

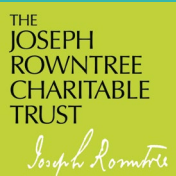
**SEMINAR REPORT**  
DUBLIN 3 SEPTEMBER 2024

ICCL-CAJ Roundtable Discussion Report  
**POLICING FOR PEACE AND  
THE COMMITMENT TO 'REPEAL  
AND REPLACE' THE NORTHERN  
IRELAND LEGACY ACT:**

*HOW SHOULD THE IRISH GOVERNMENT  
DEAL WITH LEGACY INVESTIGATIONS  
IN ITS JURISDICTION?*

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# List of Acronyms

CAJ	Committee on the Administration of Justice
ECHR	European Convention on Human Rights
ECHR Act 2003	European Convention on Human Rights Act 2003
ECtHR/the Court	European Court of Human Rights
GFA	Good Friday Agreement
GSOC	Garda Síochána Ombudsman Commission
HIU	Historical Investigations Unit
ICCL	Irish Council for Civil Liberties
ICIR	Independent Commission on Information Retrieval (Stormont House Agreement)
ICRIR	Independent Commission for Reconciliation and Information Recovery (Legacy Act)
Legacy Act	Northern Ireland Troubles (Legacy and Reconciliation Act) 2023
PSNI	Police Service of Northern Ireland
SHA	Stormont House Agreement

# The Policing for Peace Project

In recent years, the Committee on the Administration of Justice (CAJ) and the Irish Council for Civil Liberties (ICCL) have held joint conferences exploring how to embed human rights compliance in policing North and South.<sup>1</sup>

The Policing for Peace project was developed in 2023 to build on the learning from a series of conferences and to delve deeper into specific thematic areas identified as key priorities. The project has been advanced through a series of North-South expert roundtables and events.

The objective is to convene stakeholders to discuss identified areas for increased police oversight and reform, with a view to producing specific recommendations in each area, for both jurisdictions.

The Policing for Peace project was developed in 2023 to build on the learning from a series of conferences and to delve deeper into specific thematic areas identified as key priorities.

## ICCL and CAJ held four other events as part of the project prior to this roundtable event:

- **Racial Profiling in Law Enforcement**, at the Guildhall, Derry, on Wednesday 7 June 2023.<sup>2</sup>
- **Police Surveillance North and South: Covert Intelligence, Facial Recognition Technology, Oversight and Human Rights**, at the Royal College of Physicians Ireland, Dublin, on Tuesday 24 October 2023.<sup>3</sup>
- **The Policing of Protest: A Shifting Landscape**, at the New Theatre, Dublin, on Thursday 14 March 2024.<sup>4</sup>
- **Police Reform in a Changing Ireland: Next Steps After the Commission on the Future of Policing in Ireland** at Maynooth University, on Thursday 16 May 2024.<sup>5</sup>

<sup>1</sup> See for example Committee on the Administration of Justice and Irish Council for Civil Liberties, 'PSNI@20: Human Rights Reflections on Policing Reform North and South' (Committee on the Administration of Justice and the Irish Council for Civil Liberties 2022); Committee on the Administration of Justice and Irish Council for Civil Liberties, 'Police Reform in Both Jurisdictions: Learning from the Past and Planning for the Future' (Committee on the Administration of Justice and the Irish Council for Civil Liberties 2023).

<sup>2</sup> Irish Council for Civil Liberties and Committee on the Administration of Justice, 'Racial Profiling in Law Enforcement' (Irish Council for Civil Liberties May 2024).

<sup>3</sup> Irish Council for Civil Liberties and Committee on the Administration of Justice, 'Police Surveillance North and South: Covert Intelligence, Facial Recognition Technology, Oversight and Human Rights' (Irish Council for Civil Liberties May 2024).

<sup>4</sup> Irish Council for Civil Liberties and Committee on the Administration of Justice, 'The Policing of Protest: A Shifting Landscape?' (Irish Council for Civil Liberties September 2024).

<sup>5</sup> Irish Council for Civil Liberties, 'Police reform recommendations remain unimplemented, ICCL finds' <<https://www.iccl.ie/press-release/police-reform-recommendations-remain-unimplemented-iccl-finds/>> accessed 1 October 2024.

# Purpose of the Roundtable

On 3 September 2024, ICCL and CAJ convened a roundtable event, *Policing for Peace and the Commitment to “Repeal and Replace” the Northern Ireland Legacy Act: How should the Irish government deal with legacy investigations in its jurisdiction?* This was the final event in the North-South seminar series. The event was a closed roundtable to discuss the establishment of a legacy mechanism(s) to address conflict-related deaths and other historic human rights violations by State actors, including An Garda Síochána, and abuses by non-State actors in related cases in the Republic.

The purpose of the seminar was to gather a variety of perspectives on how legacy investigations into historic human rights violations should be conducted in the South in light of relevant legal obligations, opportunities in the current political climate and lessons learned from the peace process in the North. The discussion builds on previous

ICCL work in this area,<sup>6</sup> and earlier work undertaken by Dr Thomas Leahy<sup>7</sup> and the International Expert Panel on State Impunity and the Northern Ireland Conflict (2024), which examined impunity on both sides of the border.<sup>8</sup>

## PARTICIPANTS

Non-governmental and civil society organisations who attended or engaged with this event included: Justice for the Forgotten, the Pat Finucane Centre, Amnesty International Ireland, Amnesty International Northern Ireland, Women’s Resource and Development Agency, South East Fermanagh Foundation, Relatives For Justice, Justice for Shane and the Coalition of Mother and Baby Homes Survivors. Academics from Queen’s University Belfast, University of Notre Dame, Dublin City University, University College Dublin and the University of Cardiff also participated.

The purpose of the seminar was to gather a variety of perspectives on how legacy investigations into historic human rights violations should be conducted in the South in light of relevant legal obligations, opportunities in the current political climate and lessons learned from the peace process in the North.

<sup>6</sup> For example, please see ICCL’s work calling for a public inquiry regarding the Sallins train robbery, accountability for the Dublin and Monaghan bombings, and redress for past instances of torture and ill-treatment. For more information, see Irish Council for Civil Liberties, ‘Sallins Men deserve independent inquiry – human rights organisations’ <<https://www.iccl.ie/news/sallins-men-deserve-independent-inquiry-human-rights-organisations/>> accessed 1 October 2024; Irish Council for Civil Liberties, ‘ICCL & Amnesty statement on fiftieth anniversary of the Dublin and Monaghan Bombings’ <<https://www.iccl.ie/news/iccl-amnesty-statement-on-fiftieth-anniversary-of-the-dublin-and-monaghan-bombings/>> accessed 1 October 2024; Irish Council for Civil Liberties, ‘ICCL Statement on Ireland v United Kingdom’ <<https://www.iccl.ie/human-rights/iccl-statement-ireland-v-united-kingdom/>> accessed 1 October 2024.

<sup>7</sup> Dr Leahy has made numerous recommendations to the Department of Foreign Affairs but none have been implemented. For example, please see Thomas Leahy, ‘The Irish Government and Dealing with Northern Ireland Conflict Legacy 1969 to 2024: Executive Summary of Research Recommendations’ (University of Cardiff 2024); Thomas Leahy, ‘“Rigorous Impartiality”? The UK Government, Amnesties and Northern Ireland Conflict Legacy 1998-2022’ in *The Routledge Handbook of the Northern Ireland Conflict and Peace* (Routledge 2023); Eleanor Leah Williams and Thomas Leahy, ‘The “Unforgivable”? Irish Republican Army (IRA) Informers and Dealing with Northern Ireland Conflict Legacy, 1969-2021’ (2023) 38 *Intelligence and National Security* 470.

<sup>8</sup> International Expert Panel, ‘Bitter Legacy: State Impunity in the Northern Ireland Conflict’ (Pat Finucane Centre, Committee on the Administration of Justice and the Norwegian Centre for Human Rights April 2024).

