



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Technical Analysis of the Section Dealing
with 'The Past' within the Stormont House
Agreement 2014¹**

¹ As articulated in the Stormont House Agreement, 2014, p5

Foreword

This is a technical analysis of the Dealing with 'The Past' section of the Stormont House Agreement encompassing the Oral History Archive, Victims and Survivors' 'Services', the Historical Investigations Unit, the Independent Commission on Information Retrieval, and the Implementation and Reconciliation Group.

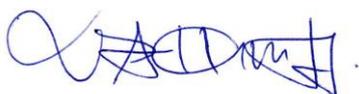
The Northern Ireland Human Rights Commission welcomes the Stormont House Agreement and wishes to see the Dealing with the Past elements implemented as quickly as possible. The United Nations Human Rights Committee recently published concluding observations on the seventh periodic report of the International Covenant for Civil and Political Rights. The report's recommendations include that the State Party (the UK, including the Northern Ireland Executive) should:

'Ensure, as a matter of particular urgency, that independent, impartial, prompt and effective investigations, including those proposed under the Stormont House Agreement, are conducted to ensure a full, transparent and credible account of the circumstances surrounding events in Northern Ireland with a view to identifying, prosecuting and punishing perpetrators of human rights violations, in particular the right to life, and providing appropriate remedies for victims'.²

This is a recognition of the critical role that the institutions proposed within the Stormont House Agreement will play in Dealing with the Past.

Notwithstanding the unanimous support for the Stormont House Agreement, the discussions in producing this document mirrored many of those held within wider society in Northern Ireland. The Northern Ireland Human Rights Commission is pluralist in line with the Paris Principles relating to the status of national human rights institutions and is the stronger for that plurality. Accordingly, Commissioners Marion Reynolds and Christine Collins were unable to endorse the document.

This document is intended as a constructive and helpful technical analysis on implementing the Dealing with the Past elements of the Stormont House Agreement and we hope it proves a valuable contribution to the debate and deliberations.



Les Allamby,
Chief Commissioner, Northern Ireland Human Rights Commission

² UN, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. CCPR/C/GBR/CO/7 (2015) para 11(b)

Preamble

1. This is a technical document containing a legal analysis of the human rights obligations specifically engaged by the package of measures contained within the Stormont House Agreement (SHA). This analysis is primarily directed towards those responsible for giving operational effect to the bodies and services set out within the SHA's package of measures to assist in ensuring that these bodies and services operate within international human rights standards.
2. The SHA was negotiated by the UK Government, the Government of Ireland, and the parties which constitute the NI Executive. It was published on 23 December 2014 and addresses issues relating to finance and welfare, flags, identity, culture and tradition, and parades;³ topics which the NIHRC has addressed in earlier publications.⁴ Significant human rights implications in the SHA arise in the section dealing with 'The Past', which is the focus of this analysis.
3. The NIHRC recognises that further detail will emerge during the implementation process, including the necessary enabling measures. The NIHRC recognises the need for timeliness in the implementation of these enabling measures. The NIHRC commits to working with those charged with developing these enabling measures and providing advice based on international human rights standards, frameworks, and experience.

Introduction

4. The Northern Ireland Human Rights Commission (NIHRC) pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights.
5. The NIHRC bases its position on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR) as incorporated by the Human Rights Act 1998 and the treaty obligations of the United Nations (UN), Council of Europe (CoE), and European Union (EU) systems. The relevant international treaties in this context include:

- European Convention on Human Rights, 1950 (ECHR) [UK ratification 1951]

³ Stormont House Agreement, 2014, para 21-55.

⁴ The NIHRC has produced publications on *The Display of Flags, Symbols and Emblems in Northern Ireland* (2013), *Parades and Protest in Northern Ireland* (2013), and *The Derry/Londonderry Report on Upholding the Human Right to Culture in Post-Conflict Societies* (2014)

- The European Cultural Convention, 1954 [UK ratification 1955]
- European Social Charter, 1961 (ESC) [UK ratification 1962]
- International Convention on the Elimination of All Forms of Racial Discrimination, 1966 (CERD) [UK ratification 1969]
- International Covenant on Civil and Political Rights, 1966 (ICCPR) [UK ratification 1976]
- International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) [UK ratification 1976]
- Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows, 1981 (as amended by the Additional Protocol, 2001) (Convention 108) [UK ratification 1987 of the Convention]⁵
- United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 (CAT) [UK ratification 1988]
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987 [UK ratification 1988] (as amended by Protocols No. 1 and No. 2, 1993) [UK ratification 1996]
- European Convention on Compensation for Victims of Violent Crimes, 1983 [UK ratification 1990]
- United Nations Convention on the Rights of the Child, 1989 (CRC) [UK ratification 1991]
- EU Directive 95/46/EC – The Data Protection Directive 1995
- The Charter of Fundamental Rights of the European Union,⁶ 2000 (CFR) [UK ratification 2000]
- European Charter for Regional or Minority Languages, 1992 [UK ratification 2001]
- Rome Statute of the International Criminal Court, 1998 [UK ratification 2001]
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005 [UK ratification 2007]
- United Nations Convention on the Rights of Persons with Disabilities (CRPD), 2006 [UK ratification 2009]
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2002 [UK ratification 2009]
- EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA
- The Treaty on the Functioning of the European Union, 2012⁷
- Directive 2012/29/EU of the European Parliament and of the Council

