims'

25. The Committee's terms of reference for the present inquiry, echoing a SHA principle, seek evidence on the 'equity' of the proposed approach. The inquiry also asks, 'What legislative steps the Government can take to address what have been described as vexatious claims against veterans?'

26. The April 2020 Model Bill team report provides detailed consideration of what is termed the 'witch-hunt' narrative concerning legacy-focused investigations and prosecutions of former soldiers. This narrative includes references to 'vexatious claims' and 'vexatious litigation' in the December 2019 Queen's Speech.[20]

27. Having reviewed the relevant parliamentary debates and media commentary, we extracted three recurring elements of the narrative and then tried to address them with relevant legal and factual data. The three elements are first the contention that there has been an 'Imbalanced Approach' to Legacy Investigations and Prosecutions; second that the early release scheme only benefited paramilitaries; and third that the 'On the Runs' scheme was an 'amnesty for paramilitaries'.

An 'Imbalanced Approach' to Legacy Investigations and Prosecutions

28. The 'witch-hunt' or vexatious claims narrative is frequently underpinned by an argument that police legacy investigations are disproportionately focused on former soldiers.[21] While it was operational, the PSNI report that the Historical Enquiries Team completed 1,615 cases – 1,038 were attributed to republican paramilitaries, 566 to loyalists and 32 to the security forces (9 were of unknown attribution).[22] In 2017, the Legacy

[20] Queen's Speech Background Briefing Notes 2019, p. 5, p128.
[21] BBC News Northern Ireland 9th December 2016, 'Troubles Killings: Police Deny Soldier 'Witch-hunt.'
[22] Legacy Investigative Branch PSNI (2017). Written evidence of Professor McEvoy submitted to the Defence Select Committee.

Investigation Branch of the PSNI (which replaced the HET) stated that of its caseload of 923 Troubles-related cases, 379 were attributed to republicans, 230 to loyalists, 282 to the security forces (238 military and 44 police) and 31 unknown.[23]

29. Given that the state was *directly* responsible for at least 360 or 10% of the overall fatalities of the conflict (leaving aside the issue of collusion),[24] the fact that almost one-third of the cases under investigation by the LIB are state focused has been suggested as evidence that such investigations are imbalanced.[25]

30. However, the reason for such a comparatively high number of state-involved investigations is that it has been accepted by the PSNI that many state-killings were not properly investigated in the first place. For example, in the period between 1970 and 1973, an RUC Force Order was in place which meant that police officers investigating a death caused by a soldier did not interview the soldier in question – that task was conducted by the Royal Military Police (RMP) rather than the investigating detectives. This practice was strongly criticised by the former Lord Chief Justice of Northern Ireland, and was ultimately stopped at the insistence of the then newly appointed DPP for Northern Ireland Sir Barry Shaw, himself a former soldier.[26] As one former senior army officer responsible for criminal investigations and litigation against the army noted in a lecture in 1973, 'the honeymoon period was over'.[27] Between 1969 and 1974, the British

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[23] Ibid. Updated figures provided by PSNI to Professor McEvoy, February 2020.

[24] By definition, it is difficult to be precise about the number of conflict-related deaths which involved the collusion of state actors and the nature and extent of that collusion in the absence of an over-arching truth recovery process. However, from existing sources we already know the following: the Glenanne gang (involving loyalists, UDR and RUC officers) committed over 120 murders; the Police Ombudsman investigations into Operation Ballast involved 10 murders and 6 murders in North Belfast and Loughinisland respectively, finding collusion in both cases; the de Silva report, quoting an internal Security Service review, reports that, between 1985 and 1989, 85% of UDA "intelligence" originated from the security forces; Lord Stevens, who conducted three investigations into collusion, arrested 210 loyalists as part of his investigation - of these, 207 were informers; Operation Kenova is currently investigating over 40 murders linked to the alleged agent Stakeknife, focusing on the IRA, members of the British Army, the security services and other government agencies. See further A. Cadwallader (2013) *Lethal Allies: British Collusion in Ireland*; OPONI (2007*) Operation Ballast: Investigation into the Circumstances Surrounding the Murder of Raymond McCord Jr;* OPONI (2016) *The Murders at the Heights Bar in Loughinisland*; Desmond de Silva (2012) *The Report of the Patrick Finucane Review*, p.11 and p.270; *Interview with Lord Stephens* in BBC Panorama 'Britain's Secret Terror Deals', 26th May 2015.

