"Dealing with the Legacy" - a human rights perspective

Submission from the Committee on the Administration of Justice (CAJ) to the Consultative Group on the Past

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What is CAJ?

The Committee on the Administration of Justice ("CAJ") is an independent human rights NGO founded in 1981 and affiliated with the International Federation of Human Rights. The Committee seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. CAJ is well known locally and internationally, having worked for many years with those affected by the conflict in Northern Ireland. CAJ has campaigned on behalf of individual cases and on improving the inquest system, has successfully taken cases to the European Court of Human Rights and has published material on a wide range of policing and criminal justice concerns over the years. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award, and in 1998 was awarded the Council of Europe Human Rights Prize for efforts to mainstream human rights and equality in the provisions of the peace negotiations.

Introduction

Between 1966 and 1999, there were 3636 deaths attributable to the conflict in Northern Ireland,[1] many of which remain unsolved. In the years since the Belfast/Good Friday Agreement, these unresolved deaths remain a continuous part of everyday life in Northern Ireland. The Good Friday Agreement, for a variety of reasons, elected to focus on the future rather than on the past. The opening preamble makes it clear that it is precisely to honour those affected by the past that Northern Ireland dedicates itself to a future of reconciliation, tolerance and mutual trust, and to the protection and vindication of the rights of all.[2] Ten years after the Agreement, the question remains whether it is possible to commit to a shared and peaceful future without addressing the legacy of the past?

In June 2007 an independent Consultative Group on the Past was established by then-Secretary of State Peter Hain to collect ideas on how to deal with the legacy of the conflict in Northern Ireland. In January, 2008, the Consultative Group concluded its investigation. In a speech on May 30, 2008, the Consultative Group addressed key challenges to dealing with the past, stating that *"there are issues from the past that must be dealt with if we are to truly ensure that we do not repeat the mistakes of the past."*[3]

This paper is intended not only as a response to the Consultative Group on the Past, but to inform the wider public debate. It is not the role of CAJ to develop a model for dealing with the past but to identify the difficult issues that would need to be addressed by any such model. Over the years, CAJ has developed a series of principles against which any truth recovery process or dealing with the past initiative must be judged.[4] These principles are drawn from a mix of international human rights standards, international good practice and CAJ's assessment of the human rights problems that need to be tackled in the specific situation of Northern Ireland. Any method for dealing with the past should be measured against these criteria to ensure compliance with domestic and international human rights standards.

In the remainder of this paper we elucidate further on a number of specific aspects of these principles, in particular the requirements of compliance with Article 2 of the European Convention on Human Rights, how a process that does not involve prosecutions can meet with human rights and rule of law obligations, and the importance of dealing with the socio-economic legacy of the conflict.

[1] McKittrick, David; Kelters, Seamus; Feeney, Brian; Thornton, Chris, Lost Lives, Edinburgh, Mainstream Publishing, 1999, p. 1474, Table 1
[2] Good Friday Agreement, Declaration of Support, para. 2
[3] Speech, Consultative Group on dealing with the Past, May 29, 2008; http://www.cgpni.org/latest-news/25/full-text-of-key-note-address/
[4] See appendix 1

Section I: Complying with Article 2 of the European Convention on Human Rights

CAJ would suggest that if Northern Ireland is to engage in a meaningful process to deal with the past, any mechanism proposed by the Consultative Group must be compliant with Article 2 of the European Convention on Human Rights (ECHR) as a minimum standard. To comply with Article 2, the requirements are those set out in ***Jordan v UK***, namely independence, effectiveness, promptness and transparency.[5]

1.1 The Development of Procedural Protection in Article 2

Barring exceptions,[6] the right to life found in Article 2 is acknowledged to be one of the most fundamental rights. In a series of recent judgments, the European Court of Human Rights ("the Court") has significantly broadened the scope of Article 2, extending its application beyond the use of lethal force to the planning for such use of force and to its subsequent investigation. In ***McCann and others v. the United Kingdom***, the Court confirmed that Article 2 applies both in situations where it is permitted to intentionally kill an individual and in situations where death may be an unintended outcome of State action.[7] The Court went on to set a standard to guide state law enforcers in their use of force. It stated:

> *"In this respect the use of the term 'absolutely necessary' in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is necessary in a democratic society under paragraph 2 of Articles 8 to 11 of the Convention."*[8]

Further and of most relevance in this context, the Court emphasized that the right to life was only meaningful where procedural protections were in place to ensure that the exercise of force was subject to independent and public scrutiny.

> *"The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1(art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State"* (CAJ's emphasis).[9]

In ***McCann***, the Court articulated a procedural aspect in Article 2 which is distinct from its substantive requirement. This procedural aspect imposes a positive obligation on the State to investigate deaths which may have occurred in violation of Article 2. In later decisions, the

[5] (2003) 37 EHRR 52 paras 106-109
[6] *European Convention on Human Rights 1950 Art. 2* in which the article contains exceptions for the cases of lawful executions, and deaths as a result of "the use of force which is no more than absolutely necessary" in defending one's self or others, arresting a suspect or fugitive, and suppressing riots or insurrections.
[7] (1995) 21 EHRR 97, para 148.
[8] *Id.* at para 149
[9] *Id.* at para 161.

Court expanded upon this procedural aspect. In ***Kaya v. Turkey***, it held that the obligations of Article 2 mandated that a State must carry out an effective official investigation when an agent of a State is involved in the exercise of lethal force.[10] In the joined decisions of ***Jordan***[11]***, Kelly***[12]***, McKerr***[13] and ***Shanaghan v. UK***[14], the Court focused on the minutiae of the investigative process,[15] examining in detail the police investigative process, the Coroner's inquest, the role of the Director of Public Prosecutions and the absence of criminal proceedings in a manner hitherto avoided in the domestic context.[16] The European Court made clear that the UK violated Article 2 by failing to thoroughly and effectively investigate the killing of twelve individuals, some by state actors and some in circumstances suggesting collusion.[17] Article 2 breaches considered by the Court included but were not limited to: failure to interview pertinent eye-witnesses (***Jordan*** and ***Shanaghan***); failure to ensure the adequate execution of forensic tests at the scene of the incident (***Shanaghan***); and failure to contact family members to indicate that the deceased had been killed by an agent of the State (***Jordan, Kelly*** et al. and ***McKerr***).[18]

The notion that failure to satisfy the procedural aspect of Article 2 could in and of itself constitute a breach of Article 2 was confirmed in further Turkish cases. In ***Gulec v Turkey***, the Court again found a violation of Article 2 on the grounds that the investigation of the killing "*was not thorough nor was it conducted by independent authorities.*"[19] While the obligation to carry out an effective investigation into unlawful or suspicious deaths comes into play primarily in the aftermath of a violent and suspicious death, the procedural obligation to investigate under Article 2 may be revived in certain circumstances. As recently as 2007 in ***Brecknell v. UK***, the European Court interpreted Article 2 ECHR as meaning 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. The steps that it will be reasonable to take will vary considerably with the facts of the situation."*[20]

Recent jurisprudence from the European Court has clarified the criteria by which the procedural aspect of Article 2 ECHR might be evaluated. Article 2 requires that the investigation be *independent*[21]*, effective*[22]*, prompt*[23]*, and transparent.*[24] The Court further

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[10] ***Kaya v. Turkey*** (1999) 28 EHRR 1, paras.86-91.
[11] ***Jordan v. UK*** (2003) 37 EHRR 52
[12] ***Kelly v. UK***, App No. 30054/96 Judgment of 4 May 2001
[13] ***McKerr v. UK,*** (2002) 34 EHRR 20
[14] ***Shanaghan v. UK,*** App. No. 37715/97 Judgement of 4 May 2001
[15] Fionnuala ni Aolain, *Truth Telling, Accountability and the Right to Life in Northern Ireland*' [2002], European Human Rights Law Review , p.580 for additional grounds
[16] *Id.*
[17] These principles have also been canvassed in a further series of recent Turkish cases including ***Ogur, Cakici, Tanrikulu, Yasa, Gulec, Salman, Ertak and Timurtas v. Turkey.***
[18] Fionula ni Aoilain, *Truth Telling, Accountability and the Right to Life in Northern Ireland*' [2002] European Human Rights Law Review 580
[19] **Gulec *v. Turkey*** (1999) 28 EHRR 121 at para 82.
[20] ***Brecknell v. UK*** App No. 32457/04 (2007) at para 71.
[21]. ***Gulec v. Turkey*** (1999) 28 EHRR 121 at para 82.
[22] ***Ergi v. Turkey*** (2001) 32 EHRR 18 at para 79; see also ***Kaya v Turkey*** (1999) 28 EHRR 1 at para 124 , "capable of leading to determination of whether the force used in such cases was or was not justified under the circumstances .".

expanded these rights in ***Kelly and others v. UK*** **(**"the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.")[25] This criterion has been echoed by domestic jurisprudence in the House of Lords in ***R v. Secretary of State for the Home Department ex parte Amin.***[26] The decision in ***Amin*** makes it clear that, in accordance with the European jurisprudence, such an investigation must be thorough and effective, independent, prompt, public and accessible to the family of the deceased.[27]

1.2 Article 2 Compliance and Current Mechanisms for Investigating Controversial Deaths

Following the ***Jordan et al*** decisions, the European Court introduced stricter standards as regards those killed by state forces or as a result of alleged collusion between state and non-state actors. While the Court acknowledged that some combination of remedies suggested by the UK[28] could satisfy the procedural aspect of Article 2, in these instances, they had not.[29] The investigation had to be capable of leading to a determination of whether the force used in such circumstances was or was not justified in the circumstances and to the identification and punishment of those responsible.[30] In response to the Court's decision in ***Jordan et al***, the UK government has subsequently presented a package of measures to the Council of Europe outlining the steps it has taken to implement the judgment of the Court and to ensure that future investigations comply with Article 2. These measures included the passage of new legislation such as the Human Rights Act and the Inquiries Act, the establishment of the Office of the Police Ombudsman ("OPONI"), the establishment of the Historical Enquiries Team ("HET"), and reform of the Coroner's Inquests and the Prosecution Service. In February 2005, the Council of Europe welcomed the initiatives already taken[31], but stated that further measures were still needed and that rapid action was necessary to address deficits in investigations.[32]

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[23] *See*, ***Kelly v. UK*** App. No. 30054/96 Judgment of 4 May 2001 at para 97,"Such promptness was regarded by the Court as essential in maintaining public confidence in the maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."