⁵ The Additional Protocol has been signed but not ratified [UK signature 2001]

⁶ 2000/C 364/01

⁷ Official Journal C 326, 26/10/2012 P. 0001 – 0390

of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012

6. The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the United Kingdom (UK) Government's ratification. In addition, the Northern Ireland Act 1998, section 26(1) provides that 'if the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... he may by order direct that the proposed action shall not be taken.'
7. The Northern Ireland Act 1998, section 24(1), states that 'a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention rights'.
8. In addition to the treaties, there exists a body of 'soft law' developed by the human rights bodies of the UN, CoE, and EU. These declarations and principles are non-binding but provide further guidance in respect of specific areas. These relevant 'standards' identified by the NIHRC in relation to the SHA section dealing with 'The Past' include:

- Council of Europe Parliamentary Assembly Resolution 828 (1984)
- UN GA, United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁸ (1985)
- UN GA, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁹ (1985)
- UN CESCR, Principles on the Effective Prevention and Investigation on Extra-legal, Arbitrary and Summary Executions¹⁰ (1989)
- Declaration on the Protection of All Persons from Enforced Disappearance¹¹ (1992)
- Council of Europe, Committee of Ministers, Recommendation No. R(97)20 (1997)¹²
- UN Human Rights Council, The role of good governance in the promotion of human rights¹³ (2000)
- UNESCO Universal Declaration on Cultural Diversity (2001)
- Council of Europe, Committee of Ministers, Recommendation Rec(2001)15 on history teaching in twenty-first-century Europe

⁸ UN Doc. A/RES/40/34

⁹ UN Doc. A/RES/40/34

¹⁰ UN Doc. E/1989/8

¹¹ UN Doc. A/RES/47/133

¹² Of the Committee of Ministers to Members States on "Hate Speech"

¹³ UN Doc. E/CN.4/RES/2000/64

- Council of Europe Parliamentary Assembly Resolution 1463 (2005)
- Council of Europe, Guidelines on the Protection of Victims of Terrorist Acts (2005)
- Council of Europe, Committee of Ministers Recommendation to member states on assistance to crime victims, Rec(2006)8
- UN GA, 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 Law¹⁴ (2006)
- Council of Europe, Committee of Ministers, Recommendation Rec(2006)8 of the Committee of Ministers to members states on assistance to crime victims
- UN Office of the High Commissioner for Human Rights, Rule-of-law Tools for Post-conflict States, Truth commissions (2006)
- Council of Europe Parliamentary Assembly Resolution 1868 (2012)
- Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, (2012)
- UN Human Rights Council, The role of good governance in the promotion and protection of human rights¹⁵ (2012)

Applicable international human rights

9. The NIHRC welcomes the SHA and the commitment of the participants to deal with 'The Past'. The NIHRC recognises that the SHA has the potential to fulfil human rights obligations. A full analysis of the wide range of human rights engaged is available in Human Rights Appendix I. For ease of reference the relevant applicable human rights obligations include:

- The right to life
 - ICCPR, Article 6(1)
 - ECHR, Article 2
 - CFR, Article 2
- The prohibition on torture or cruel, inhuman or degrading treatment or punishment
 - ICCPR, Article 7
 - ECHR, Article 3
 - CFR, Article 4
 - CAT
- The right to liberty and security
 - ICCPR, Article 9
 - ECHR, Article 5
 - CFR, Article 6
- The right to private and family life

¹⁴ UN Doc. A/RES/60/147

¹⁵ UN Doc. A/HRC/RES/19/20

- ICCPR, Article 17
- ECHR, Article 8
- CFR, Article 7
- Freedom of expression (including the right to the historical truth)
 - ICCPR, Article 19
 - ECHR, Article 10
 - CFR, Article 11
- The right to the protection of personal data
 - CFR, Article 7
- The right to the truth¹⁶
- The right to a remedy (the right to reparations, the right to redress)¹⁷
- Access to justice¹⁸
- The right to culture
 - ICESCR, Article 15(1)(a)
 - ICCPR, Article 27
- The right to health
 - ICESCR, Article 12
 - ESC, Article 11