[25] Defence Select Committee, Investigations into Fatalities in Northern Ireland Involving British Military Personnel, HC 1064, Session 2016-17, para. 15

[26] Sir Robert (later Lord) Lowry, R v Foxford, [1974] NI 181, at p. 200.

[27] The full extract from that lecture – given by an officer identified as Major INQ 3 is reproduced in the Bloody Sunday Inquiry Report Volume IX, p. 234. *"*Back in 1970 a decision was reached between the GOC and the Chief Constable whereby RMP would tend [sic] to military witnesses and the RUC to civilian witnesses in the investigation of offences and incidents. With both RMP and RUC sympathetic to the soldier, who after all was doing an incredibly difficult job, he was highly unlikely to make a statement incriminating himself, for the RMP investigator was out for information for managerial, not criminal purposes, and, using their powers of discretion, it was equally unlikely that the RUC would prefer charges against soldiers except in the most extreme of circumstances. However, in March 1972, following the imposition of direct rule from Westminster, a Director of Public Prosecutions was appointed for Northern Ireland and he soon made it clear that the existing standards were far from satisfactory. In November 1972 he revoked the RUC's discretionary powers in

army killed 170 people. Sixty-three per cent of these were undisputedly unarmed at the time and only 12% (24 people) were confirmed as armed, with a further 14 listed as 'possibly armed'.[28] There were no criminal prosecutions of state actors during this period.[29]

31. It is difficult to assert with any credibility that any of these cases were properly investigated, even by the investigative standards of the day, which is why the practice of RMP investigations was ceased.[30] More generally, as the official *Operation Banner* review noted, only a dozen or so serious cases involving Army personnel killing or injuring others came to court during the 30 years of the conflict.[31] In relation to operational shootings, the report cites four convictions for murder, one of which was overturned on retrial.[32] These figures do not appear to include members of the Ulster Defence Regiment.[33]

32. With regard to more recent investigations, the report by Her Majesty's Inspectorate of Constabulary on the work of the Historical Enquiries Team found that 'state involvement cases had been reviewed with less rigour in some areas than non-state cases'.[34] The former PSNI Chief Constable, Sir Matt Baggott, accepted those criticisms in full and ordered that all 238 military killings should be reviewed afresh.[35] The reason for the higher number of state-related cases requiring an effective investigation is therefore the

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these matters, ordering all allegations made against the security forces to be passed to him for examination. The honeymoon period was over." Major INQ 3 also gave oral evidence to the Bloody Sunday Inquiry and confirmed that the revoked discretionary powers referred to where those of the RUC deciding whether or not to institute criminal proceedings against an individual solder.

[28] Using court records (in particular inquest records), newspapers and other open sources, Professor Fionnuala Ni Aolain created a database concerning the details of the all of those killed by state actors between 1969-1994. See F. Ni Aolain (2000) '*The Politics of Force: Conflict Management and State Violence in Northern Ireland - A Brief Historical Overview*.' Minnesota Legal Studies Research Paper No. 12-12, p.23.

[29] Ibid.

[30] In one such case investigated by the Royal Military Police, Mr Justice Kerr held that it was not open to the RUC to delegate the critical responsibilities to investigate a killing to another agency such as the Royal Military Police. He also held that '….the fact that each of the interviews cannot have lasted any more than half an hour; the fact that clear discrepancies appear in the statements made, discrepancies which have not been the subject of further challenge or investigation, are sufficient to demonstrate the inadequacy of the investigation into the death of the deceased.' See In the Matter of an Application by Mary Louise Thompson for Judicial Review [2003] NIQB 80.

[31] British Army (2006) *An Analysis of Military Operations in Northern Ireland*. (officially withdrawn) http://www.vilaweb.cat/media/attach/vwedts/docs/op_banner_analysis_released.pdf p. 46, para 431.

[32] Ibid. As above, namely R v Thain (1984) R v Clegg (1993) (acquitted on retrial in 1999) and R v Fisher and Wright (1995). Private Thain was released after serving less than three years of a life sentence and returned to his regiment. Scots Guards Fisher and Wright were released following the GFA.