[24] *See* ***Kaya v. Turkey*** (1999) 28 EHRR 1, paras 98, 105. See also ***Gulec v Turkey*** (1999) 28 EHRR 121 at para 82, where the father of the victim was not informed of the decisions not to prosecute; ***Ogur v Turkey*** (2001) 31 EHRR 40 para 92.

[25] ***Kelly v. UK*** App. No. 30054/96 Judgment of 4 May 2001 at para 94

[26] ***R v. Secretary of State for the Home Department ex part Amin*** [2003] 4 All ER 1264 [HL]

[27] *Id.* at 1280, para 32

[28] ***Jordan v. UK*** (2003) 37 EHRR 52 at paras 100, 117, in which the UK had argued that a combination of police investigation, review by the DPP, the inquest system and the possibility of civil proceedings had satisfied the procedural requirement of Article 2.

[29] ***Id.*** at paras 142-143, 145; Doherty and Mageen, *Investigating Lethal Force Deaths in Northern Ireland: the Application of Article 2 of the ECHR* ,Belfast; Northern Ireland Human rights Commission; February, 2006, p.5, para 4

[30] ***Jordan v. UK*** (2003) 37 EHRR 52 at para 107; *see also*, Bell, Christine; Keenan, Johanna, L*ost on the Way Home? The Right to Life in Northern Ireland*, Journal of Law and Society; Vol. 32, No. 1, March 2005, p. 72.

[31] Doherty and Mageen, *Investigating Lethal Force Deaths in Northern Ireland: the Application of Article 2 of the ECHR*, Belfast; Northern Ireland Human rights Commission; February, 2006, p. 6, paras 7-8. These initiatives include but are not limited to the establishment of OPONI; the establishment of the SCRT (PSNI); the option for families to judicially review decisions not to prosecute; legal aid for inquests and the Inquiries Act.

[32] Id at 6., para 7

Recent speculation in the media has suggested that the Consultative Group might recommend some alternative, independent mechanism to replace the current mechanisms and individual legal remedies available to families in lieu of a more coordinated method for dealing with the past. A proposed mechanism complying with Article 2 and allowing for voluntary family participation could provide an alternative to families who wish to participate. CAJ would not oppose such a mechanism, but would stress that any family wishing to participate be afforded support ensuring their full participation. In the past, CAJ and other human rights organizations have questioned the Article 2 compatibility of existing mechanisms for dealing with the past.[33] These mechanisms will be addressed individually in the following section. However CAJ would suggest that a recommendation to replace existing mechanisms would exceed the remit of the Consultative Group. Existing mechanisms should remain open to families who wish to pursue them.

1.2.1 Office of the Police Ombudsman

The Patten Report underlined the importance of an independent, properly resourced Police Ombudsman's Office (OPONI) which had community confidence and support. OPONI provides an independent, impartial police complaints system. In 2001, the RUC (Complaints) Regulations created a statutory obligation for OPONI to investigate 'grave or exceptional' cases where the incident occurred more than a year ago and involved allegations of police misconduct. The number of historic complaints to OPONI increased significantly after the HET project began operations in 2006. According to figures provided in February 2008, there were 983 investigations then underway in the Office of which 116 were historical (54 of them HET referrals) and it is estimated that there will be a further 300 referrals in total from the HET.[34]

A 2006 report from Healing through Remembering acknowledged the important contribution made by OPONI's investigations:

> *"The considerable legal powers of the office of the Police OPONI in terms of compelling witnesses as well as capacity to access relevant files, including intelligence information, and the apparent dogged persistence with which that office has gone about its work have made it quite a powerful tool of truth recovery in the field of policing."*[35]

However, it has not been a perfect system. For example, the views of BIRW on OPONI's work were that *"the outcomes there have been patchy and we have found OPONI much less family friendly than HET."*[36] While independent of the police, OPONI does not cover cases where the army was involved.[37] Furthermore, OPONI's failure to disclose relevant police

[33] See, Committee on the Administration of Justice, 'Preliminary Response from the Committee on the Administration of Justice (CAJ) to the 'package of measures' submitted by the UK to the Committee of Ministers', 8 October 2002; Northern Ireland Human Rights Commission, *Comments on the United Kingdom Government's Package of Measures Intended to Address the Issues raised by the European Court of Human Rights in its Article 2 Judgments of 4 May 2001* (2002).
[34] Northern Ireland Affairs Committee, Third Report of Session 2007-08; *Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past*; HC 333, para 33
[35] Healing Through Remembering, *Making Peace with the Past*, 2006, p 55
[36] Northern Ireland Affairs Committee, Third Report of Session 2007-08 *Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past*; HC 333, para 32, FN 57.
[37] See, Bell, Christine; Keenan, Johanna, L*ost on the Way Home? The Right to Life in Northern Ireland*, Journal of Law and Society; Vol. 32, No. 1, March 2005, p. 75: " . . . significant given that the ECHR in ***Kelly v. UK***

documents to families has been challenged as violating the Article 2 procedural requirement.[38]

While OPONI is a statutory body, it has discretion (pursuant to the RUC (Complaints etc) Regulations 2001) to disapply certain time limits in circumstances where OPONI believes the matter should be investigated because of its gravity or exceptional circumstances or where OPONI believes a member of the police force has committed a criminal offence. The current Ombudsman has expressed concern that the cost of 'policing the past' is compromising – and will increasingly compromise – the agency's ability to carry out its core functions.[39] Absent a change to the legislation[40], the investigation of historical cases will continue to be a matter for OPONI's discretion which must be exercised legally, rationally and fairly. Any decision made not to do so would be open to judicial review. Even if such a policy was adopted it would have to allow for exceptions and each case would have to be considered on its own merits with a view to determining whether or not it was exceptional.

1.2.2 Historical Enquiries Team (HET)

HET was established within the PSNI following discussions between the police service and the Northern Ireland Office of the UK government about dealing with the legacy of the troubles. HET owes its very existence to the number of unsolved killings arising out of the period between 1968 and April, 1998.[41] The remit of HET is to re-examine all deaths attributable to the conflict and *"to assist in bringing a measure of resolution to those families of victims affected by deaths attributable to the conflict in the years 1968–1998"*.[42]

Although HET has been very cooperative and victim-centred,[43] some families and organizations have questioned whether HET is sufficiently independent and would prefer the historic investigations to be managed by an independent agency.[44] CAJ, for example, has previously reported that "some families will not engage with the HET because it is part of the Police Service in Northern Ireland, they see it as intimately tied in institutionally to the police and therefore they do not want to engage."[45] Relatives for Justice have raised concerns as to HET's independence in investigating the 1971 deaths of eleven people at Ballymurphy.

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and later ***McShane v UK*** (2002) 35 EHRR 23, found that police investigators were insufficiently independent of implicated army personnel.

[38] ***In the matter of an application by the Committee on the Administration of Justice and Martin O'Brien for Judicial Review*** [2005] NIQB 25

[39] Northern Ireland Affairs Committee, Third Report of Session 2007-08; *Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past*; London; HCC 333, paras 36, 39; See also BBC News "Troubles Team 'should be merged' ; http://news/bbc.co.uk/go/pr/fr/-/1/hi/northern_ireland/7520648.stm; 23/7/2008 08:32:58 GMT

[40] Northern Ireland Affairs Committee, Third Report of Session 2007-08; *Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past*; London; HCC 333, para 41 citing the Police Federation in describing the historic remit of the Ombudsman as a "legal straitjacket" and proposing that the legislation be amended to enable the Ombudsman to focus on complaints relating to events which had occurred after 1998.

[41] BIRW, *Dealing with the Past: Submission to the Consultative Group*, November 2007, para. 2.3

[42] Northern Ireland Affairs Committee, Third Report of Session 2007-08; *Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past*; London; HCC 333, para 10.