The Stormont House Agreement

10. The SHA provides that '[a]s part of the transition to long-term peace and stability the participants agree that an approach to dealing with the past is necessary which respects the following principles:
- promoting reconciliation;
 - upholding the rule of law;
 - acknowledging and addressing the suffering of victims and survivors;
 - facilitating the pursuit of justice and information recovery;
 - is human rights compliant; and
 - is balanced, proportionate, transparent, fair and equitable.¹⁹
11. The SHA agrees the establishment of four bodies and specific services to deal with 'The Past'. These are:
- The Oral History Archive (OHA), which will 'provide a central place for peoples from all backgrounds (and from throughout the UK and Ireland) to share experiences and narratives related to the Troubles.'²⁰

¹⁶ See Human Rights Appendix I, p28-30

¹⁷ See Human Rights Appendix I, p30-35

¹⁸ See Human Rights Appendix I, p35-36

¹⁹ Stormont House Agreement, 2014, para 21

²⁰ Stormont House Agreement, 2014, para 22

- Victims and Survivors' 'Services', which will include a Mental Trauma Service, a proposal 'for a pension for severely physically injured victims', and advocate-counsellor assistance.²¹
- The Historical Investigations Unit (HIU), which will 'take forward investigations into outstanding Troubles-related deaths'.²²
- The Independent Commission on Information Retrieval (ICIR), which will 'enable victims and survivors to seek and privately receive information about the (Troubles-related) deaths of their next of kin.'²³
- The Implementation and Reconciliation Group (IRG), which will 'oversee themes, archives and information recovery' and commission an academic report after 5 years analysing themes.²⁴

12. The UK Government has stated that specific measures of the financial package to Northern Ireland will include 'up to £150m over 5 years to help fund the bodies to deal with the past'.²⁵ It further states that '[t]he paper from the party leaders estimates the potential costs of the new bodies to be higher than Government estimates. The Government recognises the burden that this work puts on the PSNI [Police Service of Northern Ireland] and that the costs could be higher and so will provide further funding. Therefore the Government will contribute up to £30m per year for five years to pay for the institutions to help deal with the past.'²⁶

13. The SHA contains proposals for a five year mandate for both the HIU and ICIR.²⁷ The IRG is to commission a report 'on themes' after five years, the evidence for which is to be provided 'from any of the legacy mechanisms'.²⁸ For the IRG to have an evidence base after five years the HIU and ICIR need to have gathered evidence. Consequently, there is a level of sequencing implicit within the SHA. It appears the sequencing pattern is for the HIU and ICIR to run concurrently for five years, so that at the end of that timeframe the IRG can commission a report on themes as mandated having taken account of materials received from the other legacy bodies.

14. The SHA highlights that 'the integrity and credibility of this agreement is dependent on its effective and expeditious

²¹ Stormont House Agreement, 2014, para 26-29

²² Stormont House Agreement, 2014, para 30

²³ Stormont House Agreement, 2014, para 41

²⁴ Stormont House Agreement, 2014, para 51

²⁵ Stormont House Agreement, Financial Annex, 2014, p1. The SHA includes a further broad financial commitment to all sections covered in the SHA; 'The total value of the Government's package is additional spending power of almost £2 billion.' Stormont House Agreement, Financial Annex, 2014, para 3

²⁶ Stormont House Agreement, Financial Annex, 2014, p2

²⁷ Stormont House Agreement, 2014, para 40 and 43

²⁸ Stormont House Agreement, 2014, para 51

implementation. Accordingly, progress in implementing the provisions of this Agreement must be actively reviewed and monitored.²⁹ The SHA provides for review meetings between 'the Northern Ireland Executive party leaders as well as the UK Government and Irish Government',³⁰ and 'quarterly meetings', the first of which 'before the end of January 2015 at which an implementation timetable will be agreed.'³¹

15. The SHA expressly provides that individuals who are outside of Northern Ireland and outside of the UK will be able to access certain parts of the package of measures to deal with 'The Past'.³²
16. ECHR, Article 1, states that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. The ECtHR has found that jurisdiction is largely based on territory, but that extra-territorial jurisdiction exists in situations of state agent authority and control, and in cases of effective control over an area.³³ The UK Supreme Court has adopted a similar approach to the extra-territorial jurisdiction of human rights.³⁴ The UK has ratified relevant treaties and introduced domestic legislation to this effect.³⁵
17. The SHA acknowledges the extra-territorial application of human rights, including those which do not relate to establishing criminal offences on actions committed abroad. How this extra-territoriality is

²⁹ Stormont House Agreement, 2014, para 73

³⁰ Stormont House Agreement, 2014, para 74

³¹ Stormont House Agreement, 2014, para 75

³² Stormont House Agreement, 2014, para 22, 26, 39, 42, and 55.