[33] C. Ryder (1991) The Ulster Defence Regiment: An Instrument of Peace? (Methuen) suggests that 18 UDR soldiers were convicted of murder and 11 of manslaughter during the conflict p.150.

[34] HMIC (2013) Inspection *of the Police Service of Northern Ireland Historical Enquiries Team. Available at https://www.justiceinspectorates.gov.uk/hmicfrs/publications/hmic-inspection-of-the-historical-enquiries-team/.*

[35] Belfast Telegraph 3rd July 2013 'Army Killings to be Re-Examined'.

widespread acceptance by criminal justice and legal professionals that they were not properly investigated in the first place.

33. Similar criticisms concerning the lack of 'balance' have previously been directed against the Public Prosecution Service in Northern Ireland. However, the DPP has initiated legacy prosecutions in 17 legacy cases; 8 against alleged republican paramilitaries, 4 against alleged loyalists and 5 against British Army personnel (6 soldiers in total, one case involves two soldiers).[36] Again, the notion of an imbalance in prosecutions is simply not supported by the relevant data.

34. In sum, there is no historical or contemporary evidence to support the claim of a witch-hunt in terms of the proportionate number of legacy investigations or prosecutions against state actors.

'The Early Release Scheme Only Benefitted Paramilitaries'

35. A second argument raised in Westminster and elsewhere in favour of a statute of limitations for former soldiers is that such soldiers were not included in the early release scheme established under the Northern Ireland Sentences Act 1998 as a result of the GFA.[37] The legislation specifies that all prisoners convicted of scheduled offences between 1973 and 1998 who received sentences of over five years imprisonment can apply to the Commission for early release and that all qualifying prisoners had to be released within two years of the signing of the GFA. This has since been interpreted to mean that anyone eligible for the early release for offences committed before 1998 will serve a maximum of two years.

36. However, it was clear from the outset that soldiers and other state actors were entitled to apply to the same accelerated release scheme as paramilitary prisoners. In 1998, the only soldiers imprisoned for conflict-related offences were Guardsmen Fisher and Wright, both of whom had been convicted of murder. Both applied to the Sentence Review Commission and the Commission indicated a willingness to consider them in the same way as paramilitary prisoners. However, as a parliamentary answer from then Security Minister Adam Ingram makes clear, the government took the decision to release them on license under the Prison Act to ensure that they would be released before the early release of paramilitary prisoners commenced later that same week.[38]

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[36] Letter from Director of Public Prosecutions to Professor Kieran McEvoy, 10th January 2020.

[37] See e.g. HC Debates 25th January 2018, Vol, 635. Given Robinson MP, col. 212.

[38] Hansard, 28th October 1998, Column 201. Mr. Dalyell: To ask the Secretary of State for Northern Ireland if she will make a statement on the case of Guardsmen Fisher and Wright. [54784] Mr. Ingram: Guardsmen Fisher and Wright were released on life licence by the Secretary of State on 2 September 1998. This decision took into account that while the Secretary of State had been carrying out a review of the cases, the Northern Ireland (Sentences) Act 1998 became law. Although she was aware that the Guardsmen had applied to the Sentence Review Commission for early release, the Secretary of State was conscious that the Sentences Act enables the early release of prisoners who were engaged in terrorism. The Guardsmen were in Northern

This was a political rather than a legal decision. Their eligibility under the Sentence Review scheme was not in question. Former Minister of State for the Armed Forces Mark Lancaster confirmed this in the course of a debate on the Defence Select Committee report on Investigations into fatalities in Northern Ireland.[39]

The 'On the Run' Scheme was an 'Amnesty for Paramilitaries'

37. A third argument raised in parliament and in the media to support the witch-hunt narrative relates to the 'On the Run' (OTR) Scheme which operated between 2000-2014.[40] This scheme involved republican suspects receiving 'letters of assurance' as to whether or not they were deemed a person of interest to the police. This scheme came to prominence in February 2014 following the collapse of a murder trial against John Downey, an alleged IRA member accused of involvement in the Hyde Park bombing. The case against Mr Downey collapsed when it became clear that Mr Downey was in fact a person of interest and that he had been given a letter of assurance in error. The trial judge ruled that it would be an abuse of process to try Mr Downey since he had relied upon the erroneous letter to travel to the UK.[41] That decision was not appealed.