[43] Id. at paras. 16-17

[44] Northern Ireland Affairs Committee, Third Report of Session 2007-08; *Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past*; London; HCC 333, para 20

[45] Id. at para 20, FN 48 citing Q175

In contrast to OPONI, HET is not a statutory body and its remit is subject to the control and management structures of the PSNI. It has been reported that the PSNI has considered the case for a transfer of responsibility to carry out historical work from HET[46] to an independent organization capable of investigating historical complaints in an Article 2 compliant manner; effectively combining the historical remits of both HET and OPONI into a single independent body.[47] David Cox, head of HET, said that it was "sensible to consider consolidating the ombudsman's investigations into historical murders with the work of his own detectives in investigating the circumstances of a death."[48]

1.2.3 Coroner's Inquests

The inquest system in Northern Ireland has long been the subject of controversy. CAJ has previously criticized the inability of inquests to issue verdicts of lawful or unlawful killings as inadequate to meet international standards[49], a view echoed by the ***House of Lords in R. Middle v. Her Majesty's Coroner for the Western District of Somerset.***[50] This is particularly problematic when families are denied their right to a declaration of whether their loved ones were lawfully or unlawfully killed by state agents. While state witnesses are now compellable, protection against self-incrimination still applies, leaving the inquest's scope, in this regard, limited. The Chief Constable still refuses to disclose the Stalker/Sampson reports to a Coroner attempting to hold inquests on six men who died in three alleged shoot-to-kill incidents [51]despite the recent ruling by the House of Lords in the case of ***Jordan, McCaughey & Ors***[52]that coroners should be entitled to see all relevant information. Concerns also remain as to the frequent issuance of Public Interest Immunity Certificates ("PIIC") by the Secretary of State in coroner's inquests. The PSNI has reported that approximately 100 historic inquests remain outstanding and that 48 of these deaths are classed as contentious because they involved allegations of collusion or involvement of the security forces in the death. The PSNI also stated that "these inquests have the potential to be almost akin to public inquiries. They demand complete disclosure which brings with it issues of intelligence and source handling that will require PII consideration."[53]

Finally, the inquest system continues to face a severe backlog of cases and cost overruns. At the close of 2001 there were 1,897 deaths still awaiting an inquest some dating from as far

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[46] Id. at para 21

[47] Id. at, paras 40-42; Editorial, *Tread with Caution over any Merger*, The News Letter, July 24, 2008; *Police Ombudsman is 'open to merger' plan*, The News Letter, July 24, 2008; McCaffrey, Barry; *Ombudsman and HET should merge: O'Loan*, The Irish News, July 24, 2008; *Troubles team 'should be merged'*, BBC News, July 23, 2008, 08:32:58 GMT (available at http://news.bbc.co.uk/go/pr/fr/-/1/hi/northern_ireland/7520648.stm)

[48] McCaffrey, Barry; News Feature, *HET chief says working closer with ombudsman makes sense*, The Irish News, 5 August 2008, p. 13, remarking that "If Eames/ Bradley can adjust the statutory requirements it obviously makes sense not to be spending two lots of money doing the same thing covering a past case. I think it makes a lot of sense to treat the past as an issue as opposed to two lots of people looking at the same thing. It wouldn't become like an enhanced ombudsman's office. It's about more sensible use of resources."

[49] Committee on the Administration of Justice, 'Preliminary Response from the Committee on the Administration of Justice (CAJ) to the 'package of measures' submitted by the UK to the Committee of Ministers', 8 October 2002,p.5;

[50] (2004) 1 A.C. 182

[51] Thornton, Chris; *PSNI says Stalker report is 'top secret'* ; Belfast Telegraph, 29 November 2007

[52] Jordan (AP) (Appellant) v. Lord Chancellor and another (Respondents) (Northern Ireland) McCaughey (AP) (Appellant) v. Chief Constable of the Police Service *Northern Ireland (Respondent) (Northern Ireland)* [2007] UKHL 14

[53] Northern Ireland Affairs Committee, Third Report of Session 2007-08; *Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past*; London; HCC 333, para 76

back as the early 1990s.[54] The senior coroner in Northern Ireland recently criticised the PSNI at a preliminary hearing in the *Jordan* inquest for causing further delays.[55] Additionally, the PSNI has estimated that its costs relating to inquests for 2007–08 were £0.19 million, with projected costs of around £4.5 million per annum for each of the subsequent five years. [56]

Coroner's inquests are governed by the Coroner's Act (NI) 1959, Section 13, which renders the decision to hold an inquest subject to the decision-making perimeters of the coroner. This will continue to be the case unless the relevant legislation is amended. A Coroner is an independent judicial officer who must exercise his/her discretion lawfully, rationally and fairly. Any decision made by the coroner will be open to judicial review. However, the availability or outcome of an alternative investigation process may be a relevant factor for a Coroner to take into account in deciding whether or not an inquest should be held and, if so, the extent of that inquest.

1.2.4 Inquiries

As part of the Weston Park Proposals, Canadian Judge Peter Cory was appointed to make 'a thorough investigation of allegations of collusion' in six cases.[57] In 2004, Judge Cory ordained inquiries into five of these deaths, four in Northern Ireland.[58] Three of the four inquiries were intended by Cory to be constituted under previously-existing legislation.[59] Prior to the commencement of an inquiry into the death of Patrick Finucane, in which Judge Cory found strong evidence of collusion, the government repealed the Tribunals of Inquiry (Evidence) Act 1921 and replaced it with the Inquiries Act 2005. Both the Wright and Hamill Inquiries have been converted to be conducted under the Inquiries Act 2005.[60] The fourth inquiry recommended by Judge Cory into the death of Patrick Finucane has not yet been established.

The Inquiries Act 2005 has been roundly criticized for weakening the ability of inquiries to be transparent, effective and independent of government officials, most recently by the UN Human Rights Committee.[61] The Committee remains concerned that, a considerable time

[54] Luce T (2003) *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review* Cm 5831 TSO, London (The Luce Review) Chapter 17 para 30.
[55] Northern Ireland Affairs Committee, Third Report of Session 2007-08; *Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past*; London; HCC 333, para 75
[56] Id. at para 77.
[57] Weston Park Proposals, published by the NIO and the Republic of Ireland Dept. of Foreign Affairs, in the form of a letter to party leaders, 1 August 2001 (available at www.cain.ulst.ac.uk/events/peace/docs/bi010801.html).
[58] P. Cory, *Cory Collusion Inquiry Reports into Chief Superintendent Breen and Superintendent Buchanan; Patrick Finucane; Lord Justice Gibson and Lady Gibson; Robert Hamill; Rosemary Nelson; and Billy Wright* (2004).
[59] At the time of the Weston Park Agreement, the only inquiry possible would have been held under the Tribunals of Inquiry (Evidence) Act 1921. Judge Cory has confirmed that he did indeed have the Act in mind when he made his recommendation
[60] The Wright inquiry was initially established under section 7 of the Prisons Act (Northern Ireland) 1953 but later converted to be conducted under the Inquiries Act 2005. The family challenged the conversion at the time and in particular challenged the operation of section 14 of the Act. They were successful in the first instant before the High Court but lost before the Court of Appeal and then decided not to pursue it further. The Hamill inquiry was initially established under the Police Act but later converted under the Inquiries Act. The family did not challenge the conversion.
[61] Submission from CAJ to the UN Human Rights Committee in response to the Sixth Periodic Report submitted by the government of the UK, June 2008, p.3; UN HRC, "*Consideration of Reports Submitted by State Parties under Article 40 of the Covenant - Concluding Observations of the UN Human Rights Committee re United*

after murders (including of human rights defenders) in Northern Ireland have occurred, several inquiries into these murders have still not been established or concluded and that those responsible for those deaths have not yet been prosecuted.[62] The Act removes effective control of inquiries from independent judges and places it in the hands of the relevant government Minister, who in many of the cases arising in Northern Ireland is an interested party. Under the Act, the Minister decides whether there should be an inquiry; sets its terms of reference; can amend its terms of reference; appoints its members; can restrict public access to inquiries; can prevent the publication of evidence placed before an inquiry; can prevent the publication of the inquiry's report; can suspend or terminate an inquiry, and can withhold the costs of any part of an inquiry which strays beyond the terms of reference set by the Minister. Many have expressed reservations that inquiries held under the Inquiries Act would be insufficiently independent to satisfy the requirements of Articles 2 and 3 ECHR.[63]

Additionally, many have expressed reservations as to the continued tenability of inquiries. The operation of the Bloody Sunday Inquiry has begun to indicate the difficulty of any domestic Tribunal in holding the state's military actors to account.[64] The Tribunal's operation has also generated concerns about equality of treatment of witnesses, concerns about the type of support systems needed for victims who testify, and concerns about the costs.[65] A recent report by the Northern Ireland Affairs Committee entitled *Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past* contends that the annual cost of inquiries is financially unsustainable and must be addressed, either through controlling costs or limiting the establishment of inquiries.[66] Furthermore, the Bloody Sunday Inquiry has come under criticism for exorbitant duration and legal costs. [67]

*1.2.5 **Individual Legal Remedies***

Regarding possible remedies under the ECHR, the six month rule governing admissibility of applications to the Court under Article 35(1) of the Convention applies to all potential applications. Absent some fresh evidence or investigation (such as in ***Brecknell v UK***) many of the outstanding cases could not be the subject of an admissible application to the Court. However, the right of application to the Court cannot be removed without the government taking certain steps to do so. The United Kingdom could, for example, attempt to derogate

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Kingdom of Great Britain and Northern Ireland", 93rd session, Geneva 7-25-2008, "Even where inquiries have been established, the Committee is concerned that instead of being under the control of an independent judge, several of these inquiries are conducted under the Inquiries Act 2005 which allows the government minister who established an inquiry to control important aspects of that inquiry. (art.6)

[62] Id.

[63] Requa, Marny, *Truth Transition and the Inquiries Act 2005*, European Human Rights Law Review 2007, 4, p. 404

[64] Campbell, Colm; Turner, Catherine, *Utopia and the doubters: truth, transition and the law*, Journal of Legal Studies (2008), p. 10.

[65] Id.

[66] Northern Ireland Affairs Committee, Third Report of Session 2007-08; *Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past*; London; HCC 333, para 69

[67] Campbell, Colm; Turner, Catherine, "*Utopia and the doubters: truth, transition and the law*", Journal of Legal Studies (2008) p. 10 ("Cost has also been a significant factor in evaluating the work of the Tribunal: the total bill now exceeds £175 million or about 20 times the typical cost of truth commissions. More than half of these costs have been consumed by legal fees (totally approximately £86 million). A significant portion of these have been accumulated not in the Tribunal itself but in legal challenges in the civil courts to aspects of the tribunal's operations – typically in applications by the Ministry of Defence designed to reduce the exposure of military witnesses and sources).

from Article 46 in which the High Contracting Parties agree to abide by the final decision of the Court in cases to which they are parties. Such derogation could only be validly made where the requirements of Article 15 are satisfied. There is no indication that derogation is under contemplation.[68] In any event this would not preclude the right of application or the consideration of the case by the Court but merely the binding nature of any judgment that emerged. Alternatively, the United Kingdom could denounce the Convention as provided for by Article 58. This would effectively mean withdrawing from the entire Convention and would be a drastic and unprecedented step. There is no indication that such a step has ever been contemplated.