³³ *Al-Skeini and Others v. The United Kingdom*, Application No. 55721/07, 7 July 2011, para 133-140; and see *Jaloud v. The Netherlands*, Application No. 47708/08, 20 November 2014, para 139

³⁴ *Smith and Others v. The Ministry of Defence* [2013] UKSC 41

³⁵ The UN Committee on the Rights of the Child has recommended 'that the [UK] take steps to ensure that domestic legislation throughout the State party, including in its devolved administrations enables it to establish and exercise extraterritorial jurisdiction, without the criterion of double criminality, over all the offences under the Optional Protocol [to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography]'. UN Committee on the Rights of the Child, Concluding observations on the report submitted by the United Kingdom of Great Britain and Northern Ireland under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child; The EU has issued a directive on the trafficking in human beings and protecting its victims, which obliges states take measures to extend their jurisdiction extra-territorially. EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Article 10 This directive was implemented in Northern Ireland through the Criminal Justice Act (Northern Ireland) 2013 which amends the Sexual Offences Act 2003 to include a section on 'Offences committed in a country outside the United Kingdom'. Section 4

developed will depend on the implementation measures to deliver the bodies and services contained within the SHA.

Oral History Archive (OHA)

18. The OHA will 'provide a central place for peoples from all backgrounds (and from throughout the UK and Ireland) to share experiences and narratives related to the Troubles.'³⁶ It is to be established 'by 2016', and will include a 'research project', 'to report within 12 months.'³⁷
19. The OHA can be consistent with a human rights based approach to dealing with 'The Past'. The SHA provides that the OHA 'will be independent and free from political interference.'³⁸ The UN Special Rapporteur in the field of cultural rights has noted that '[m]useums and curators may face particular difficulties when they are subject to political control and financial pressure and it is crucial to ensure their independence within the framework of the right to freedom of opinion and expression, as set out in articles 19 and 20 of the International Covenant on Civil and Political Rights.'³⁹
20. The NIHRC advises that the collection of experiences and narratives by the OHA engages the right to culture as history and culture are overlapping concepts, and an OHA engages the right to culture.⁴⁰ The UN Special Rapporteur in the field of cultural rights has highlighted the importance of remembering that 'history is always subject to differing interpretations. While events may be proven, including in a court of law, historical narratives are viewpoints that, by definition, are partial. Accordingly, even when the facts are undisputed, conflicting parties may nevertheless fiercely debate moral legitimacy and the idea of who was right and who was wrong. Provided that historical narratives rigorously follow the highest deontological standards, they should be respected and included in the debate.'⁴¹
21. The UN Special Rapporteur has highlighted that '[t]he past constantly informs the present. History is continuously interpreted to fulfil contemporary objectives by a multiplicity of actors. The challenge is to distinguish the legitimate continuous reinterpretation of the past

³⁶ Stormont House Agreement, 2014, para 22

³⁷ Stormont House Agreement, 2014, para 22 and 25

³⁸ Stormont House Agreement, 2014, para 22

³⁹ UN, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, Memorialization processes, UN Doc. A/HRC/25/49 (2014) para 75

⁴⁰ For an exploration of the right to culture, see NIHRC Report, The Derry/Londonderry Report on Upholding the Human Right to Culture in Post-Conflict Societies (2014)

⁴¹ UN GA 'Cultural Rights, Note by the Secretary-General' UN Doc. A/68/296 (2013), para 6

from manipulations of history for political ends.⁴² Indeed, '[t]he reconstruction of human history to fit a particular world view is a phenomenon in all societies. The question is whether, and to what extent, access to resources or historical facts and earlier interpretations is obstructed and whether space is given to articulate differences freely without fear of punishment. Even without deliberate manipulation, history teaching is not exempt from bias and, too often, the diversity of historical narratives is insufficiently acknowledged. Democratic and liberal societies too must question their existing paradigms from the perspective of ensuring a multi-voice narrative inclusive of, and accessible to, all.'⁴³

22. The SHA states that people from all backgrounds can 'share experiences and narratives related to the Troubles.'⁴⁴ The implementation process is integral to realising the SHA, and should provide clarity on the operation of the OHA, who can participate, and what information can be submitted. The range of experiences and narratives the OHA will accept must also be clarified in its implementation, as it could be approached with experiences and narratives detailing alleged human rights violations or abuses which remain unaddressed by the criminal justice system. It is common for peace agreements to be implemented and clarified in greater detail through subsequent policy and legislation, as the SHA recognises.⁴⁵ The implementation measures which address these issues may engage further human rights.⁴⁶