# Executive Summary

CCL and CAJ propose that new legacy mechanisms for the Republic be established to investigate violations of Articles 2 and 3 of the European Convention on Human Rights (ECHR). This would include instances of death, torture and other forms of ill-treatment connected to An Garda Síochána and other State agencies within a defined timeframe, in line with Ireland's legal obligations.<sup>9</sup>

Three mechanisms, set out below, are proposed for consideration by the Irish government to enable the State to discharge its obligations relating to the rights of victims and survivors. If comprehensively implemented, ideally in combination,<sup>10</sup> the mechanisms would ensure State accountability for historic human rights violations and, in particular, accountability for violations committed by An Garda Síochána. These measures would ensure that Ireland meets its investigative obligations under the ECHR and would be in line with the principle of equivalent protection of human rights under the Good Friday Agreement (GFA).

Northern Ireland has introduced a variety of legacy mechanisms since the signing of the GFA, such as the Police Service of Northern Ireland (PSNI) Historical Enquiries Team,<sup>11</sup> the PSNI Legacy Investigations Branch,<sup>12</sup> and independent (e.g., Operation Kenova) and Police Ombudsman of Northern Ireland investigations. In contrast, there have been no systematic legacy processes in the South.<sup>13</sup> There is much to be learned from the experiences of the peace process and handling of legacy cases in the North, on which the recommendations in this paper draw.



<sup>9</sup> European Convention on Human Rights, arts 2, 3.

<sup>10</sup> The experience with legacy mechanisms in the North has demonstrated the importance of having multiple mechanisms to address different cases. For example, some cases are better suited to police investigations, while more complex cases (e.g., the Pat Finucane case) require a public inquiry to fulfil Article 2 obligations.

<sup>11</sup> The Historical Enquiries Team was a unit within the PSNI which reviewed conflict-related deaths from 2005-2014.

<sup>12</sup> Following the passage of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (Legacy Act), the Legacy Investigation Branch of the PSNI will review legacy homicide cases that do not fall within the Legacy Act. For more information, please see Police Service of Northern Ireland, 'Legacy Investigation Branch' <<https://www.psni.police.uk/about-us/our-departments/justice/legacy-and-disclosure-branch/legacy-investigation-branch>> accessed 1 October 2024.

<sup>13</sup> The work of the PSNI Legacy Investigations Branch and the legacy investigations by the Police Ombudsman of Northern Ireland ceased following the Legacy Act coming into force on 1 May 2024.

# Recommendations

## 1. ESTABLISH AN INDEPENDENT, TIME-BOUND HISTORICAL INVESTIGATIONS UNIT

Establish an independent, time-bound Historical Investigations Unit (HIU) in the South, similar to the one provided for in the North in the Stormont House Agreement (SHA) but never implemented.<sup>14</sup> A HIU would allow for effective and independent police investigations into unresolved deaths and incidents of torture or ill-treatment, based on the procedural obligations in Articles 2 and 3 of the ECHR. It would focus on assigning criminal responsibility for individual cases.

A timeframe of 1968 to the 2020s is suggested to allow a HIU to investigate unresolved cases, beginning with violations that emerged during the period of the conflict. Such a scope would be in line with the Irish government's obligation to investigate.<sup>15</sup> More recent and any future allegations of Garda misconduct will be investigated by the Garda Síochána Ombudsman Commission (GSOC) and the soon to be established Office of the Police Ombudsman, provided complaints are made within one year of an alleged incident.<sup>16</sup>

While there have been ad-hoc "historical" or "cold case" reviews of cases led by An Garda Síochána in the past,<sup>17</sup> no dedicated independent processes have ever been established. GSOC has not been empowered to effectively investigate historic cases of alleged police misconduct.<sup>18</sup> There is therefore no established pool of cases for a HIU to draw on. What is clear is that there is a need to examine a range of different types of miscarriages of justice and ill-treatment in custody in order to comply with the ECHR, including cases which relate to the Troubles (e.g., the Dublin and Monaghan bombings and the Sallins train robbery) and ones which do not (e.g., the Shane O'Farrell case).

Based on the SHA model, legislation could establish a HIU to address individual outstanding cases of misconduct and criminal offences by both State and non-State actors. Such investigations must establish the facts to an ECHR-compatible standard, identify those responsible and facilitate prosecution if required.<sup>19</sup> The decision to prosecute would be confined to the Director of Public Prosecutions as Gardaí do not have powers to prosecute in such serious cases.<sup>20</sup> In the meantime, any internal investigations within An Garda Síochána such as cold-case reviews of historic cases should cease.<sup>21</sup>

Crucially, a HIU would require the necessary policing powers to fulfil an investigative mandate including powers to compel disclosure of information, and it should be trauma-informed, victim-focused and gender-responsive.<sup>22</sup> It could be overseen by the Policing and Community Safety Authority.<sup>23</sup> Statutory cooperation with the British government would be an absolute necessity for its success.<sup>24</sup> The HIU could aim to complete its work within a relatively short timeframe (e.g., five years) to ensure timely investigations, although this could be extended in the event of outstanding cases.

<sup>14</sup> This was also recommended by the International Expert Panel (n 8) 172.

<sup>15</sup> For more information, see the legal context section on page 9.

<sup>16</sup> Section 84(1) of the Garda Síochána Act 2005 and section 197(1) of the Policing, Security and Community Safety Act stipulate that complaints must be made within one year. Section 84(2) provides GSOC has discretion to extend the time limit, "if it considers that there are good reasons for doing so". The same discretion to extend the one-year time limit to make a complaint is found in section 197(2) of the Policing, Security and Community Safety Act for the new Police Ombudsman.

<sup>17</sup> See for example, the cold-case review of the murders of Una Lynskey and Martin Kerrigan. For more information, please see Diarmuid Pepper, 'Gardaí Carrying out Full Reviews of 1971 Murders of Una Lynskey and Martin Kerrigan', *The Journal* (Dublin, 12 October 2023) <<https://www.thejournal.ie/gardai-carry-out-full-review-into-una-lynskey-and-martin-kerrigan-murders-6194462-Oct2023/>>.

<sup>18</sup> The new Office of the Police Ombudsman is not envisioned to investigate historic or legacy cases of alleged police misconduct. For more information, please see Emily Williams, 'Human Rights in Irish Policing: Analysing the Implementation of the Recommendations from the Commission on the Future of Policing' (Irish Council for Civil Liberties 2024) 27.

<sup>19</sup> Stormont House Agreement (Ireland – United Kingdom) adopted 23 December 2014, paras 30, 34-6; United Nations (ed), *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Professional training series / Office of the United Nations High Commissioner for Human Rights 8, Rev. 2, United Nations 2022) para 190.

<sup>20</sup> Gardaí only have the power to prosecute in less serious cases and do not have the power to prosecute in serious cases, such as murder: see Policing, Security and Community Safety Act, s10.

<sup>21</sup> Irish Council for Civil Liberties, 'ICCL expresses concern at internal investigation into alleged Garda human rights violations' <<https://www.iccl.ie/news/iccl-expresses-concern-at-internal-investigation-into-alleged-garda-human-rights-violations/>> accessed 1 October 2024.

<sup>22</sup> Stormont House Agreement, para 40.

<sup>23</sup> Stormont House Agreement, paras 36, 38.

<sup>24</sup> Stormont House Agreement, para 39.

## 2. ESTABLISH A SYSTEM OF STRONG, ROBUST AND INDEPENDENT PUBLIC INQUIRIES AND INQUESTS

Establish a system of strong, robust and independent public inquiries and inquests to investigate egregious outstanding historic human rights violations, or cases that are a matter of public importance, such as Article 2 and 3 violations.<sup>25</sup>

The term “public inquiry” has a broad meaning in Ireland and includes bodies such as tribunals of inquiry and commissions of investigation. Broadly speaking, inquiries aim to establish facts and make recommendations to prevent reoccurrence.<sup>26</sup> In certain circumstances, a public inquiry may be more appropriate than a criminal investigation in the form of the HIU, as it can employ its fact-finding and investigative powers to discern how and why violations occurred and how State actors responded. Some victims may find this approach more suitable to their needs, rather than seeking to assign criminal responsibility. Simultaneously, in the course of its work, the findings of any public inquiry can lead to independent civil or criminal proceedings. The new system of public inquiries would be complementary to, and could commence alongside, HIU investigations.