1.3 Article 2 Compliance and Proposals for Investigating Controversial Deaths

In asking whether any mechanism constituted to replace current bodies/ processes would be Article 2 compliant in the absence of all relevant statutory powers available to what it would replace, the European Court has never been prescriptive about how the investigative obligation under Article 2 ECHR should be fulfilled. The European Court stated in ***Jordan*** that

> "…The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances…"

However, ECHR jurisprudence suggests that any mechanism constituted, to fulfil the requirements of Article 2 must, as a minimum, have the features identified in that case i.e. it must be independent, effective, prompt and transparent.

Whether the procedural requirements of Article 2 can be met by a mechanism aimed at securing maximum disclosure in the likely absence of prosecution and in the interests of reconciliation and broader settlement will be developed in greater detail in the following section. Legal criteria indicate that "the interests of reconciliation and broader settlement" cannot operate to dilute the requirements of Article 2 where those requirements apply and can be enforced. In the Commission admissibility decision in ***Dujardin v France***[69], the Commission declared the application inadmissible and declined to interpret Article 2 as imposing a positive obligation to prevent every possibility of violence that can be derived from the provision concerned. The Commission stated that:

> *"It is not for the Commission to assess the advisability of the measures taken by France to that end. The State is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law. In the present case, the Commission considers that such a balance was maintained and that*

[68] See ***McCann and Others v UK*** (1995) 21 EHRR para 147; ***Soering v. UK*** (1989) 11 ECHR 439; ***Andronicou*** *and* ***Constantinou v. Cyrpus*** (1977) 25 EHRR 491 para 171; ***Gul v Turkey*** (2002) 34 EHRR 719 para 76; ***Jordan*** **v UK** (2003) 37 EHRR b2 11 BHRC 1 para 102; ***Kelly v UK*** App No 30054/96 Judgment of May 2001 para 91.

[69] App. No. 16734/90; 72 D.R. 236

there has therefore been no breach of the above mentioned provision."[70] (CAJ's emphasis).

The ***Dujardin*** case should be treated with some caution, given that it is a Commission decision from 1991, which predates the expanded development of Article 2 guarantees. In a later judgment, ***Oneryildiz v Turkey***[71], the Grand Chamber determined that it should be in no way inferred that Article 2 could entail an absolute obligation for all prosecutions to result in conviction.[72] However, national courts should not under any circumstances allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts.[73] The Grand Chamber set forth the following criteria in ascertaining whether national courts have fulfilled Article 2 obligations:

"The Court's test therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the ECHR, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined."[74]

This approach was confirmed in the case of ***Okkali v Turkey.***[75] The court reaffirmed the procedural aspect of Article 3 in imposing upon national authorities the duty to undertake an "effective official investigation capable of establishing the facts and identifying and punishing those responsible."[76] The proceedings as a whole must meet the requirements of the prohibition enshrined in Article 3 in that:

"The domestic judicial authorities must on no account be prepared to let the physical or psychological suffering inflicted go unpunished. This is essential for maintaining the public's confidence in, and support for, the rule of law and for preventing any appearance of the authorities' tolerance of or collusion in unlawful act."[77]

Although that case related to alleged violations of Article 3, the Court's case law establishes that the investigative obligations are the same in relation to Articles 2 and 3. Later in the same case the Court also suggested that amnesties might not be permissible for violations of Article 3.[78] This position echoes opinion juris from the practice of the UN in recent years.

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[70] Id.
[71] Application no. 48939/99, 30 November 2004, emphasis added
[72] Id. citing *mutatis mutandis*, ***Tanli v. Turkey***, App. No. 26129/95, § 111, ECHR 2001-III
[73] Id. citing *mutatis mutandis*, ***Jordan***, §§ 108 and 136-40). However, clearly the Court only interprets on the basis of the applicability of international human rights law, an open question remains as to what the obligation would look like if it involved the recognition of international humanitarian law (the laws of war).
[74] *Id.*
[75] Application No. 52067/99, 17 October 2006
[76] *Id.*, citing ***Slimani v. France***, no. 57671/00, §§ 30 and 31, ECHR 2004-IX (extracts) and ***Assenov and Others v. Bulgaria***, judgment of 28 October 1998, Reports, §102.)
[77] *Id.* citing *mutatis mutandis*, ***Öneryıldız***, cited above, § 96).
[78] *Id.* "The Court reaffirms that when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible (see, *mutatis mutandis*, *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004; compare *Laurence Dujardin v. France*, no. 16734/90, Commission decision of 2 September 1991, Decisions and Reports, 72, pp. 236-240)."

In conclusion, it seems that while Article 2 does not include an automatic guarantee of prosecution, in principle, amnesties should not be permissible for breaches of Article 2. Furthermore, Article 2 will be violated where action is taken which would undermine the public's confidence in, and support for, the rule of law and for preventing any appearance of the authorities' tolerance of or collusion in unlawful acts. Although ***Dujardin*** would appear to permit amnesty as part of a broader political settlement, striking an appropriate balance between the individual and the rights and needs of the community, later case law suggests otherwise.

That being said, a grant of limited immunity need not inevitably be incompatible with Article 2. Limited "immunity" has been granted by way of guarantees in relation to criminal prosecution or disciplinary procedures in inquiries dealing with state involvement in deaths in this jurisdiction (e.g. the Saville Inquiry, Rosemary Nelson Inquiry etc). The purpose of such guarantees (which have generally related only to the subsequent use of evidence given by an individual against him or herself) has been to ensure that witnesses are free to give evidence and cannot rely on the privilege against self-incrimination to refuse to answer questions. It does not mean that other evidence could not be used against an individual in any subsequent prosecution and does not preclude the possibility of prosecution. Nor should this be taken to suggest an application of blanket immunity for either individuals or offences, rather strict criteria should be required. If such a limited form of immunity is provided to ensure that the mechanism is capable of determining the facts about the death and/or responsibility for it, then this may be permissible under Article 2, provided that the other requirements (independence, promptness, effectiveness and transparency) were met.

1.4 Article 2 Compliance and Domestic Requirements for Investigating Controversial Deaths

The Human Rights Act 1998 ("HRA") has provided a domestic framework for the enforcement of the investigative aspect of the right to life. In Northern Ireland, the majority of HRA cases relating to Article 2 have concerned the conduct of inquests into deaths caused by the security forces or deaths where collusion between paramilitaries and the security forces is alleged.[79] Following the House of Lords' decision in *re McKerr*, Article 2 lacks domestic enforceability with regards to Sections 3 and 6 of the HRA[80] in relation to deaths that occurred before the Act came into force on 2 October 2000. The nature of historical cases suggests that they will fall beyond the remit of the HRA, and that any mechanism suggested by the Consultative Group could not be challenged domestically for failure to comply with Article 2. This is a potentially significant limitation on legal action that could be taken if any mechanism does not comply with Article 2.

However, the obligation for the state to comply with Article 2 still remains on an international plane. Where an Article 2 compliant investigation is not provided for at domestic level and all domestic legal options have been exhausted, an application against the state can be made to the European Court. [81]

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[79] Doherty and Mageen, *Investigating Lethal Force Deaths in Northern Ireland: the Application of Article 2 of the ECHR* ,Belfast; Northern Ireland Human rights Commission; February, 2006, p.31

[80] Human Rights Act 1998, §6(1) states: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'.

[81] Doherty and Mageen, *Investigating Lethal Force Deaths in Northern Ireland: the Application of Article 2 of the ECHR* ,Belfast; Northern Ireland Human rights Commission; February, 2006, p.31

Section 2: Amnesty and Accountability

Article 2 concerns lie at the very heart of a much larger discussion. Law in transition must reconcile the need to address past abuses with a desire for peace, and the practical difficulties inherent in such a process. The last twenty years have seen major developments in international law and practice in relation to conflict resolution, including the invigoration of international humanitarian law as it relates to non-international armed conflict; an expansion of the concept of "crimes against humanity"; a convergence of international human rights law and international humanitarian law[82] and agreement of the Rome Statue on the International Criminal Court.[83] Experience both international and domestic has shown that amnesty provisions can facilitate truth recovery and in the likely absence of prosecutions, may counter perceptions of impunity. CAJ would suggest that any genuine attempt to deal with the past should facilitate the recovery of truth as laid down by international and national human rights standards. However, CAJ would stress that the state be held accountable for human rights abuses it committed during the conflict, reflecting the higher level of accountability that rests on a state to protect its citizens.. Any process which neither can nor will hold the state accountable is fundamentally flawed and as such, illegitimate. A truth-recovery process must achieve an acceptable balance between truth recovery, reconciliation and political stability. Any assessment of its respective merits or demerits should be made on the basis of these criteria.

2.1 International discourse

Grants of limited immunity or amnesty provisions have been used increasingly in the aftermath of violence to address cultures of widespread impunity.[84] A basic argument in support of these provisions is that they are necessary for the stability of emerging and fragile democracies and for the aims of national reconciliation. The impact that these measures can have in transitional states is dependent upon the nature of the provisions themselves - particularly what types of crimes they cover - and whether they coexist with other measures to address the rights of victims to truth and reparations.[85] Some examples include Rwanda, in which it would be logistically impossible to punish all participants, or Chile in which delicate power relationships make prosecutions politically unfeasible.[86] Equally, however, trends are emerging which in practice place limits on the substance and the subjects of amnesty in specific contexts.