23. Historical and memorialisation processes are recognised as part of the right to culture.⁴⁷ The right to culture may be exercised by a person individually, in association with others, or as a community or group.⁴⁸ The implementation of the OHA should give consideration to empowering the body to accept submissions from individuals, groups,

⁴² UN GA 'Cultural Rights, Note by the Secretary-General' UN Doc. A/68/296 (2013), para 7

⁴³ UN GA 'Cultural Rights, Note by the Secretary-General' UN Doc. A/68/296 (2013), para 23

⁴⁴ Stormont House Agreement, 2014, para 22

⁴⁵ Stormont House Agreement, 2014, para 73

⁴⁶ For example, if the OHA were to accept narratives which detail alleged human rights violations and abuses which remain unaddressed by the criminal justice system. Furthermore, if the OHA were to accept relevant materials other than oral submissions, including images, then further human rights could be engaged.

⁴⁷ UN Human Rights Council, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, Memorialization processes, UN Doc. A/HRC/25/49 (2014); UN GA, Cultural rights, Note by the Secretary-General, Report of the Special Rapporteur in the field of cultural rights, UN Doc. A/69/286 (2014); and see UNESCO Oral Archives Initiative, available at http://www.unesco.org/archives/new2010/en/oral_archives.html <last accessed 03/09/15>

⁴⁸ UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 9

organisations, and communities and what arrangements are required to facilitate their input.

24. The SHA states that '[t]he sharing of experiences will be entirely voluntary and consideration will be given to protecting contributors, and the body itself, from defamation claims.'⁴⁹ Where a submission to the OHA includes commentary on identifiable individuals or legal persons (e.g. a business) there is the possibility that there could be a claim of defamation. How consent will be evidenced is a matter which the OHA implementation arrangements will need to address.
25. The current law on defamation in Northern Ireland has not kept pace with changes and reforms in the rest of the UK.⁵⁰ In its 2008 concluding observations on the UK's Sixth Periodic Report on compliance with the ICCPR the UN Human Rights Committee stated that it was 'concerned that the State party's practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism."... The State party should re-examine its technical doctrines of libel law, and consider the utility of a so-called "public figure" exception, requiring proof by the plaintiff of actual malice in order to go forward on actions concerning reporting on public officials and prominent public figures...'⁵¹ The Defamation Act 2013 raises the threshold for bringing a defamation claim and a defence of publication on a matter of public interest has been introduced in England & Wales. The Defamation Act 2013 is not, however, applicable to Northern Ireland and the law governing defamation in Northern Ireland remains unchanged, based on the Defamation Act (Northern Ireland) 1955.⁵² Consequently, the concerns raised by the UN Human Rights Committee are still relevant in Northern Ireland.

⁴⁹ Stormont House Agreement, 2014, para 23

⁵⁰ See Human Rights Committee, Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland (2008) UN Doc. CCPR/C/GBR/CO/6 para 25. It is important to note that the recommendation of the UN Human Rights Committee applies to the entire jurisdiction of the United Kingdom, including Northern Ireland. At the time of the UN Human Rights Committee's recommendation the law governing defamation in Northern Ireland and England & Wales, whilst in separate legal instruments, was directly comparable. Whilst the law in England & Wales has now been 'rebalanced' the imbalance which existed during the time of the Committee's recommendations remains present in Northern Ireland.

⁵¹ UN, Concluding observations of the Human Rights Committee on sixth periodic report submitted by the United Kingdom UN Doc. CCPR/C/GBR/CO/6 (2008) para 25

⁵² As amended by subsequent legislation and interpreted through jurisprudence. See Northern Ireland Law Commission, Consultation Paper, Defamation Law in Northern Ireland NILC 19 (2014)

26. An independent European advisory body on data protection and privacy (The Working Party on the Protection of Individuals with regard to the Processing of Personal Data) has collated jurisprudence which highlights that to consent a person must have the capacity to consent,⁵³ and it must be gained prior to the use of the data.⁵⁴ Consent must be freely given,⁵⁵ specific,⁵⁶ and informed.⁵⁷ To be informed, appropriate language should be used,⁵⁸ and be clear and sufficiently conspicuous so it cannot be overlooked.⁵⁹ Consent related to material containing special or sensitive data (personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life) must be explicit.⁶⁰ Consent related to data other than sensitive data must be unambiguous.⁶¹ It is also acknowledged that consent can be withdrawn at a later stage.⁶² The SHA states the OHA 'will attempt to draw together and work with existing oral history projects.'⁶³ When drawing together existing material, the consent provided for this material must be studied to see if it is compatible with the new project. If there is a new purpose to the use of the data, new consent can also be required.⁶⁴