The existing public inquiry system in the South is ad hoc, not human rights compliant, unsatisfactory for victims, and has led to limited State accountability.<sup>27</sup> Future inquiries under both the Tribunals of Inquiry (Evidence) Acts 1921 to 2011 or the Commission of Inquiry Act 2004 should be compliant with the requirements of the ECHR for effective investigations<sup>28</sup> and respect victims’ rights, which may require new legislation to reform the current system.

### Inquiries should:

- Be conducted in public, where possible, to maintain public confidence, consistent with the recommendation from the Law Reform Commission;<sup>29</sup>
- Provide victims with a copy of the inquiry report;<sup>30</sup>
- Have full investigatory powers to compel witnesses and secure evidence;
- Be adequately resourced with a robust budget and sufficient human and technical expertise;
- Have independent, competent and impartial staff and, in particular, be independent of any suspected perpetrators and the institutions or agencies they may serve;<sup>31</sup> and
- Allow for individuals to access their personal data relating to public inquiries (this would require amending the Commission of Inquiry Act 2004 and the Freedom of Information Act 2014).

<sup>25</sup> Having stronger public inquiry legislation would have long-term benefits beyond policing. For example, it would also apply to other public interest issues which invoke Article 2 and 3 obligations – such as any future inquiry regarding sexual abuse in schools or the State’s response to Covid-19.

<sup>26</sup> Law Reform Commission, *Report on Public Inquiries Including Tribunals of Inquiry* (LRC 73-2005), 5.

<sup>27</sup> The deficiencies identified in the current public inquiry system were identified by participants at the seminar. The compatibility of commission of investigations with human rights law was also explored in ICCL’s submission to the Commission on the Future of Policing. For more information, please see Irish Council for Civil Liberties, ‘Rights-Based Policing: How Do We Get There? A Submission to the Commission on the Future of Policing in Ireland’ (Irish Council for Civil Liberties January 2018), p. 33-35.

<sup>28</sup> The ECtHR has identified that independence, effectiveness, promptness and reasonable expedition, thoroughness, public scrutiny, State initiation, and victim involvement are the requirements for an ECHR-compliant investigation. For more information, please see Irish Council for Civil Liberties (n 27).

<sup>29</sup> Law Reform Commission, *Report on Public Inquiries Including Tribunals of Inquiry* (LRC 73-2005), 5.

<sup>30</sup> UN General Assembly, ‘Resolution 55/89, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (22 February 2001), A/RES/55/89 (22 February 2001), Principle 4.

<sup>31</sup> *Ibid.*, Principle 5(a).



Separately, the inquest system, which has been successfully used in the North to deliver factual findings, information recovery and historical clarification for families, should also be reformed and professionalised. Victim experiences of legacy inquests in the South have generally been poor, including denial of and resistance to inquests and lack of access to legal aid. ICCL research on the Coroner Service identified concerns regarding the independence of Gardaí in inquests and recommended reforms including introducing a “Charter for the Bereaved” setting out the rights of the bereaved and standardisation of the management and delivery of the service.<sup>32</sup>

ICCL welcomes the announcement that a new model to reform the coroner's service will be costed and brought to government this year, alongside commitments in the Programme for Government.<sup>33</sup> Suggested reforms to the inquiry and inquest systems would not be time-bound as they are standing processes.

### 3. ESTABLISH AN INDEPENDENT, INTERNATIONAL TRUTH COMMISSION TO EXAMINE THEMES AND PATTERNS RELATING TO CONFLICT-RELATED VIOLATIONS

Truth commissions have become a crucial element of peacebuilding and reconciliation in post-conflict societies as a tool of transitional justice.<sup>34</sup> Working towards reconciliation, they are complementary to criminal justice and civil procedures by examining themes and patterns of abuses, while contributing to the human rights goals of truth recovery, historical clarification and guarantees of non-recurrence.<sup>35</sup>

In 2024, the International Expert Panel on State Impunity and the Northern Ireland Conflict recommended that:

“The United Kingdom and Ireland seek to establish, with the assistance of the United Nations and Council of Europe human rights mechanisms, an independent international commission to thematically examine **patterns of human rights violations and impunity during the Northern Ireland conflict, including torture and collusion**, with legislation to provide full powers of disclosure”.<sup>36</sup>

An all-Ireland truth commission could be considered to complement other investigative mechanisms North and South. Its purpose would be to facilitate an all-Ireland conversation about the past, to promote cross-border truth recovery for victims and families, and to promote reconciliation and accountability. The truth commission could cover the period of the conflict up until the signing of the Good Friday Agreement (1968-1998).<sup>37</sup> It could also identify the systemic conditions and culture that led to abuses and impunity on both sides of the border.<sup>38</sup> It would need to be fully independent of both States to achieve this purpose.

<sup>32</sup> Phil Scraton and Gillian McNaul, ‘Death Investigation, Coroners’ Inquests and the Rights of the Bereaved’ (Irish Council for Civil Liberties April 2021).

<sup>33</sup> Ann Murphy, ‘New Model for Coroner Service Will Be Brought to Government in 2025’, *Irish Examiner* (Cork, 4 February 2025) <https://www.irishexaminer.com/news/arid41567365.html>; Government of Ireland, ‘Draft Programme for Government 2025’, p. 117.

<sup>34</sup> International Center for Transitional Justice, ‘Truth Seeking: Elements of Creating an Effective Truth Commission’ (International Center for Transitional Justice 2013).

<sup>35</sup> Ibid.

<sup>36</sup> International Expert Panel (n 8) 172.

<sup>37</sup> There are some cases, such as the Omagh bombing (August 1998), the Rosemary Nelson assassination (March 1999) or the Holy Cross dispute (2001, 2002) that occurred after the Good Friday Agreement. This should be considered when deciding on a final terms of reference for a truth commission.

<sup>38</sup> Stormont House Agreement, para 21.

In order to be most effective, the proposed mechanisms would need to work in conjunction with existing structures North and South. Cooperation with relevant authorities and agencies in both states would be essential to provide for full information disclosure. Together, they would provide a robust response to investigating historic human rights violations and uphold Ireland's legal obligations to investigate under Articles 2 and 3 of the ECHR.

The establishment of the Independent Commission on Information Retrieval (ICIR), a cross-border information and truth recovery body based on protected statements, would complement all three recommended mechanisms in this paper as it would allow individuals to privately receive information about conflict-related deaths of their next of kin.<sup>39</sup> This would be yet another option to vindicate victims' right to truth. Envisaged as part of the SHA, the ICIR has not been established following a change in the British government's legacy policies (see section entitled "The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023").

Alongside the legacy mechanisms, a key recommendation from the event was that the Irish government should not end its inter-state case at the European Court of Human Rights (ECtHR) against the United Kingdom. Ireland initiated the inter-state case in January 2024 in light of concerns that provisions of the Legacy Act are not compatible with the ECHR and will lead to impunity for legacy cases in the North. Seminar attendees agreed that it is essential Ireland does not withdraw from the case until these concerns (see section entitled "The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023") have been fully addressed, including the establishment of ECHR-compliant mechanisms to investigate legacy cases in the North.

<sup>39</sup> Stormont House Agreement, paras 41-50; A Fresh Start: The Stormont Agreement and Implementation Plan: An agreement to consolidate the peace, secure stability, enable progress and offer hope (Ireland-United Kingdom) adopted 17 November 2015, p 34-35.