38. The subsequent review of the scheme was led by Lady Hallett. While she was critical of the scheme operating without a proper structure or policy in place, she was clear that 'the administrative scheme did not amount to an amnesty for terrorists. Suspected terrorists were not handed a "get of jail free" card'. The definition of an amnesty used by Lady Hallett was 'under an amnesty the state agrees never to prosecute for an offence, whatever the strength of the case against an alleged offender'.[42]

Ireland as a consequence of that terrorism and committed the offence while on duty to counter it. At the time of her decision the Secretary of State was also aware that the first possible releases under the Sentences Act could have taken place from 7 September onwards. Taking all these factors into account and having consulted the Lord Chief Justice as required by statute, the Secretary of State decided that the Guardsmen should be released on life licence under the Prison Act 1953.

[39] HC 1064, Session 2016-17, and the Government response, HC 549. See Https://www.parliamentlive.tv/Event/Index/b4c512e0-51c4-4251-ad0b-3f6b3f525fbb In response to a question on whether the Northern Ireland Sentences Act 1998 applied to former soldiers as well as paramilitaries, Mr Lancaster replied (at 15.00:07) 'Yes it does providing the eligibility criteria set out in the Act are met.' Mr Lancaster went on to say that in practice, no members of the security forces had yet been convicted of relevant offences since the passing of the Act so the Act had not yet been used. He also said with regard to the mechanism used to release Guardsmen Fisher and Wright, 'that case does not demonstrate that members of the security forces are debarred from making use of the Northern Ireland Sentences Act.' See also See. e.g. HC Debates 25th January 2018, Vol, 635. col. 223.

[40] See e.g. HC debate on Private Members Bill Armed Forces (Statute of Limitations) Bill, 1st November 2017, Vol 630, col 824 Richard Menyon MP.

[41] R v John Anthony Downey 2014 https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-downeyabuse-judgment.pdf

[42] 51 Lady Heather Hallett, An Independent Review into the On the Runs Administrative Scheme (2014) p 7. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/335206/41003_Hallett_Web_Accessible.pdf

The concept of 'vexatious' claims, litigation and prosecutions

39. Finally, it is bears emphasis that the very concept and allegations of 'vexatious' claims is in itself problematic and confused. The use of the terms in the Queen's Speech appears to transpose, erroneously, the idea of 'vexatious' litigation that exists within civil law to the realm of (potentially) criminal investigations into allegations of past crimes and human rights abuses. Despite its political prominence, there is no precise legal meaning to the term 'vexatious litigation'. A vexatious proceeding has been described in *AG v Barker* as one that *'*has little or no basis in law (or at least no discernible basis)' wherein its effect is to subject the defendant to inconvenience, harassment and expense out all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court…*'*[43]

40. In a similar vein, there is no legal definition of a 'vexatious prosecution'. There is an analogous tort of 'malicious prosecution' which has been defined as one (a) wherein the proceedings were found in the defendant's favour, (b) where there was no 'reasonable and probable cause to bring the prosecution' and (c) where the police or prosecutor acted 'maliciously'.[44] A reasonable and probable cause has been defined as 'an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead to any ordinarily prudent and cautious man [sic] to the conclusion that the person charged was probably guilty of the crime imputed'.[45]

41. Acting maliciously in such a case is an extremely high threshold, requiring that the police or prosecutor's motives were something other than bringing an offender to justice (e.g. revenge) or that the police or prosecutor had fabricated evidence.[46] Where investigations and prosecutions are conducted for good faith reasons, but are unsuccessful in securing a conviction, this is not evidence that the investigation and trial were vexatious. Bearing in mind that legacy investigations in Northern Ireland are of the most serious offences (including murder), and that previous investigations have been widely accepted as substandard in a large number of important cases (see further below), the idea that Troubles-related investigations or prosecutions could be legally described as 'vexatious' or 'malicious' is not intellectually credible.

42. Moreover, such a view appears to suggest that the Police Service of Northern Ireland (or previously the Historical Enquiries Team) and the Public Prosecution Service have been engaged in unprofessional behaviour, amounting to either vexatious or malicious investigations or prosecutions. With regard to the proposed role of the HIU, as is

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[43] [2000] 1 FLR 759

[44] D. Young et al (2014) Abuse of Process in Criminal Proceedings (4th edition).