27. The right to life, ECHR, Article 2, and ICCPR, Article 6, must be considered by the OHA. If a submission contained information which, if made publically available, could create 'real and immediate risk to life

⁵³ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p34. The Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

⁵⁴ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p34

⁵⁵ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

⁵⁶ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

⁵⁷ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

⁵⁸ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

⁵⁹ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

⁶⁰ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

⁶¹ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

⁶² The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p34

⁶³ Stormont House Agreement, 2014, para 22

⁶⁴ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p34

of which [the authorities] have or ought to have knowledge' of,⁶⁵ then state obligations under the right to life are engaged and could require action to be taken to prevent this from occurring.

28. The SHA requires the OHA bring forward future proposals on the circumstances and timing of contributions being made public.⁶⁶ The receipt of information and its actual release are two distinct issues engaging human rights obligations under the OHA. The circumstances and timing of the release of information is still to be decided. In the meantime, as the data will be privately stored for a period by a state body, human rights obligations are engaged.⁶⁷
29. The Data Protection Act 1998 and the powers and functions of the Information Commissioner go some way to meeting these human rights obligations,⁶⁸ with the Information Commissioner noting that:
- 'The Data Protection Act (DPA) applies to all organisations that handle information about people, in both the public and private sectors. Most public sector bodies are also "public authorities" for the purposes of the Human Rights Act 1998 (HRA). This means that when public sector bodies, including governmental ones, collect, share or otherwise handle information about people, they have to do so in a way that's compatible with the right to respect for private and family life — Article 8 of the European Convention on Human Rights (ECHR). However, the DPA should help public authorities to comply with their duty under Article 8, because the European Data Protection Directive, which the DPA gives effect to in the UK, and the HRA both have their origins in the [ECHR].'⁶⁹
30. The Information Commissioner further highlights that 'that there is a mutually supportive interplay between human rights, data protection and the work of the Information Commissioner.'⁷⁰

⁶⁵ Osman v. The United Kingdom (Application No. 87/1997/871/1083) 28 October 1998, para 116

⁶⁶ Stormont House Agreement, 2014, para 23

⁶⁷ See Human Rights Appendix I, p9-10, 17, 21-26

⁶⁸ The Information Commissioner has evolved from its initial role in 1984, see <https://ico.org.uk/about-the-ico/our-information/history-of-the-ico/> <last accessed 03/09/15>

⁶⁹ Memorandum by the Information Commissioner (DP 3) Human rights, data protection and information sharing: background paper for the Joint Committee on Human Rights (2007) as contained within House of Lords, House of Commons, Joint Committee on Human Rights, Data Protection and Human Rights, Fourteenth Report of Session 2007-08, HL Paper 72, HC 132, p Ev30, para 2. The right to a private and family life is also protected under ICCPR, Article 17

⁷⁰ Memorandum by the Information Commissioner (DP 3) Human rights, data protection and information sharing: background paper for the Joint Committee on Human Rights (2007) as contained within House of Lords, House of Commons, Joint Committee on

31. The OHA engages the right to access information. The UN Human Rights Committee has found that individuals 'should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes.'⁷¹ Access to, and protection of, personal data further engages ECHR, Article 8,⁷² and CFR, Articles 7 and 8.⁷³ Consequently the limitations contained with these rights are relevant to any limitation in access to personal data.
32. At the international level, the right to access information held by public bodies (or bodies carrying out public functions) has been highlighted by the UN Human Rights Committee as forming part of the right to freedom of expression.⁷⁴ Consequently, the right is subject to the limitations included in ICCPR, Article 19(3), which are possible when provided by the law, and are necessary, for a) the respect of the rights or reputations of others, and for b) the protection of national security or of public order (ordre public), or of public health or morals.
33. The release of personal data from the OHA engages cultural rights, such as the right to access and to enjoy cultural heritage, and transmit it to future generations.⁷⁵ Furthermore, the release of data from the OHA, may engage the right to the truth, which has an individual and collective element, and the right to the historical truth.⁷⁶ Both individuals and the wider society have the right to know what happened and why.⁷⁷

Human Rights, Data Protection and Human Rights, Fourteenth Report of Session 2007-08, HL Paper 72, HC 132, p Ev31, para 16

⁷¹ Human Rights Committee, General Comment No. 16 (1988), UN Doc. HRI/GEN/Rev.1 at 21 (1994), para 10

⁷² See for example *M.S. v. Sweden*, Application No. 74/1996/693/885, 27 August 1997, para 41

⁷³ See the Human Rights Appendix I, p5-6, 9, 17-26

⁷⁴ UN Human Rights Committee, General Comment No. 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) para 18. Paragraph 7 reads: 'The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities. The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.'