# The Legal Context: The State's Obligation to Investigate

Ireland has an obligation to conduct investigations into “legacy cases”, understood as incidents of violations of human rights that are considered historic. This obligation is legally binding based on a number of legal sources, including the ECHR (transposed into domestic law by Ireland’s European Convention on Human Rights Act 2003 [ECHR Act 2003]), and bilateral agreements between the United Kingdom and Ireland (see below). On foot of the ECHR Act 2003, the ECHR is directly applicable before Irish courts and should be interpreted in line with relevant judgments of the ECtHR.<sup>40</sup>

## DUTY TO INVESTIGATE UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS

The right to life under Article 2 and the prohibition of torture and inhuman or degrading treatment or punishment under Article 3 of the ECHR do not simply place negative obligations on the Irish State to prevent torture and inhuman or degrading treatment or punishment, or loss of life. They also include positive obligations to act once a violation of these rights has occurred. The ECtHR has played a major role in the development of the jurisprudence on these positive obligations.

The State’s obligation to carry out an effective investigation is an obligation inherent in Article 2 of the ECHR, which requires, amongst other things, that the right to life be “protected by law”. The essential purpose of an investigation under Article 2 is to secure the effective implementation of the domestic laws safeguarding the right to life and, in cases involving State agents or bodies, to ensure accountability for deaths occurring under their responsibility.<sup>41</sup>

It has been established that the right to life under Article 2 contains procedural obligations requiring effective investigations into killings, independent from the individuals or institutions potentially responsible or implicated in a death. The Article 2 obligation to investigate is triggered “whether the death occurs at the hands of State actors or private persons or persons unknown, and regardless of whether there is evidence of criminal action requiring investigation and prosecution under criminal law”.<sup>42</sup>

In *McCann & Ors v. the United Kingdom*, the ECtHR underlined that the obligation to protect the right to life under Article 2, read in conjunction with the State’s general duty under Article 1 of the ECHR to “secure to everyone within their jurisdiction the rights and freedoms defined in the Convention”, implicitly requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.<sup>43</sup>

The type of investigation required by Article 2 depends on the circumstances. However, the Court has made clear that it is the responsibility of the State to conduct an investigation as soon as it becomes aware of a breach of Article 2, and that it should not

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<sup>40</sup> ECHR Act 2003, s 2, 4.

<sup>41</sup> *Hugh Jordan v the United Kingdom* App no 24746/94 (ECtHR, 4 May 2001), para 105.

<sup>42</sup> UN Human Rights Council, ‘Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi’ (19 June 2019) A/HRC/41/CRP1, para 260.

<sup>43</sup> *McCann & Ors v the United Kingdom* App no 18984/91 (ECtHR, 27 September 1995), para 161.

wait for a formal complaint or for the next of kin to initiate an investigation.<sup>44</sup> In the context of killings allegedly perpetrated by, or in collusion with State agents, the procedural obligation on the State under Article 2 is to conduct an official investigation and that obligation cannot be satisfied through civil proceedings. The Court has outlined that the reasoning for this is not only because allegations of such an offence give rise to criminal liability, but also because the true circumstances of a death are, or may be, largely confined within the knowledge of State officials or authorities.<sup>45</sup>

States also have positive obligations to effectively investigate allegations of torture and inhumane or degrading treatment under Article 3.<sup>46</sup> Investigations must be independent, prompt, thorough and transparent.<sup>47</sup> Prompt responses and investigations of torture and other forms of ill-treatment are necessary to maintain public confidence in the State's respect for the rule of law and to prevent perceptions of State collusion in unlawful acts.<sup>48</sup> European human rights case law has highlighted the importance of family and next of kin participation and involvement in an inquiry into Article 2 and 3 cases "to the extent necessary to safeguard his or her legitimate interests".<sup>49</sup> Taking reasonable steps to identify the deceased and to determine the cause of death are also key components of a State's obligation to conduct an effective investigation under Articles 2 and 3.<sup>50</sup>

States also have positive obligations to effectively investigate allegations of torture and inhumane or degrading treatment under Article 3.

## THE RIGHT TO AN EFFECTIVE REMEDY

Under Article 13 of the ECHR, victims of human rights violations have the general right to an effective remedy.<sup>51</sup> This is one of the key provisions underlying the ECHR's human rights protection, along with the requirements of Articles 1 (general obligation to respect human rights), 2 and 3.

Under the ECHR, a "remedy" must allow the competent domestic authorities both to deal with the substance of the relevant complaint and grant appropriate relief.<sup>52</sup> A remedy is only effective if it is available and sufficient.<sup>53</sup> It must be sufficiently certain not only in theory but also in practice,<sup>54</sup> and must be effective in practice as well as in law,<sup>55</sup> having regard to the individual circumstances of each case. For Article 3 violations, an effective remedy may include compensation payments and requires an investigation capable of leading to the identification and punishment of those responsible, with victim participation.<sup>56</sup>

<sup>44</sup> *Al-Skeini and Others v the United Kingdom* [GC] App no 55721/07 (ECtHR, 7 July 2011), para 165.

<sup>45</sup> *Makaratzis v Greece* App no 50385/99 (ECtHR, 20 December 2004), para 73.

<sup>46</sup> UN General Assembly, 'Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions' (12 October 2020) A/75/384, para 54.

<sup>47</sup> *Kukhalashvili and others v Georgia* App nos 8938/07 and 41891/07 (ECtHR, 2 August 2020), paras 129, 130; UN Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant; (26 May 2004) CCPR/C/21/Rev/1/Add.13, para 15.

<sup>48</sup> *Çelik and Imret v Turkey* App no 44093/98 (ECtHR, 26 January 2005), para 55.

<sup>49</sup> Last Rights Project, 'Last Rights: The Dead, the Missing and the Bereaved at Europe's International Borders: Proposal for a Statement of the International Legal Obligations of States' (May 2017) 12.

<sup>50</sup> *Ibid.*

<sup>51</sup> Article 13 states that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

<sup>52</sup> *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), para 288.

<sup>53</sup> *El-Masri v "the former Yugoslav Republic of Macedonia"* App no 39630/09 (ECtHR, 13 December 2012), para 255; *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996), para 95.

<sup>54</sup> *McFarlane v Ireland* App no 31333/06 (ECtHR, 10 September 2010), para 114.

<sup>55</sup> *El-Masri v. "the former Yugoslav Republic of Macedonia"* para 255.

<sup>56</sup> *Çelik and Imret v Turkey* para 54.

# The Shifting Political Context North and South

The shifting political context and developing relationships between the Irish government, the Northern Ireland Executive and the UK government have opened an opportunity for examining best practices for investigations of historic human rights violations. There are also lessons the Irish government can learn – both positive and negative – from the peace process and legacy investigations in the North.

In the North, the GFA in 1998 missed a crucial opportunity to provide for a truth and reconciliation mechanism. While there were a range of “past facing” elements contained in the GFA – including provisions for support for victims and the early release of prisoners convicted of conflict-related offences – the Agreement contained no overarching mechanism, such as a truth and reconciliation commission, to comprehensively provide a record of the past. The GFA did, however, commit to the incorporation of the ECHR into Northern Ireland law and comparable steps by the Irish government, which led to the UK Human Rights Act 1998 and the Irish ECHR Act 2003.

Following the GFA, there were rulings in a series of cases taken to the ECtHR known as the *McKerr* group of cases, which concerned the actions of the security forces in Northern Ireland.<sup>57</sup> The cases related to Gervaise McKerr who was shot and killed, with others, on 11 November 1982. A criminal trial of three police officers resulted in their acquittal. Mr McKerr’s family wanted a proper and effective inquest into the circumstances of his death, which the UK government strongly resisted. The ECtHR found procedural violations of Article 2 of the ECHR in relation to cases involving both direct killings by security forces and security force collusion with loyalist paramilitary groups. These cases established

the above procedural obligations in relation to effective and independent investigations.