The fact that transitional justice mechanisms are often asked to focus beyond punishment does not mean that states have a free hand with regard to creating a culture of impunity. Condemnations have focused on blanket amnesties, often in the Latin American context. Blanket amnesties have been found to be unlawful, often because they remove the right to a remedy. The UN has cautioned that the aims of reconciliation or forgiveness should not be

[82] *See generally* Fionnula Ni Aolain, *Fluid Boundaries – Charting the Relationship between Human Rights and Humanitarian Law*, 28 Isr. Yearbook of Hum. Rts. 97 (1999)
[83] Rome Statute of the International Criminal Court, UN Doc A/Conf/183/9 (1998).
[84] Mallinder, Louise; McEvoy, Kieran "Amnesty as a Tool for Seeking the Truth about Northern Ireland's Past?" Feb. 2008, Just News Newsletter. In a database constructed by Louise Mallinder, over 506 amnesties have been documented since the Second World War
[85] Id.
[86] Healing Through Remembering, *Making Peace with the Past*, 2006, p.10

allowed where they further impunity.[87] The UN has expressly rejected the granting of amnesties for core crimes,[88] and those crimes which have been deemed to be international in nature. It is not open to local states to permit the perpetrators of such acts to be amnestied.

The debate surrounding amnesty and accountability is guided by two schools of thought. Restorative justice emphasizes amnesty, forgiveness and truth telling and is aimed at achieving political reconciliation and national unity rather than retribution. It is rooted in the belief that even if retributive justice identifies crimes and criminals, the systematic result will be the perpetuation of new generations of victims.[89] In contrast, theorists of retributive justice contend that amnesties are counterproductive and impede states from complying with their absolute duty to investigate, prosecute and punish gross violations of human rights.[90]

Customary international humanitarian and human rights law[91]requires that every state respect individual human rights and invoke no exception to them or from the obligations arising from them. International criminal law recognizes that each state has a duty to exercise its criminal jurisdiction over those responsible for serious international crimes. Although the Rome Statute of the International Criminal Court cannot be applied retrospectively, the UK's accession[92] and signature[93] to the Statute confirms their agreement to the Statute. Articles 26 and 27 of the Vienna Convention on the Law of Treaties also prohibit a party from invoking internal law as justification for failure to abide by treaty obligations.[94]

The right to a remedy is a composite right that is contained in general human rights and humanitarian treaties.[95] As further defined in the United Nations' Basic Principles and Guidelines on the Right to a Remedy, this right consists of the victims' rights to 'equal and effective access to justice', 'adequate, effective and prompt reparation for harm suffered'; and 'access to relevant information concerning violations and reparation mechanisms'. A state must fulfil each of these elements (justice, reparations and investigations) to avoid breaching a victim's right to a remedy.[96] This right was described in the Basic Principles and Guidelines as the right of a victim of 'a gross violation of human rights law or of a serious violation of international humanitarian law' to have 'equal access to an effective judicial remedy as

[87] Resolution 1999/32 of the Commission on Human Rights urges that governments 'abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations.'

[88] The expression 'core crimes' in the preamble of the Rome Statute is used as a shorthand to refer to the most serious crimes of concern to the international community as a whole. Core crimes include the crimes of genocide, crimes against humanity, war crimes and crimes of aggression (included but not yet defined).

[89] Andrew Rigby[89] and Michael Ignatieff[89] have argued that some degree of forgetting is necessary for the survival of the state. Andrew Rigby 2001, *Reconciliation and Forgetting the Past in Justice and Reconciliation*; *After the Violence*. p.2; Michael Ignatieff 1997 *The Warriors Honour: Ethnic War and the Modern Conscience* NY p. 171

[90] International Commission of Jurists, August 2005 'Fiji: Legal Submission on the Promotion of Reconciliation, Tolerance and Unity Bill 2005'

[91] Including the Universal Declaration on Human Rights, general state practice accepted as law and the interpretation of regional and international human rights treaties.

[92] 4 October 2001

[93] 30 November 1998

[94] Article 26-27 of the Vienna Convention on the Law of Treaties in force as of 27 January 1980

[95] See, for example, International Covenant on Civil and Political Rights, art.2(3)

[96] United Nations General Assembly, *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*, Res. 60/147 (16 Nov. 2005) [hereinafter '*Basic Principles and Guidelines*'], Princ 11. This is not intended to be a legally binding document, but rather to reflect the existing legal obligations of states under international human rights and humanitarian law

provided for under international law'. The Basic Principles continue however that 'other remedies available to the victim include access to administrative and other bodies as well as mechanisms, modalities and proceedings conducted in accordance with domestic law.'[97] Although the emphasis appears to be on judicial remedies, the Basic Principles and Guidelines recognize other acceptable forms of recourse for crimes which do not meet the threshold of international crimes, and appear to recognize the possibility of other forms of recourse, including non-prosecutorial truth recovery mechanisms satisfying the redress requirements under wider international law.[98]

This right to a remedy has also been recognized in the jurisprudence of the international courts.[99] The Inter-American Commission held that measures to ensure truth and reparations that accompany amnesties are not sufficient to guarantee respect for human rights . . . as long as [the victims] are denied the right to justice. Nonetheless, some key elements can be identified from the case law. First, to be considered 'effective', a remedy 'must be substantiated in accordance with the rule of law', and must 'address an infringement of a legal right'. Secondly, victims should be aware that the remedy exists, and be able to access it without fear of intimidation. Thirdly, the exercise of an effective remedy must not 'be unjustifiably hindered by the acts or omissions of the authorities', such as intimidation of witnesses or failure to supply evidence. Fourthly, a remedy should entail access to a competent national organ to conduct a 'thorough and effective investigation' and decide the issue within a 'reasonable time.' *Abdülsamet Yaman v Turkey*, which does not deal with a particular amnesty, but rather the concept of amnesty in general relating to torture, declared that where a state agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an 'effective remedy' that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.

In addition, the court has held that it is the obligation of the state to guarantee enforcement of the decisions awarding remedies by competent authorities. In the 1992 case, *Alicia Consuelo Herrara et al v Argentina*, the Inter-American Commission noted that state parties have a duty to ensure that any person claiming such a remedy shall have his rights determined by a competent authority provided for by the legal system. Therefore, an amnesty which prevents individuals having their rights determined by a competent authority could violate their right to legal recognition.

ECHR jurisprudence has further found that the notion of an effective remedy entails that in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure is required (***Aksoy v. Turkey 1996, No 100/***). As discussed in Section I of this paper, in the decisions of May 2001 regarding Northern Ireland, the ECHR has insisted that in order to comply with Article 2, the investigations need to be independent, thorough, prompt and effective.[100]

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[97] Ibid, Princ. 12

[98] Healing Through Remembering, *Making Peace with the Past*, 2006, p. 12 citing Mallender 2005

[99] See, for example, ***Aksoy v.Turkey***, judgment of 18 December 1996, ECHR, Reports of Judgments and Decisions 1996-VI [98]; ***Barrios Altos Case*** (***Chumbipuma Aguirre et al. v. Peru***) Inter-Am. Ct. H.R. (ser. C) No. 74 (2001) [43].

[100] (2003) 37 EHRR 52 paras 106-109

Nevertheless, wider international law does not prohibit amnesties per se except in relation to certain crimes such as genocide or comes against humanity. Additional Protocol II to the Geneva Convention encourages states to grant the broadest possible amnesty at the end of hostilities in non-international conflicts.[101] Although the Red Cross has tried to narrow the reading of this clause, international humanitarian law foresees and encourages the use of amnesties in certain contexts.[102] In examining the Rome statute discussion, scholars William Schabas et al have detected considerable sympathy to local truth recovery mechanisms in the drafting of the relevant sections concerning the decision to prosecute at the Court.[103] It was suggested that the court should not become involved in decisions to prosecute perpetrators in instances where local countries were involved in genuine or sincere truth commission projects as compared to naked attempts by outgoing or incumbent regimes to obfuscate their past misdeeds. The Security Council has power to defer an investigation if it promotes international peace or stability. A prosecutor may not initiate investigation where it is not in the interests of justice.[104] Prosecutions at the International Criminal Court ("ICC") may be restricted in a number of circumstances that could protect an amnesty. If a state with the appropriate criminal jurisdiction to prosecute or investigate a case decides not to prosecute, the decision will stand *so long as it does not flow from unwillingness or inability to prosecute*. This provision does not explicitly say that a local amnesty process will automatically trump the unwillingness to prosecute hurdle. The Rome Statute is silent on the issue of amnesties and it also does not specify the conditions under which the ICC will respect an amnesty agreement.[105] Rather, it retains what Kirsch referred to as creatively ambiguous provisions[106] and it is arguable that a lawfully established truth commission or amnesty process was not in fact evidence of an unwillingness to prosecute but rather spoke to a conscious decision not to prosecute in the broader interests of national reconciliation.[107]

An inter-relationship between amnesty and truth was strongly developed in the South African experience with the Truth and Reconciliation Commission. Previous truth commissions had been established in the context of an existing amnesty for political offences as a brokered compromise to gain peace. In El Salvador, issues surrounding amnesty became relevant following completion of the commission's work and a blanket amnesty was enacted to protect those in the report. However, the Amnesty Commission of the Truth and Reconciliation Commission in South Africa had the power to grant amnesty to individual applicants who fulfilled specific criteria relating to the application process and the political nature of their crimes. South Africa's approach is suggested as having partially overcome the

[101] Article 6(5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)., 1125 UNTS 609, entered into force 7 Dec. 1978. See also, Healing Through Remembering, *Making Peace with the Past*, 2006, p. 12. See also, Campbell, Colm; Turner, Catherine, "*Utopia and the doubters: truth, transition and the law*" Journal of Legal Studies (2008) p. 9 in stating that amongst the web of international commitments ratified by both the UK and the Republic of Ireland are the Rome Statute of the International Criminal Court (which, amongst other things, helps define the current norms on the imperative to prosecute and to delimit amnesty), and the two 1977 Protocols to the Geneva Conventions (Protocol II of which obliges states in the aftermath of high intensity internal conflict to 'grant the broadest possible amnesty')

[102] Id.