⁷⁵ UN Human Rights Council, Report of the independent expert in the field of cultural rights, Farida Shaheed, UN Doc. A/HRC/17/38 (2011) para 34

⁷⁶ *Chauvy and Others v. France*, Application No. 64915/01, 29 September 2004, para 69; *Fatullayev v. Azerbaijan*, Application No. 40984/07, 4 October 2010, para 87; *Dzhugashvili v. Russia*, Application No. 41123/10, 9 December 2014, para 33

⁷⁷ UN GA Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Right to the truth UN Doc. A/HRC/12/19 (2009) para 5; Also see Promotion and Protection of All

34. The release of information into the public sphere has the potential to engage other human rights and, as a consequence, limitations are both possible and, at times, necessary. For example, if the information to be released were to contain details which may place an individual at a real and immediate risk, then state obligations under ECHR, Article 2, and ICCPR, Article 6, would be engaged. Limitations should be considered under both the positive and negative obligations of the State, recognising that they can be considered as both limiting but also protective. The nature and scope of any limitation on the release of information should be fully considered.⁷⁸

35. The UK has signed, but not ratified, the Additional Protocol to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows (Convention 108) which requires a body that deals with personal data undergoing automatic processing be accountable to an authority(ies) with 'powers of investigation and intervention, as well as the power to engage in legal proceedings or bring to the attention of the competent judicial authorities violations of provisions of domestic law giving effect to the principles' contained within Convention 108, and the Additional Protocol.⁷⁹ Such authority(ies) should be independent and decisions should contain the possibility of an appeal.⁸⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data contains measures the UK must transcribe into domestic law. The UK has since passed the Data Protection Act 1998, and established the Information Commissioner.

36. **To ensure the SHA complies with human rights obligations the implementation of the OHA should take into account the following:**

- **The criteria for submissions (para 21-23);**

Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Human Rights Council, Human Rights and Transitional Justice UN Doc. A/HRC/RES/12/12 (2009), p3; Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91 (2006) para 58

⁷⁸ See Human Rights Appendix I, p5-6, 9, 17-26

⁷⁹ Article 1(2)(a). The UK Mission at Geneva has stated, 'The UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow up with ratification in a short time thereafter.' See, UK Mission at Geneva, 'Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations agreed in June 2008' (March 2010) on recommendation 22 (France)

⁸⁰ The Additional Protocol, Article 1(3) and 1(4)

- **Whether (in addition to individuals) groups, organisations, and communities will be able make submissions (para 21-23);**
- **Concerns over the compatibility of defamation law in Northern Ireland with the ICCPR (para 24-25);**
- **Gaining consent for new and transferred information (para 26) and;**
- **The storage and release of information (para 27-35).**

Victims and Survivors' 'Services'

37. The SHA provides the NI 'Executive will take steps to ensure that Victims and Survivors have access to high quality services, respecting the principles of choice and need. The needs of victims who do not live in Northern Ireland should also be recognised.'⁸¹ Victims and Survivors 'Services' will include a comprehensive Mental Trauma Service, further work on the proposal 'for a pension for severely physically injured victims', and advocate-counsellor assistance.⁸²

38. Human rights obligations to victims exist independently from the SHA. Measures to provide services in Northern Ireland to victims may only be accessible to individuals within Northern Ireland. The NI Executive has competence for matters transferred from the Westminster Parliament and only within Northern Ireland. UK human rights obligations apply to all persons in the UK. Consequently if victims of a 'conflict-related incident'⁸³ under the definition in The Victims and Survivors (Northern Ireland) Order 2006 in the UK are unable to access services provided for in the SHA by the NI Executive,⁸⁴ then the competent body in the relevant jurisdiction retain responsibility for human rights obligations in relation to these individuals.

39. The right to the highest attainable standard of health is contained within ICESCR, Article 12, and encompasses psychological healthcare.⁸⁵ A further obligation to provide psychological care also arises through rehabilitation under the right to a remedy, which extends to physical and psychological rehabilitation.⁸⁶ Similar provisions are provided by ESC, Article 11.⁸⁷

⁸¹ Stormont House Agreement, 2014, para 26

⁸² Stormont House Agreement, 2014, para 26-29

⁸³ The Victims and Survivors (Northern Ireland) Order 2006, section 3

⁸⁴ See the below discussion on the services

⁸⁵ UN CESCR, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000) reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1rev.6 at 85 (2003) para 17