The implementation of judgments in these cases (which are still under supervision by the Council of Europe Committee of Ministers) led to the UK agreeing to a Package of Measures of changes to existing judicial and investigative bodies, in order to deliver ECHR-compatible investigations into conflict-related cases in Northern Ireland. The Package of Measures formed a piecemeal series of ad hoc legacy mechanisms including public inquiries; legacy investigations by the Police Ombudsman; legacy inquests; police investigations by the PSNI Historical Enquiries Team and subsequently the Legacy Investigation Branch; independent police investigations by external police teams; and changes to prosecutorial decision-making in Northern Ireland.<sup>58</sup> In addition, families of victims have sought accountability and reparations through civil court cases. Numerous challenges from families, non-governmental organisations and lawyers to compel ECHR compliance have led to considerable success in information recovery.

## BILATERAL INITIATIVES AND INVESTIGATIONS IN THE REPUBLIC

Crucially, the GFA introduced the principle of equivalence, which requires equivalent human rights protections on both sides of the border.<sup>59</sup> This includes equivalent human rights compliant investigations into Article 2 and 3 violations.

In the Republic, there have been a number of specific post-GFA initiatives by the Irish government to pursue such investigations into historic violations. The

<sup>57</sup> *McKerr v United Kingdom* App no 28883/95 (ECtHR, 4 May 2001).

<sup>58</sup> Committee on the Administration of Justice, ‘The Road to the Northern Ireland Troubles (Reconciliation and Legacy) Act 2023: A Narrative Compendium of CAJ Submissions’ (Committee on the Administration of Justice November 2023).

<sup>59</sup> The Belfast Agreement: Agreement: An Agreement Reached at Multi-Party Talks on Northern Ireland (Ireland-United Kingdom) adopted 10 April 1998, Rights, Safeguards, and Equality of Opportunity, para 9.

2001 Weston Park Agreement led to governments appointing a judge of international standing, Mr Justice Peter Cory, to examine allegations of collusion in selected cases on both sides of the border. Both governments committed to convening public inquiries into the deaths if recommended by Mr Justice Cory.<sup>60</sup> In the Republic, this led to the establishment of the Smithwick Tribunal (2006-2013) to examine allegations of Irish Republican Army-Garda collusion in the killings of Royal Ulster Constabulary superintendents Harry Breen and Bob Buchanan in south Armagh in 1989.<sup>61</sup> In addition, between 2003 and 2006, Mr Justice Henry Barron released reports into the Dublin and Monaghan bombings (1974) and other cross-border attacks.<sup>62</sup> Both governments also established an Independent Commission for the Location of Victims' Remains (known as "the disappeared commission") in 1999 to aid the location of victims' remains, whose work is ongoing.<sup>63</sup>

## THE STORMONT HOUSE AGREEMENT

In 2014, both governments and a majority of Northern Ireland parties agreed to the SHA. The SHA was intended to supersede the piecemeal approach to legacy investigations provided for under the auspices of the Package of Measures. The SHA provided that the legacy inquests system and civil cases would continue, alongside two new mechanisms focused on investigation and information recovery:

### A Historical Investigations Unit (HIU):

an independent body in Northern Ireland to conduct ECHR-compliant investigations and produce information recovery reports for families, taking up the outstanding legacy caseload from the PSNI and the Ombudsman.<sup>64</sup>

### An Independent Commission on Information Retrieval (ICIR):

a cross-border body to receive information about Troubles-related deaths in confidence. These "protected statements" could not be used in civil or criminal proceedings. The ICIR was designed based on the success of the Independent Commission on the Location of Victims' Remains.<sup>65</sup> The ICIR was to provide an alternative to civil or criminal proceedings and serve as a truth recovery mechanism for individuals to access information and vindicate their right to know the truth of how their relative died.<sup>66</sup>

The HIU was to be set up in UK legislation and only to operate in the North. A number of non-governmental organisations, including the Pat Finucane Centre, Justice for the Forgotten, CAJ and the South East Fermanagh Foundation, argued for a HIU-type mechanism to be established in the South to address conflict-related cases as well, but with no success.<sup>67</sup> Neither the HIU nor the ICIR were ever established.

<sup>60</sup> CAIN Web Service, 'Implementation Plan issued by the British and Irish Governments on 1 August 2001' <<https://cain.ulster.ac.uk/events/peace/docs/bi010801.htm>> accessed 1 October 2024, para 19.

<sup>61</sup> Smithwick Tribunal of Inquiry, 'Terms of Reference' <<https://www.smithwicktribunal.ie/smithwick/HOMEPAGE.html>> accessed 1 October 2024.

<sup>62</sup> Justice for the Forgotten, 'Publications' <<http://www.dublinmonaghanbombings.org/home/publications.html>> accessed 1 October 2024.

<sup>63</sup> Independent Commission for the Location of Victims Remains, 'The Disappeared' <<https://www.iclvr.ie/>> accessed 1 October 2024.

<sup>64</sup> Stormont House Agreement, paras 30-40.

<sup>65</sup> Stormont House Agreement, paras 41-50.

<sup>66</sup> Victims & Dealing with the Past, 'Independent Commission for Information Retrieval' <<https://victimsandthepast.org/dealing-with-the-past/independent-commission-information-retrieval/>> accessed 1 October 2024.

<sup>67</sup> For example, please see Thomas Leahy, 'The Irish Government and Dealing with Northern Ireland Conflict Legacy 1969 to 2024: Executive Summary of Research Recommendations' (University of Cardiff 2024) and Justice for the Forgotten, 'The Irish Government and Dealing with Northern Ireland Conflict Legacy: Opening Statement to the Joint Oireachtas Committee on the Implementation of the Good Friday Agreement' (20 June 2019) 1.



## THE INTER-STATE CASE

In 2024, the Irish government initiated an inter-state case against the UK at the ECtHR in light of concerns that provisions of the Legacy Act are not compatible with the ECHR.<sup>74</sup> The case alleges violations of Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 6 (right to a fair trial), 13 (right to an effective remedy) and 14 (prohibition of discrimination) given the Legacy Act's halting of inquests, civil cases and criminal prosecutions for crimes during the Troubles.

The then Tánaiste and Minister for Foreign Affairs Micheál Martin (now Taoiseach) announced that the decision to take the case was based on the British government's decision not to proceed with the SHA and to pursue the Legacy Act without consultation with the Irish government and other affected parties. He raised the importance of taking a victim-centred approach to legacy issues and the fact the Legacy Act is opposed by victims and their families.<sup>75</sup> Martin also referenced the opposition to the Legacy Act by the Council of Europe's Commissioner for Human Rights and the UN High Commissioner for Human Rights.<sup>76</sup> The provisions of the Legacy Act, which provide for immunity and the cessation of inquests, police investigations, Police Ombudsman investigations and civil actions, were highlighted as areas of specific concern as they impede access to truth and justice, as was the inability of the ICIR to meet ECHR independence requirements.<sup>77</sup>

It is imperative that the Irish government does not end the inter-state case until the issues with the Legacy Act and the ICIR are fully addressed and there are instead mechanisms to deliver ECHR-compliant investigations.

## HISTORICAL LACK OF ACCOUNTABILITY IN THE SOUTH

The historical backdrop to the inter-state case and the Irish government's desire to seek justice for conflict-related violations in the North is a documented lack of accountability for historical violations in the South. Victims and survivors of outstanding violations from conflict-related violence in the South, including the Dublin and Monaghan bombings (1974) and the Sallins train robbery (1976), have not been provided with a formal and systematised approach to investigations and accountability.

While it appears not to have been a concern of the UK during SHA negotiations, this point was raised by the former British government in December 2023 when the Irish government first announced its intention to seek the inter-state case.<sup>78</sup>

Crucially, the Legacy Section of An Garda Síochána only has jurisdiction to review enquiries linked to legacy matters received from investigators in Northern Ireland and Great Britain.<sup>79</sup> Due to the absence of an official policy regarding investigating historic human rights violations by the State, some victims and families have been campaigning and waiting for adequate accountability and access to information and justice for decades. Various UN treaty bodies have highlighted the lack of accountability and transparency for violations in Ireland,<sup>80</sup> including concerns regarding the independence and effectiveness of GSOC to investigate instances of torture and ill-treatment.<sup>81</sup>

In other areas – such as abuses by religious orders in Magdalene laundries and mother and baby institutions – the UN Committee Against Torture has documented an established pattern

<sup>74</sup> European Court of Human Rights Press Release, 'New inter-State application brought by Ireland against the United Kingdom' <<https://www.echr.coe.int/w/new-inter-state-application-brought-by-ireland-against-the-united-kingdom>> accessed 20 October 2024.