[103] Healing Through Remembering, *Making Peace with the Past*, 2006, p. 13

[104] Rome Statute of the International Criminal Court [1998] Article 52, 3© available at http://www.un.org/icc/part5.htm

[105] Currin, Brian; Hindle, Katy; *The Implications of Amnesty Legislation in Transitional Justice in Northern Ireland*; p. 24, FN 76 citing Popkin, M 2003

[106] Healing Through Remembering, *Making Peace with the Past*, 2006, p. 13

[107] Healing Through Remembering, *Making Peace with the Past*, 2006, p. 13; see also FN 49 for possible counterarguments.

amnesty/ accountability dilemma by requiring full and public disclosure – thereby ensuring some social responsibility for crimes.[108]

This approach has been influential on truth commissions in Liberia, DRC, Indonesia (both the commission and the commission for Aceh) and Timor-Leste. In Timor-Leste, truth and justice operated as coordinated concurrent procedures. A truth commission was mandated to grant or recommend amnesty. Statements by those involved in violence before the Truth Commission were first evaluated and then referred to community reconciliation processes in which amnesty was made available for lesser offences (if there was admission and performance of an act of reconciliation) or in cases of serious offences, referred to the office of general prosecutor. In Rwanda, Gacaca tribunals in which perpetrators of all but the most serious offences appear before community tribunal have been integrated with the national criminal justice system, with sentencing concessions granted for full and free confessions. Amnesties have also been a key feature of recent debates in Nepal and Burundi.

It has been argued that in emerging democracies of transformation or transplacement, where new and fragile regimes have limited authority, there should be selective prosecution of high level offenders ('only the most senior decision makers') so as to avoid the acute political costs that could otherwise come into effect. However elective prosecutions are not without complexity – if only high level officials are tried, there are likely to be problems in acquiring evidence as officials more likely would have destroyed evidence. Prosecution of low level officials might also be a scapegoat for high level officials and so can lead to a breakdown of moral capital and accountability.[109]

2.2 Domestic application

In dealing with the situation in Northern Ireland, there have already been amnesties/ decisions not to prosecute. Some examples of non-prosecution include the Saville Inquiry in which any evidence given by a witness in the Inquiry could not be used against them (although it could be used to prosecute others). In 1969, non-prosecution was used to 'wipe the slate clean and look to the future.'[110] Amnesty was provided for in the Decommissioning Act of 1997 which provided that criminal proceedings would not be pursued for a range of offences committed in relation to the decommissioning scheme. Additionally, the Commission on the Disappeared constituted under the NI (Location of Victims' Remains) Act 1999 offered immunity from prosecution in exchange for truth under legislation aiming to gain information on the whereabouts of individuals who disappeared during the Troubles.[111] The proposed On the Runs bill also had partial amnesties in the sense that normal due process was not followed for individuals with outstanding arrest warrants and extradition proceedings. Finally, the Early Release Scheme introduced in NI Sentences Act 1998 provided for the release of prisoners who belonged to paramilitary groups that were on ceasefire. Although this does not constitute an amnesty in that it applied to those who had already been convicted, many

[108] Claudio R Santorum and Antonio Maldono 'Political Reconciliation or Forgiveness of Murder - Amnesty and its Application on Selected Cases' available online at http://www.wcl.american.edu/hrbrief/v2i2/amnesty.html)
[109] Bruce Ackerman, 1992, the mirage of corrective justice in the future of the liberal revolution, page 75 to 77.
[110] Stormont, Hansard. May-August 1969, 42
[111] McEvoy, Kieran; Conway, Heather; *The Dead, the Law and the Politics of the Past*; Journal of Law and Society, vol. 31, No. 4, Dec. 2004, 539-62; p.559.

qualifying prisoners received early release from prison early as a result of the Agreement. This could be regarded as a form of amnesty which greatly benefited those in prison.[112]

As to whether an amnesty could be human rights compliant, CAJ believes that there are certain criteria that would have to be met before it could be considered. The amnesty process should be applicable to eligible applicants from all armed groupings. If some parties are excluded, the truth recovery will only be partial. It would have to deal with individuals on a case by case basis. An unconditional blanket amnesty would leave the state open to challenge in Strasbourg under the ECHR on the basis that the state had failed to uphold Convention rights and had failed to provide an effective remedy. Some corresponding issues could arise at domestic level under the Human Rights Act 1998.[113] Individuals should have to apply and fulfil conditions including admitting their actions. It should be possible to revoke the amnesty in cases of recidivism. It could apply only to political or conflict related offences, although given the lack of consensus in Northern Ireland on what if anything constitutes a political or conflict related offence, this may not be a workable option.[114] It would have to specifically exclude ordinary crimes and some serious crimes and human rights abuses (e.g. torture, rape, crimes against humanity). In South Africa, anything with a purely racial motivation was exempted from the amnesty program. It would need to be time-framed, not open-ended with a deadline for individual applications to encourage former combatants to come forward and engage with the process. The institution deciding on individual applications must be independent and the amnesty must to be linked to truth recovery and a genuine search for reconciliation.

Section 3: Addressing the socio-economic legacy

Undoubtedly the most obvious manifestation of the impact of the conflict is the legacy of the 3636 people killed, and the many more thousands who were injured. Such statistics provide a very obvious and clear rationale for the creation of the Consultative Group on the Past. CAJ would argue, however, that any attempt to deal with the legacy of the past in Northern Ireland must recognise that few areas of life remained impervious to the violence of the past thirty years.

To focus solely on the experiences of individual suffering would be a somewhat restricted perspective on what has happened over the last thirty years. Questions as to individual culpability or wrongdoing, while important, must also take account of how organisations, or systems failed so that particular incidents were able to occur in the first place.

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[112] Id.

[113] Campbell, Colm; Turner, Catherine, *Utopia and the doubters: truth, transition and the law* (Belfast, Legal Studies, 2008), p.11

[114] One possible guide could be the existing scheduled offences attached to the emergency legislation The term "scheduled offence" derives from the fact that offences deemed appropriate for trial by judge alone in Diplock courts are listed in Schedule 1 to the Northern Ireland (Emergency Provisions) Act.93 These include a wide range of serious criminal offences which are all capable of being committed in connection with the emergency situation. The list ranges from general criminal offences such as murder, manslaughter, wounding with intent, grievous bodily harm, and assault occasioning actual bodily harm to offences more specifically related to the troubles such as membership in a proscribed organisation. Since not all cases where these offences have occurred have been connected to the troubles, the Attorney General is given discretion in a particular case to certify that certain scheduled offences are not to be treated as a scheduled offence and are therefore to be dealt with by jury trial.

Beyond the remit of the police, criminal justice system, or indeed any future truth recovery process there is another important area in which the legacy of the conflict must be addressed. Undoubtedly, the killings, injuries, intimidation, discrimination, sectarianism and damage to property over the past thirty years has bequeathed a legacy of inequality, deprivation and mistrust which must also be addressed if Northern Ireland is not to repeat the mistakes of the past.

3.1 Domestic context

While discrimination and sectarianism existed in Northern Ireland before the onset of the current conflict, the last thirty years provided the forum in which the worst excesses of such behaviour could thrive. In addition to huge population shifts in the late 1960s and early 1970s, workplace intimidation continued throughout the conflict, while arson attacks on churches, Orange Halls, GAA clubs, and other forms of sectarian violence left few areas of Northern Ireland immune from some aspect of the conflict.

Yet it remains a truism that in any conflict, impact is most severely felt among the poorest. Certainly, the recent conflict in Northern Ireland has not been an exception in this respect.

According to the Northern Ireland Statistics and Research Agency (NISRA), of the top twenty most deprived areas in Northern Ireland, 17 are located in North or West Belfast, while the names of all the areas in question are synonymous with the recent conflict (see below). Clearly, one can see that the most deprived parts of Northern Ireland are also the most segregated, containing the most number of peace walls. It should be noted that North and West Belfast alone accounted for 1240 (or over one third) of the 3636 fatalities in total that took place over the course of the conflict. Such statistics provide direct evidence of the disproportionate impact of the conflict on the poorest sections of our society.