[45] Hawkins J in Hicks v Faukner, 1878 8 QBD 167, 171 approved and adopted by the House of Lords in Herniman v Smith 1938 AC 305 316 per Lord Atkin.

[46] D. Young et al op cit.

detailed in the Draft Northern Ireland (Stormont House Agreement) Bill, there are already safeguards built into that require the HIU Director to consider previous investigations and avoid unnecessary duplication.[47]

43. Given the gap between the high threshold outlined in law and the reality of how investigations have unfolded, it would appear that the term 'vexatious' is a term of political rather than legal import.

44. As noted above, we have previously outlined two mechanisms that would result in the potential sentence reduction to zero of those convicted of conflict-related offences under the Northern Ireland Sentences Act 1998. Both are premised on the implementation of the SHA including an Article 2 ECHR compliant investigation into conflict-related offences, an independent decision to prosecute taken by the DPP and a trial in a court of law – usually a no-jury Diplock trial for offences that occurred in Northern Ireland.

45. Under one option, a version of which was presented to the Defence Select Committee in 2017,[48] such a sentence reduction would require the convicted person to cooperate fully in providing information to the ICIR. Under the other option, no such cooperation would be required. Anyone convicted of conflict-related offences would automatically have the current two year maximum threshold reduced to zero under section 10(8) of the Northern Ireland Sentences Act. These sentence reductions would be legally required to be applied to both state and non-state actors. Any attempt to apply the sentence reduction to state actors *only* would be vulnerable to challenge on the grounds of Article 14 of the European Convention on Human Rights as well as the state's legal obligation under international law to prevent impunity.[49]

46. In sum, we conclude the key arguments which have been deployed to support the 'witch-hunt' and 'vexatious' claims narrative against members of the security forces with regard to legacy investigations and prosecutions are neither factually nor legally accurate and lack intellectual credibility. It is possible to devise lawful mechanisms to reduce jail time to zero for conflict related offences but not at the expense of Article 2 compliant investigations.

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[47] Northern Ireland Office (2018) *Northern Ireland (Stormont House Agreement) Bill* Explanatory Notes para 53.
[48] K. McEvoy (2017) *Amnesties, Prosecution, and the Rule of Law in Northern Ireland*. Submission to the Defence Select Committee.
[49] Article 14 of the ECHR provides that the rights guaranteed by the Convention 'shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. The ECtHR has determined that sentencing related issues can engage Article 14. See e.g. ECtHR judgment Paraskeva Todorova v. Bulgaria (2010) (no. 37193/07). It is unlikely that any mechanism that is explicitly designed to simply shield members of the security forces from punishment would be considered an 'objective and reasonable' justification for differential treatment between convicted person based on their status as a state actor. See also United Nations Commission on Human Rights (2005) Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity

Recommendations

47. On the basis of these points, we recommend that the Committee

- Call upon the Government to refrain from continuing with its March 2020 proposal given that it is likely to be in violation of the UK's binding international obligations and will erode rather than build trust in the government's approach to dealing with the past.
- Call on the UK government to introduce legislation to implement the SHA agreement promptly without further undue delay.
- Call upon the UK government to refrain from using inaccurate language on 'vexatious prosecutions' that can undermine confidence in the rule of law in Northern Ireland.
- In the event that the government seeks to revise the terms of the Northern Ireland Sentences Act 1998 to reduce the sentence of those convicted of conflict-related offences, we call upon the government to ensure that such sentence reductions are compliant with binding international human rights law, the SHA and the GFA. In particular, any such sentence reductions should only be applied after an article 2 compliant effective investigation, an independent prosecution and a fair trial for the defendant. We also draw attention to the potential that any such sentence reduction provision should be linked to engagement with the ICIR to aid truth and information recovery for victims and survivors.[50]

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[50] See K. McEvoy, Daniel Holder, L. Mallinder, A. Bryson, B. Gormally and G. McKeown (2020) Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland p.41. https://pureadmin.qub.ac.uk/ws/portalfiles/portal/203198685/Prosecutions_Imprisonment_the_SHA_LOW_RES.pdf