<sup>75</sup> Opposition to the Legacy Act on these grounds was also expressed by individuals at the seminar.

<sup>76</sup> Government of Ireland, 'Statement by the Tánaiste Micheál Martin on the government decision to initiate an inter-State case against the United Kingdom' <<https://www.gov.ie/en/press-release/82232-statement-by-the-tanaiste-micheal-martin-on-the-government-decision-to-initiate-an-inter-state-case-against-the-united-kingdom/>> accessed 15 October 2024.

<sup>77</sup> Freya McClements, 'Ireland Had "No Option" but to Take Case against UK over Northern Ireland Troubles Legacy Act, Says Taoiseach', Irish Times (Dublin, 20 December 2023) <<https://www.irishtimes.com/politics/2023/12/20/irish-government-to-take-case-against-uk-over-controversial-northern-ireland-legacy-act/>>.

<sup>78</sup> UK Government, 'Statement in response to legacy inter-state case by the Irish Government' <<https://www.gov.uk/government/news/statement-on-the-northern-ireland-troubles-legacy-and-reconciliation-act>> accessed 15 October 2024.

<sup>79</sup> An Garda Síochána, 'Legacy Section' <<https://www.garda.ie/en/about-us/our-departments/legal/crime-legal/legacy-section/>> accessed 15 October 2024.

<sup>80</sup> UN Human Rights Committee, 'Concluding observations on the fifth periodic report of Ireland' (26 January 2023) CCPR/C/IRL/CO/5, paras 11-12.

<sup>81</sup> UN Committee against Torture, 'Concluding observations on the second periodic report of Ireland' (31 August 2017) CAT/C/IRL/CO/2, para 19.



An Garda Síochána operated with virtually no oversight for the first 80 years of its existence.

of the State impeding efforts at accountability.<sup>82</sup> Advocates have described the attitude of government and institutions towards access to information, apologies and redress for institutional abuse as “deny til they die”.<sup>83</sup> Previous attempts at redress and accountability for institutional abuse, including the Commission of Investigation into Mother and Baby Homes and the Inter-Departmental Committee to establish the facts of State involvement with the Magdalene Laundries, have been widely acknowledged, including at the UN level, as unsatisfactory in terms of delivering redress and justice to survivors.<sup>84</sup>

Broader policing culture within An Garda Síochána and Irish society is relevant. An Garda Síochána operated with virtually no oversight for the first 80 years of its existence. Corruptive policing practices arose, in part due to the response to the conflict happening in the North.<sup>85</sup> Prior to reforms to the oversight bodies introduced by the Policing, Security and Community Safety Act 2024, the Garda oversight structures (GSOC, the Garda Síochána Inspectorate and the Policing Authority) all arose as a response to crisis, rather than in a planned, systematic manner.<sup>86</sup> ICCL and UN treaty bodies have documented the deficiencies and limitations of GSOC.<sup>87</sup>

In the North, the Patten Commission (1999)<sup>88</sup> led to a series of reforms and successes in relation to police oversight. There has not been the same focus in the South and this hinders independent investigation of

outstanding legacy cases. The Commission on the Future of Policing in Ireland in 2018 aimed to simplify the police oversight framework.<sup>89</sup> Despite changes to the police oversight and governance framework since then, gaps remain regarding investigating police wrongdoing in historical or legacy cases. The Policing, Security and Community Safety Act 2024 does not explicitly provide for investigations into such cases. Section 205 outlines a series of possible investigations into matters of “public interest”, including the power of the Garda Commissioner to refer such matters to the new Police Ombudsman.<sup>90</sup> Engagement with the Department of Justice suggests that the Act is not intended to provide for the Police Ombudsman to investigate allegations of past wrongdoing.<sup>91</sup> There is thus a need for a separate mechanism or mechanisms to investigate such cases to comply with human rights law and vindicate the rights of survivors.



<sup>82</sup> UN Committee against Torture, 'Concluding observations' paras 23-28; UN Human Rights Committee, 'Concluding observations' paras 11-12.

<sup>83</sup> Mike Milotte, *Banished Babies: The Secret History of Ireland's Baby Export Business* (New Island Books 1997) 198.

<sup>84</sup> UN Committee against Torture, 'Concluding observations' paras 25-28; UN Human Rights Committee, 'Concluding observations' paras 11-12.

<sup>85</sup> Dermot Walsh, *Human Rights and Policing in Ireland: Law, Policy, and Practice* (Clarus Press 2009) x.

<sup>86</sup> Williams (n 18) 15, 32.

<sup>87</sup> For example, please see Irish Council for Civil Liberties, 'Review of the Effectiveness of the Legislation Relating to Oversight of An Garda Síochána by the Oireachtas Joint Committee on Justice, Defence and Equality' (16 April 2014); UN Committee Against Torture, 'Concluding observations' para 19.

<sup>88</sup> The Patten Commission was established following the provisions in the Good Friday Agreement which detailed the role of policing in the conflict and outlined a new framework for policing in Northern Ireland. For more information, please see Independent Commission on Policing for Northern Ireland, 'A New Beginning: Policing in Northern Ireland' (The Independent Commission on Policing for Northern Ireland 1999).

<sup>89</sup> Commission on the Future of Policing in Ireland, 'The Future of Policing in Ireland' (Commission on the Future of Policing in Ireland September 2018).

<sup>90</sup> Policing, Security and Community Safety Act, s 207(5).

<sup>91</sup> Garda Síochána Ombudsman Commission, 'GSOC Observations on the Policing, Security and Community Safety Bill 2023' (Garda Síochána Ombudsman Commission February 2023) 21.

# Key Issues Captured During the Roundtable Discussions

The roundtable discussions revealed a general consensus on the need for a new legacy mechanism(s), or combination thereof, to investigate State and non-State actors in conflict and non-conflict related historical cases, to be established in consultation with survivors and families. The following reflections were shared by participants and have been grouped into thematic areas.

## There is a need for a trauma-informed, gender-responsive HIU mechanism with statutory cooperation from the British government alongside the ICIR

- There was a broad consensus on the need for an independent HIU-type mechanism with full police powers to conduct ECHR-compliant investigations. This could include scrutinising deficiencies in past investigations and identifying responsible parties, with the potential for criminal justice outcomes and comprehensive information recovery for survivors and families. To be effective, any mechanism set up by the Irish government would need to have the cooperation of the British government. There are several examples of previous attempts at accountability that have been hampered by lack of cooperation from the British government.<sup>92</sup>
- A HIU for the Republic should extend its remit beyond Article 2 obligations (related to deaths) to also cover Article 3 obligations (related to incidents of torture and ill-treatment).
- The failure to disclose documents held by State agencies has long hampered legacy investigations in the South and many relevant documents have already been destroyed.<sup>93</sup> New mechanisms such as a HIU will need adequate and unfettered powers to compel disclosure. Penalties (such as criminal offences or fines) for not disclosing information, or destroying it, should be part of the design of such a mechanism.

<sup>92</sup> It was noted that in dealing with the Dublin and Monaghan bombings Judge Henry Barron had very limited cooperation from the UK authorities, which hampered the inquiry.

<sup>93</sup> The Maternity Protection, Employment Equality and Preservation of Certain Records Act 2024 was signed into law by the President on 28 October 2024. Section 10 creates a criminal offence for an information source, or person acting on behalf of an information source, who "conceals, destroys, mutilates, or falsifies the relevant record, fails to maintain the relevant record, or removes the relevant record (where, on the coming into operation of this section, the record was in the State) from the State, shall be guilty of an offence. This legislation should hopefully combat previous efforts of refusing to disclose records in the area of institutional abuse and has been long called for by both ICCL and Justice for Magdalenes Research.