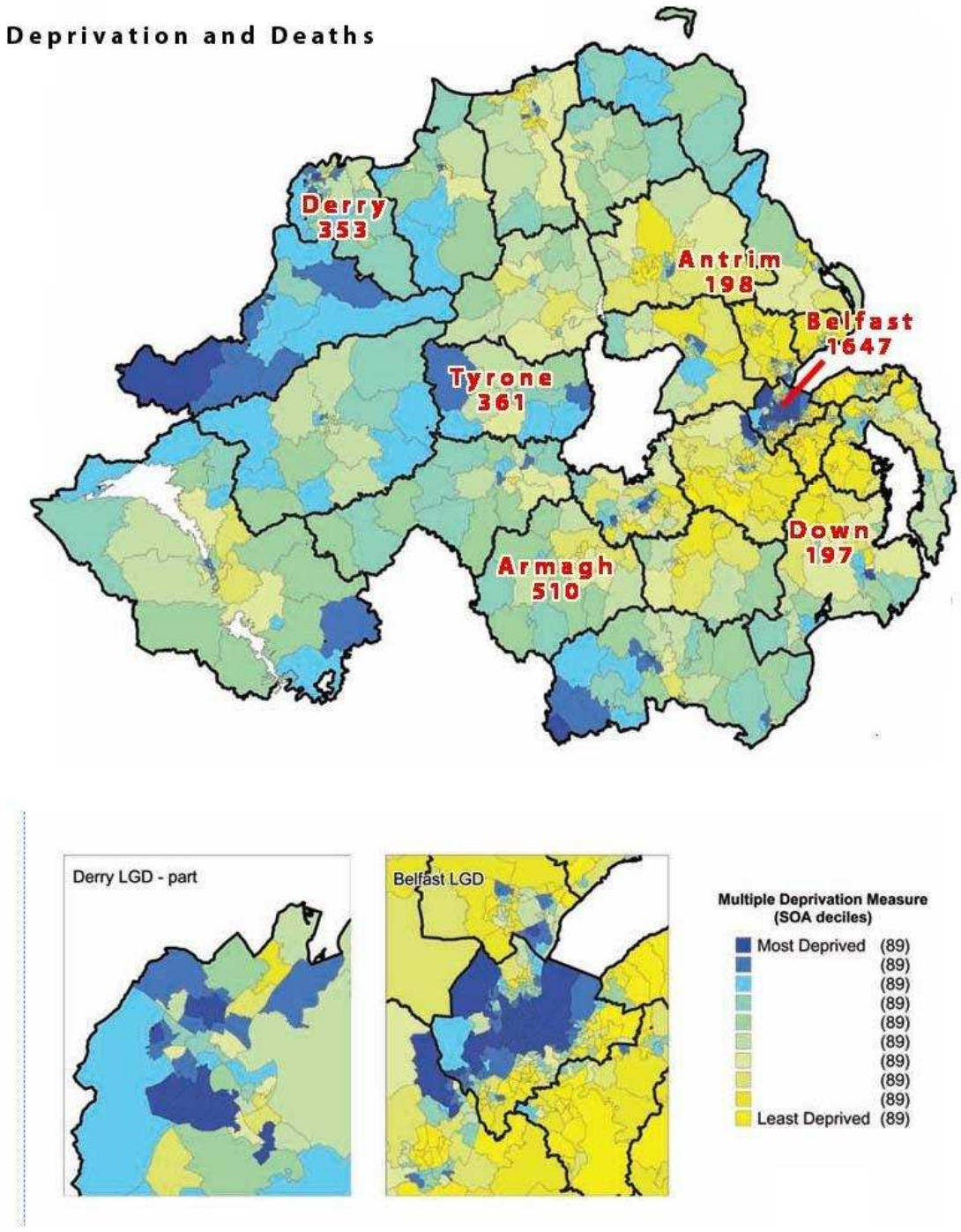
Northern Ireland Multiple Deprivation Measure 2005: All SOAs MDM score and rank[115]

SOA name	**LGD name**	**Percentage Catholic**	**Percentage Protestant/ Other**	**Rank of MDM**
Whiterock 2	Belfast	99	1	**1**
Shankill 2	Belfast	3	94	**2**
Falls 2	Belfast	97	3	**3**
Crumlin 2	Belfast	5	92	**4**
Whiterock 3	Belfast	99	0	**5**
Falls 3	Belfast	98	2	**6**
Shankill 1	Belfast	3	95	**7**
New Lodge 2	Belfast	99	1	**8**
New Lodge 1	Belfast	95	4	**9**

[115] Oxford Economics Study, p. 38, Table 5.2

Ballymacarrett 3	Belfast	3	94	**10**
Creggan Central 1	Derry	99	1	**11**
Upper Springfield	Belfast	97	3	**12**
Ardoyne 3	Belfast	98	1	**13**
Falls 1	Belfast	96	3	**14**
New Lodge 3	Belfast	98	2	**15**
Brandywell	Derry	99	1	**16**
Duncairn	Belfast	6	90	**17**
Woodvale 3	Belfast	4	94	**18**
Crumlin 1	Belfast	2	96	**19**
Ardoyne 2	Belfast	96	3	**20**

Moreover, looking at the NISRA deprivation data as a whole (see map overleaf) one can identify a strong correlation between the poorest parts of Northern Ireland (in particular the urban centres of North and West Belfast and Derry, followed by the border regions of Tyrone and South Armagh), and those areas in which statistically the impact of the conflict was felt most severely in terms of deaths and injuries.



Undoubtedly therefore, addressing these unacceptable levels of deprivation in the areas identified remains a key task if one is to adequately address the legacy of the past in a comprehensive manner.

3.2 International experience

International experience also demonstrates the necessity of dealing with the socioeconomic effect of past conflict[116]. The South African Truth and Reconciliation Commission, which was lauded as a major success, contained an intensive programme of socio-economic reconstruction aimed at addressing past imbalances.[117] Yet despite these advances, levels of severe poverty and destitution have remained constant in South Africa since 2000.[118] Unemployment levels remain high and where jobs were created, they did not affect rates of unemployment or absorb new entrants.[119] In a 2005 poverty survey, black respondents reported an average rate of lived poverty 7.5 times as high as that of whites. Lingering inequality has had a negative impact on South Africa's ability to wholly deal with the past. Many remain disgruntled with the amnesty process and controversy around reparations. Large segments of the population perceive the government as having failed them.

3.3 The Way Forward

The inclusion of human rights and equality protections in the Good Friday Agreement responded to the analysis that human rights abuses by the state had contributed to the onset, escalation, and sustenance of conflict and were required to be addressed if a lasting peace was to be achieved.[120] If any process addressing the legacy of the past in Northern Ireland is to achieve legitimacy, it is essential to meaningfully address the socioeconomic legacy of the past. Discussion must take place at all levels of society including at the highest levels of government asking what happened in these deprived neighbourhoods and finding the means to reintegrate them into the fabric of society.

It is worth noting that the recent budget and programme for government published by the Executive acknowledged the damage that the Northern Ireland economy experienced as a result of the conflict and has indeed made "growing the economy" the number one priority for the coming years.

Certainly, CAJ would agree that the best way of ensuring a prosperous and secure future for everyone in Northern Ireland would be in the context of an expansion of the economy and increased wealth generation. However CAJ would be concerned at the extent to which those communities who experienced the most severe impact during the conflict, and who live in the areas facing greatest deprivation, will actually benefit from an expansion of the economy as a whole.

It is by no means certain that a rising tide will in fact raise all boats in any economy. It is all the more unlikely that this will happen however when one considers that the most deprived

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[116] Cyril Adonis, Centre for Study of Violence and Reconciliation *Post Apartheid South Africa and the Truth and Reconciliation Commission (TRC): Socio-economic reflections*, CAJ Just News Newsletter, Feb. 2008

[117] Some examples of the South African attempt to address conflict-related inequality include the Reconstruction and Development Plan (RDP) which was replaced by Growth, Employment and Redistribution Plan (GEAR), massive investment in pro-poor programmes, affirmative action laws and the redrawing of Black Economic Empowerment charters. See id.

[118] Cyril Adonis, Centre for Study of Violence and Reconciliation *Post Apartheid South Africa and the Truth and Reconciliation Commission (TRC): Socio-economic reflections*, CAJ Just News Newsletter, Feb. 2008

[119] Id.

[120] Bell, Christine, Keenan, Johanna; "Lost on the Way Home: The Right to Life in Northern Ireland", Journal of Law and Society, vol. 32, no. 1, March 2005, 69

areas in the case of Northern Ireland face the additional handicap of thirty years of conflict. Factoring in the impact of 1240 killings in a geographical area the size of North and West Belfast for example, which is already top of the deprivation league, would give some indication of the scale of the challenge in terms of ensuring such areas emerge from their past. It is also worth noting that a recent study by the consultancy group, Oxford Economics, revealed that based on existing trends, the degree of deprivation in the poorest areas of Belfast is unlikely to improve.

Moreover, in a report published two years ago, CAJ cited government statistics which showed that in the immediate years following the ceasefires, the proportion of workless households within the Protestant community actually increased, at a time of record job growth. At the same time, little change occurred with respect to the percentage of workless Catholic households. This would suggest that over the period concerned, the increased wealth and jobs went to those households in which someone was already working. In other words, the peace dividend was clearly not benefiting those who were living in greatest deprivation in those areas most affected by the conflict. In fact, CAJ is concerned that within the context of a growing economy, and increased inward investment, the poorest areas of Northern Ireland, and those which experienced the most severe impact of the conflict, actually find themselves relatively worse off.

Unless programmes and resources are specifically targeted to those areas of most need, the likelihood is that the most deprived areas of North and West Belfast will merely remain stagnant while the rest of Northern Ireland gets wealthier. Such areas, rather than growing with the rest of Northern Ireland in terms of wealth, will actually find themselves relatively worse off than they were at the height of the conflict in socio-economic terms. Already one can identify the differences in the physical landscape of Belfast city centre for example, with new businesses and residential developments offering a range of goods and services hitherto unknown in Northern Ireland. Unfortunately, the residents of the most deprived parts of the city, such as the Shankill and the New Lodge, have not seen a commensurate improvement in the conditions within their own communities, in spite of the fact that the areas concerned are within walking distance of the city centre. A situation in which the areas which experienced the highest levels of violence throughout the conflict, become relatively worse off following the ending of conflict, is not in our view a stable way for Northern Ireland to progress into the future, if the mistakes of the past are not to be repeated.

The issues outlined above are by no means exhaustive, indeed there are many other social and economic aspects to the legacy of the conflict which we could have included such as the mental health problems that will have arisen as a result of trauma for example. CAJ would however be concerned that little attention appears to have been given to this important aspect of the conflict in terms of the public discourse that has hitherto taken place.

CAJ therefore recommends that in the first instance what is required is an explicit acknowledgment of the importance of addressing the social and economic aspects of the conflict by the Consultative Group. In this, we believe that the Group do not need to go beyond that which has been recognised at other times, and with other conflicts. The Marshall plan for instance was a particularly useful example of the recognition of the need for social and economic structures to be rebuilt after the conflict in Europe during the Second World War.

CAJ also recommends that the Consultative Group explicitly acknowledge that very specific measures, above and beyond those which have been undertaken to date, or included in the programme for government, are required if the life experiences of those living in areas which have experienced the most severe impact of the conflict are to be improved. At the very least, such specific measures would include the full implementation of the recommendations of the Greater Shankill and West Belfast Task Force, as well as specific targeting of resources, and investment and procurement policies to address the needs of those experiencing the highest levels of deprivation. It is worth noting that in the discussions around the redevelopment of the Crumlin Road Gaol/Girdwood Barracks site, one of the main criticisms from local communities has been their perception that plans to date have been inadequately formulated so as to address the needs of those actually living in the immediate surrounding areas of the Shankill, Crumlin Road, and New Lodge. Effective equality impact assessments of these and other regeneration and investment projects would ensure that existing inequalities are identified and addressed rather than further exacerbated.