- There was general consensus that a legacy mechanism(s) needs to address themes and patterns of violations, as well as individual cases.<sup>94</sup> A number of themes were suggested by participants to cover areas of concern, including miscarriages of justice; intelligence practice and cooperation; torture and ill treatment; An Garda Síochána collusion with the Irish Republican Army in the early part of the conflict; and security policies, including extradition.
- The SHA's ICIR provides a complementary model to obtain information on legacy cases from non-State actors. Where police investigations have not borne results, there needs to be an alternative way to obtain information. The ICIR could function in a similar manner to the Independent Commission for the Location of Victims' Remains, which has generally been considered successful.
- There is significant learning from post-GFA experiences in Northern Ireland on successes and challenges regarding investigating historic cases that should inform the Republic's response.

### There is a lack of political will to progress a legacy mechanism

- Previous engagement over many years by attendees at the roundtable with the Irish government (at ministerial level) on a HIU has been met with resistance. Discussions have not moved beyond a tentative proposal for an independent unit within An Garda Síochána to deal with legacy cases.
- There was a general consensus that such a unit would be insufficient and would lack the ECHR-required independence, as An Garda Síochána is involved in legacy allegations, including investigative failures, allegations of collusion, and allegations of torture and ill-treatment of suspects.<sup>95</sup>
- Crucially, the existing Legacy Section of An Garda Síochána only has jurisdiction to review enquiries linked to legacy matters received from investigators in Northern Ireland and Great Britain.<sup>96</sup> The current Garda Commissioner's former roles in the PSNI add a further layer of concerns regarding practical and hierarchical independence.
- Costs are often cited by elected and public representatives as a rationale for not taking forward inquiries and inquests. In reality, a lack of political will and an aversion to scandal are prevalent in the South, coupled with institutional resistance. There is also public fatigue with inquiries regarding historic human rights violations. Thus, new political will and champions are required to progress mechanisms in the South.
- Irish investigative models to date have been generally unsatisfactory, providing poor information and displaying a lack of courtesy and information to survivors.<sup>97</sup>

<sup>94</sup> For example, the International Expert Panel on Impunity recommended that both governments set up a cross-border international commission with UN and Council of Europe assistance to do so.

<sup>95</sup> It was noted that the the Historical Enquiries Team in Northern Ireland, a unit within the PSNI, did not meet ECHR required independence standards.

<sup>96</sup> An Garda Síochána, 'Legacy Section' <<https://www.garda.ie/en/about-us/our-departments/legal/crime-legal/legacy-section/>> accessed 15 October 2024.

<sup>97</sup> The Commission of Investigation into Mother and Baby Homes was cited as an example.

## Staff and powers of a legacy mechanism

- There was general agreement that there should not be a requirement for judges to lead a legacy mechanism(s) in the South. Rather, the powers of future bodies of truth recovery, discovery, disclosure and investigation are more important than the qualifications of the individual who leads it. These powers are particularly important given the regression in powers of the new police oversight bodies introduced by the Policing, Security and Community Safety Act 2024.<sup>98</sup>
- It will be essential to introduce mandatory training for members of the criminal justice system on trauma, harm, identity and gender-responsive approaches to investigations and to prevent re-traumatisation when seeking justice.

## Litigation on ECHR obligations has been limited to date

- The incorporation of the ECHR into domestic law in the North<sup>99</sup> gave families a sense of agency, led to significant developments and compelled the introduction of legacy mechanisms (i.e., through the Package of Measures).
- This was combined with reforms to policing and the criminal justice system which were driven by the GFA and led to growing confidence in the courts. Families had numerous battles of attrition through the courts but ultimately achieved significant progress in the discharge of ECHR investigative obligations.<sup>100</sup>
- In contrast, there have been fewer cases in the South where failures to hold ECHR-compatible investigations in relation to Articles 2 and 3 have been challenged in the courts.<sup>101</sup> This is due to a different legal culture and context regarding the enforcement of human rights through the courts, including enforcement through the ECHR Act 2003. There is a need for training for practitioners on the ECHR Act 2003 to enable enforcement of Ireland's Article 2 and 3 obligations to investigate in domestic courts.

<sup>98</sup> Williams (n 18) 23–31.

<sup>99</sup> See Human Rights Act 1998.

<sup>100</sup> See for example, *McKerr v United Kingdom* App no 28883/95 (ECtHR, 4 May 2001).

<sup>101</sup> For example, *Nic Gibb v Ireland* App no 17707/10 (ECtHR, 25 March 2014) regarding failure to investigate Gardaí shooting two people dead and *O'Keeffe v Ireland* App no 35810/09 (ECtHR, 28 January 2014), regarding failure of the State to provide effective remedy for abuse in schools.

## Inquiries have been limited or not granted

- Tribunals or inquiries usually take place in private, including non-statutory inquiries (e.g., the Inter-Departmental Committee on Magdalene Laundries), and have led to limited accountability for the State.
- The Tribunals of Inquiry (Evidence) Act 1921 was a stronger mechanism than the Commission of Inquiry Act 2004. A commission of investigation can be set up under the 2004 Act to prevent a public inquiry and run without sessions in public, as was the case for Dublin and Monaghan bombing victims. In the case of Shane O’Farrell,<sup>102</sup> a public inquiry has yet to be held despite several related votes in the Oireachtas.<sup>103</sup> In the case of the Sallins train robbery, torture was inflicted by State officials on the Sallins men while at the same time Ireland was challenging torture by the UK at the ECtHR.<sup>104</sup> Despite a decades-long campaign for justice in the Sallins case, an inquiry has yet to be held.<sup>105</sup>

## Inquest model has untapped potential

- Inquests are an important avenue for victims to publicly access justice and seek information about the tragic circumstances of a loved one’s cause of death.<sup>106</sup>
- The inquest system needs general reform. The experience of legacy inquests in the North has delivered positive results and more families are choosing this option. The Kingsmill inquest in 2024 illustrated how inquests can deliver historical clarification in relation to non-State actors.<sup>107</sup>
- The Stardust fire inquest was welcomed as an example of good practice, although it did not focus on State actors (aside from local government).<sup>108</sup> The enabling legislation for this was, however, restricted to Stardust and there is strong resistance to it being used to open doors to legal reforms.<sup>109</sup> The success of the Stardust inquest could be used to help mobilise political and public support for reforms.<sup>110</sup>
- Generally poor experiences of legacy inquests were reported in the Republic, including due to official resistance and the lack of access to legal aid. The inquests into the deaths of the 34 people killed in the Dublin and Monaghan bombings, held in 2004, was described as a short, frustrating experience after a 30-year wait.<sup>111</sup> The repeated adjournment at the behest of An Garda Síochána of the inquest into the 2006 killing of Denis Donaldson and the refusal of a commission of inquiry was noted as being deeply frustrating for the family.<sup>112</sup>

<sup>102</sup> Justice for Shane is a group campaigning for a public inquiry into the death of Shane O’Farrell in a hit and run in 2011. For more information, please see Justice for Shane, ‘Home’ <<https://justiceforshane.ie/>> accessed 15 October 2024.

<sup>103</sup> News Northern Sound, ‘Continued Calls for Public Inquiry into Death of Shane O’Farrell’, Northern Sound (Longford, 3 October 2024) <<https://www.northernsound.ie/news/continued-calls-for-public-inquiry-into-death-of-shane-ofarrell-244241>>.

<sup>104</sup> *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978).

<sup>105</sup> Sallins Inquiry Now, ‘Home’ <<https://sallinsinquirynow.ie/>> accessed 15 October 2024.

<sup>106</sup> Scraton and McNaull (n 32).

<sup>107</sup> Judiciary Northern Ireland, ‘Kingsmill Inquest’ <<https://www.judiciaryni.uk/kingsmill-inquest>> accessed 15 August 2024.

<sup>108</sup> Dublin District Coroner’s Court, ‘The Stardust Inquests’ <<https://www.stardustfireinquests.ie/>> accessed 15 October 2024.

<sup>109</sup> Law Society Gazette, ‘Special Provisions for Stardust Inquest Jury Only’, Law Society Gazette (Dublin, 10 June 2022) <<https://www.lawsociety.ie/gazette/top-stories/2022/june/special-provisions-for-stardust-inquest-jury-only>>.

<sup>110</sup> Cormac McQuinn and Conor Pope, ‘Stardust: Cabinet Signs off on €24m Redress Package for Families of Victims’, Irish Times (Dublin, 9 August 2024) <<https://www.irishtimes.com/politics/2024/08/09/stardust-cabinet-meeting-to-sign-off-on-24m-redress-package-for-families-of-victims/>>.

<sup>111</sup> Irish Times, ‘Inquest Finds Dublin-Monaghan Victims “Unlawfully Killed”’, Irish Times (Dublin, 20 May 2004) <<https://www.irishtimes.com/news/inquest-finds-dublin-monaghan-victims-unlawfully-killed-1.979798>>.

<sup>112</sup> Seanín Graham, ‘Daughter of Slain British Agent Denis Donaldson Critical of Coalition over Persistent Inquest Delays’, Irish Times (Dublin, 2 August 2024) <<https://www.irishtimes.com/ireland/2024/08/02/daughter-of-slain-british-agent-denis-donaldson-critical-of-coalition-over-persistent-inquest-delays/>>; Irish Legal News, ‘McEntee Refuses Inquiry into Denis Donaldson Murder’, Irish Legal News (16 August 2024) <<https://www.irishlegal.com/articles/mcentee-refuses-inquiry-into-denis-donaldson-murder>>.

## Any new legacy mechanism(s) should not be restricted to conflict-related cases

- While the number of conflict-related cases is much smaller in the South than in the North, significant unfulfilled investigative obligations remain, which are required by law.
- In the Northern context, there is a clear rationale to separate a very high number of conflict-related cases from other historic human rights violations (e.g., mother and baby institutions) due to patterns of violations related to the conflict.<sup>113</sup>
- When examining violations in the South, such as miscarriages of justice and ill-treatment in custody, practices tend to transcend both conflict and non-conflict related cases. Thus, any independent legacy mechanism(s) in the South should include both types of cases.

## The Legacy Act has hampered cross-border Police Ombudsman investigations

- The Police Ombudsman in Northern Ireland has been able to carry out investigations into cases with a cross-border dimension, including the Glennane series of cases, on which a report is pending following an investigation.<sup>114</sup>
- However, the Legacy Act's prohibition on any further Ombudsman legacy investigations has curtailed further work. Furthermore, the ICIR has confirmed it has no capability to deal with cross-border cases. This means there is currently no mechanism that can deal with cross-border cases that were within the Ombudsman's remit. This is a significant loss hindering victims' rights to truth and justice.
- If the ICIR is retained in its current form in the North, there is a risk that a mechanism with similar flaws may be proposed for the South, resulting in a race to the bottom. This must be avoided as the ICIR is not viewed as being sufficiently independent and does not have the confidence of victims.

<sup>113</sup> International Expert Panel (n 8).

<sup>114</sup> Connla Young, 'Police Ombudsman Expects to Complete Glennane Gang-Linked Probes before Legacy Axe Falls', Irish News (Belfast, 30 November 2023) <[https://www.irishnews.com/news/northernirelandnews/2023/11/30/news/glenanne\\_gang-3812319/](https://www.irishnews.com/news/northernirelandnews/2023/11/30/news/glenanne_gang-3812319/)>.

## The Package of Measures was delivering in Northern Ireland

- The Package of Measures mostly delivered information recovery and historical clarification. The importance of the work was that it reduced the space for “permissible lies” and justifications for violations.
- The relative success of the Package of Measures was achievable through a law and rights-based approach, coupled with office-holders with proper independence and powers.
- The Bloody Sunday Inquiry<sup>115</sup> was referenced as a positive example along with a number of Police Ombudsman reports, including Loughinisland<sup>116</sup> and the Ormeau Road massacres.<sup>117</sup> The Kenova model was also referenced as a criminal investigation staffed by investigators who were not afraid to use their powers.<sup>118</sup>
- Attempts to limit or obstruct the Package of Measures occurred under previous UK governments. This was notable in the introduction of the UK Inquiries Act 2005 and refusal to hold an independent inquiry into the murder of Pat Finucane for three decades.<sup>119</sup>

## Reconciliation as a goal

- Participants noted that effective investigations can aid reconciliation. As one participant said, “You can’t grieve the death of someone if you’re constantly seeking justice”. Another noted, “People can’t be forced to reconcile but knowing the truth can help people reconcile with the past”.
- Government acknowledgements and apologies for injustices do not always have to come at the end of a process. They can also be positive mood-setters at the beginning.
- While the ICIR has “reconciliation” in its name it appears to have no working definition of reconciliation and is widely mistrusted.<sup>120</sup>

<sup>115</sup> UK Government, ‘Independent report: Report of the Bloody Sunday Inquiry’ <<https://www.gov.uk/government/publications/report-of-the-bloody-sunday-inquiry>> accessed 15 October 2024.

<sup>116</sup> Police Ombudsman of Northern Ireland, ‘Report: The murders at the Heights Bar in Loughinisland: Police Ombudsman report’ <<https://www.policeombudsman.org/investigation-reports/historical-investigations/the-murders-at-the-heights-bar-in-loughinisland-police-ombudsman-report>> accessed 15 October 2024.

<sup>117</sup> Police Ombudsman of Northern Ireland, ‘Report: Collusive behaviours and investigative failings’ <<https://www.policeombudsman.org/investigation-reports/historical-investigations/investigative-and-intelligence-failures-and-collusive-behaviours-by-police-in-relation-to-series-of>> accessed 15 October 2024.

<sup>118</sup> For more information, please see Operation Kenova, ‘About Kenova’ <<https://www.kenova.co.uk/about-kenova>> accessed 15 October 2024.

<sup>119</sup> Following the seminar, it was announced on 11 September 2024 that the British Government is to establish a public inquiry into the murder of Pat Finucane. For more information, please see Government of Ireland, ‘Taoiseach Simon Harris welcomes confirmation of a public inquiry into the murder of Pat Finucane’ <<https://www.gov.ie/en/press-release/125a1-taoiseach-simon-harris-welcomes-confirmation-of-a-public-inquiry-into-the-murder-of-pat-finucane/>> accessed 15 October 2024.

<sup>120</sup> Rebecca Black, “It’s Absolutely Disgusting” – Troubles Victims React with Anger as UK Challenges Court Judgment on Legacy Act’, Irish Independent (Dublin, 22 October 2024) <<https://www.independent.ie/irish-news/its-absolutely-disgusting-troubles-victims-react-with-anger-as-uk-challenges-court-judgment-on-legacy-act/a906752652.html>>; Enda McClafferty, ‘Troubles Legacy Body Won’t Be Scrapped - NI Secretary’, BBC News (London, 23 September 2024) <<https://www.bbc.com/news/articles/crl8xp7yxego>>.

# Conclusion

The key issues raised by participants at the seminar and supported by ICCL and CAJ's desk research and legal analysis demonstrate the obligation of the Irish State to investigate outstanding historic human rights violations by State actors, including by An Garda Síochána. Regardless of the exact design or type of any new investigative mechanism(s), it is a legal imperative that it investigates violations of Articles 2 and 3 of the ECHR.

For any of the complementary, comprehensive recommendations discussed in this paper to be effective, there must be a shift in attitude towards legacy mechanisms and investigating historic human rights violations by the Irish government. Furthermore, there must be a meaningful commitment to adequate financial and human resources to make such bodies effective, to vindicate the rights of victims and survivors to truth and justice, and to combat impunity for egregious human rights violations.













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