CAJ also proposes that specific work be undertaken to provide an audit of the social and economic cost of the conflict, and that a programme of action be compiled to address the issues identified. Such a study would include the impact across all areas of life including physical and mental health needs, housing, employment, and education and indeed the built environment. Only by recognising the breadth of the impact of the conflict in this way can adequate recognition be given of the scale of the challenge of ensuring that the past remains the past, and that the unfortunate history of the last thirty years is not repeated.

Finally CAJ believes that the Consultative Group should recommend the inclusion of social and economic rights in a Bill of Rights that is framed around the particular circumstances of Northern Ireland. As can be seen above, there is little doubt that Northern Ireland has suffered particularly in social and economic terms as a result of thirty years of conflict. The focus on the political and security aspect of the conflict - at the expense of social and economic issues - has meant that marginalised groups have suffered to a greater extent than in more stable societies. The development of a strong Bill of Rights for Northern Ireland that protects social and economic rights presents a unique opportunity to redress the social and economic imbalances of the conflict and contribute towards a fairer and more stable society for all.

Conclusion

Ten years after the Good Friday Agreement, failure to address the past ensures that the future of Northern Ireland remains divided - not only by politics but by the past itself; the most poisonous legacy a past can impart is how easily it is repeated. The Consultative Group announced in a keynote address in May that "Dealing with our past will secure our future." It is not CAJ's role to recommend a model or a process at this point for repairing the legacy of the past. Rather, CAJ is concerned that any model aspires to the highest standards of compliance with human rights obligations – the best basis for any genuine attempt to deal with the legacy of conflict.

In this paper, we have focussed on three areas:

- the **compliance of any investigative model with Article 2 obligations** as set out in key decisions of the European Court and as monitored by the Council of Europe Committee of Ministers. Our conclusions point to the fact that a number of criteria need to be met in the context of Northern Ireland. First, any new arrangements cannot over-ride existing rule of law processes and agreements already entered in to such as the Cory Inquiries. Thus, families should not be railroaded into a transitional mechanism and prevented from requiring an inquest to be held. Families should also be able to insist that the police keep a file open pending new information or evidence. Similarly, the Cory and other inquiries should not be discontinued notwithstanding concerns about expense. The key will be whether an alternative truth recovery mechanism has the capacity to discover more "truth" than currently existing arrangements such as police investigation, inquest or public inquiry. From a human rights point of view, the attitude of government, its agencies and agents will be the most important variable. Is there a willingness to stop prevaricating and fighting the need to open up and be transparent about its role in the conflict? Is there a willingness to answer questions as to how high up the command chain decisions were taken on policies and practices that appear to breach the rule of law? Will the Stalker/Sampson and Stevens Inquiries be opened to public scrutiny? And will the government legislate for any new investigative mechanism to have sufficient authority to access the information it requires to draw conclusions in an independent way? These are all legitimate criteria to apply to whatever recommendations flow from the Consultative Group on the Past later this year.

- **whether a process that does not involve prosecution can meet with human rights and rule of law obligations** in the context of transitional post-conflict arrangements. This is often the corollary of the first area concerning independent investigation. International practice appears to accept that this can happen in certain limited circumstances. Partly, its compliance with rights obligations depends on ensuring a limited application of immunity as opposed to broad amnesty applications. But also, there will be a requirement to judge the genuineness of the truth recovery process. Thus the key question will be whether the failure to prosecute is an attempt at covering up what took place as opposed to a means of seeking to ensure the widest possible revealing of events during the conflict. The second measure is the extent to which the arrangements are aimed at a genuine desire for post-conflict reconciliation. Thus relevant questions will be whether the parties to the conflict – and the state in particular – are seeking to provide information to victims, whether the proposals have been a real debate involving the broadest possible range of opinion, whether the proposals have the capacity to promote political generosity and whether

significant sectors are opposed to the transitional arrangements. Finally, the capacity for information to emerge concerning decision-making as well as what happened on the ground will be an important criterion to apply to any alternative mechanism both in terms of its design as well as its outcomes.

- the need for any **genuine effort at post-conflict transformation to include measures aimed at addressing the social and economic legacy of conflict**. The final area examined by this paper concerned the important social and economic legacies of conflict. By and large, this has been a failure of past truth processes and it is increasingly becoming clear that the absence of measures to address social and economic legacies of conflict have been contributory to some of the criticisms levelled against truth processes thus far. The effectiveness of any proposals emerging from the Consultative Group on the Past will also need to be judged against their willingness to grapple with poverty and disadvantage. This firstly applies in relation to victims of and participants in the conflict. Are measures in place to ensure appropriate reparations to the one and a means of social inclusion to the other, be they state or non state? Secondly, will measures be put in place to ensure that government policy going forward seeks to rectify the inequalities experienced by those areas most affected by conflict? As the statistical information presented in this paper makes clear, areas of greatest poverty, social exclusion and marginalisation were also the areas that experienced the conflict at its most intense. Government spending and policy should take this into account and ensure that we create a society of social cohesion where gross economic and environmental inequality is eradicated. Ensuring that government procurement and investment takes this into account in a meaningful way is one mechanism. Making best use of equality impact assessments can also make a contribution. Finally, we hope that the Consultative Group of the Past will recommend to the Human Rights Commission and to government that social and economic rights are included in any Bill of Rights that emerges from the process currently underway. It is only when these rights are enshrined constitutionally that citizens will be able to access them and make them real.

These are not insignificant issues; in our view, they are a pre-requisite to building respect for the rule of law as we move forward. They will provide a test as to the genuineness of any process of truth recovery that is taken forward. They will also allow us to assess the commitment of the various parties to the need for political generosity in the search for genuine political reconciliation.

Appendix 1

Basic Principles for a truth process in Northern Ireland

September 03

The Good Friday Agreement, for a variety of reasons, focused on the future rather than on the past. The Agreement did not necessarily seek to ignore the past, but rather to affirm a better future to avoid a repetition of the past. The opening preamble makes it clear that it is precisely to honour those who have died, been injured, and their families, that we need to make a fresh start, and dedicate ourselves to a future of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the rights of all. With hindsight, there is now some doubt as to whether it is desirable or indeed possible to fully commit to a shared and peaceful future, without some addressing of the legacy of the past.

There has been significant discussion recently regarding mechanisms to deal with the past. The Chief Constable has suggested that a Truth and Reconciliation Commission be established to examine the past and particularly 1800 unsolved killings. There have been references by government ministers to the possibility of establishing such a Commission. It may well be that a variety of processes will be needed properly to examine the past.

CAJ has worked for many years with families who have lost loved ones during the conflict in Northern Ireland. We have campaigned on individual cases, on improving the inquest system, and have successfully taken cases to the European Court of Human Rights on article 2 of the Convention. We believe that any new proposal to deal with the past needs to be measured against certain criteria to ensure that is will act in accordance with domestic and international human rights standards and that it will properly engage with the rights of victims and others.

While our mandate relates only to the actions of the state we believe that the issue of truth can only be addressed in the context of a full and informed examination of the past including the actions of all relevant actors.

Independence
Any process must be completely independent of all parties to the conflict including the state. Those who are charged with chairing the process must be persons of sufficient standing in the international human rights community to command respect across the community in Northern Ireland.

Transparency
Cooperation on the part of the state must include full disclosure of material including documents relevant to the conflict. Nothing should be exempted from this undertaking save information which would clearly put someone's life in danger. Any process must involve public hearings.

Accountability
The process should be primarily about ensuring that institutions and individuals are held accountable for their actions or inactions. This need not necessarily be about punishment or actual imprisonment. A range of accountability measures could be considered.

Procedures should be article 2 and 3 compliant
In the Jordan et al cases the European Court of Human Rights laid down a series of tests to ensure that any investigation into a violation of the right to life should be compliant with article 2 of the Convention. Any process suggested by the government to examine past cases in Northern Ireland must comply with article 2. Similarly the European Court of Human Rights in a series of cases has laid down tests for article 3 investigations.

There can be no impunity or blanket amnesty
Truth processes which grant unqualified amnesty for those accused of serious violations are in violation of human rights law. There is a growing legal debate about what – short of a blanket amnesty – is an acceptable compromise when reconciliation and political stability are major concerns. In South Africa for instance, amnesty could only be obtained in return for a full and frank admission of one's activities.

The process should be voluntary
Families or victims should retain the option of pursuing their case through general legal processes and should not be forced to take part in a truth and reconciliation process.

Process of acknowledgement of wrong-doing
There must be acknowledgement from the state and all parties to the conflict that wrongs were committed and there must be undertakings by all parties to cooperate with a fair and impartial truth seeking mechanism.

Integrity of criminal justice process should be upheld
The conflict in Northern Ireland has warped the criminal justice system and undermined public confidence in it. We believe any truth process should not repeat this pattern. Indeed a crucial aspect of any process will be to try and restore confidence in the criminal justice system by making recommendations where appropriate about how to improve it.

Must comply with international human rights law
We have already highlighted our view that any truth and reconciliation process examining deaths or allegations of torture or ill-treatment should comply with articles 2 and 3 of the European Convention on Human Rights which of course is now part of domestic law. However, other relevant international human rights standards should be the parameters for any such process.

No hierarchy of victims
Victims of the conflict should be self-defined. There should be no discrimination as between different classes of victims.

Report should be produced and published
The process should culminate in a published report which, in addition to describing the work undertaken, will make recommendations to ensure that such violations do not recur. In addition the process should be capable of making reparations where appropriate.