⁸⁶ UN GA, 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

40. There is a definition of 'victim' under The Victims and Survivors (Northern Ireland) Order 2006. This definition is broader than required by human rights obligations.⁸⁸
41. The SHA provides that '[t]he Commission for Victims and Survivors' recommendation for a comprehensive Mental Trauma Service will be implemented and operated within the NHS. It will work closely with the Victims and Survivors Service (VSS), and other organisations and groups who work directly with victims and survivors.⁸⁹ As the service will sit within the NHS the criteria to access it will be centred on a health-based needs assessment.
42. The SHA includes a commitment to seek 'an acceptable way forward on the proposal for a pension for severely physically injured victims in Northern Ireland.'⁹⁰ The NIHRC welcomes this commitment to provide for the needs of this group of victims.
43. Within the SHA the proposed measures for victims with psychological and physical injuries differ. Under human rights law measures for different groups do not have to be the same, but should be designed around the specific needs of the group and be responsive to individual circumstances.⁹¹ Alternative measures may be required to

International Humanitarian Law, UN Doc. A/RES/60/147 (2006), para 21; UN Committee against Torture, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3 of the Committee against Torture, Implementation of article 14 by States parties UN Doc. CAT/C/GC/3 (2012) para 11; UN Human Rights Council, Torture and other cruel, inhuman or degrading treatment or punishment: rehabilitation of torture victims UN Doc. A/HRC/22/L.11 (2013) para 11-12
⁸⁷ Secretariat to the European Social Charter, The Right to Health and The European Social Charter (2009), at II.B

⁸⁸ See Human Rights Appendix I, p27-28

⁸⁹ Stormont House Agreement, 2014, para 27

⁹⁰ Stormont House Agreement, 2014, para 28. A pension would be welcomed under the right to social security, ESC, Article 12, and ICCPR, Article 9

⁹¹ UN CESCR, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000) reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1rev.6 at 85 (2003) para 18-27. Consider that The Consultative Group on the Past states that '[s]ome 47,000 people sustained injuries in 16,200 bombing and 37,000 shooting incidents.' Report of the Consultative Group on the Past (2009), p62; The Commission for Victims and Survivors reports that over '40,000 people have been affected by the Troubles and experience ongoing physical and psychological problems.' Impact of the Individual Needs Programme, Prepared for the Commission for Victims and Survivors by RSM McClure Watters (2015) p25; Towards A Better Future: The Trans-generational Impact of the Troubles on Mental health, Prepared for the Commission for Victims and Survivors by Ulster University (2015) p42; WAVE Trauma Centre acknowledges that 'current estimates of numbers of people injured which range from 8,383 to 100,000.'; Injured in the Troubles: the needs of individuals and their families, Executive Summary – May 2012 (2012), Marie Breen-Smyth Professor of

better meet the needs of groups of individuals who sustained injuries during the 'Troubles', including those with psychological injuries. Under the SHA, '[v]ictims and survivors will be given access to advocate-counsellor assistance, if they wish.'⁹² During the implementation process it will be important to clarify the role of advocate-counsellor assistance. The role should be informed by human rights obligations which includes rehabilitation within the victims' right to a remedy embraces 'medical and psychological care as well as legal and social services.'⁹³ To ensure that victims receive appropriate support the design of measures should include the participation of those victims affected and facilitate participation.⁹⁴

44. To ensure the SHA complies with human rights obligations the implementation of the Victims and Survivors' 'Services' should take into account the following:

- **The eligibility criteria for the services (para 40-42);**
- **Services available to be designed around the specific needs of victims (para 43).**

Historical Investigations Unit (HIU)

45. The HIU will be an independent statutory body established to 'take forward investigations into outstanding Troubles-related deaths'.⁹⁵ The body will take forward the outstanding cases from the HET and the legacy work of the Police Ombudsman for Northern Ireland (PONI). A report will be produced in each case.⁹⁶

46. The SHA states that a decision to prosecute 'is a matter for the DPP and the HIU may consult his office on evidentiary issues in advance of submitting a file.'⁹⁷ The SHA further provides that the 'HIU will be overseen by the Northern Ireland Policing Board.'⁹⁸

47. The SHA states, in the proposals for the HIU, that '[p]rocesses dealing with the past should be victim-centred.'⁹⁹ Victim-centred

International Politics University of Surrey, In association with Northern Visions, Commissioned by WAVE Trauma Centre

⁹² Stormont House Agreement, 2014, para 29

⁹³ UN Guidance Note of the Secretary-General, 'United Nations Approach to Transitional Justice', 2010, p9

⁹⁴ UN CESCR, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000) reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1rev.6 at 85 (2003) para 11, 17, and 54

⁹⁵ Stormont House Agreement, 2014, para 30

⁹⁶ Stormont House Agreement, 2014, para 30

⁹⁷ Stormont House Agreement, 2014, para 35

⁹⁸ Stormont House Agreement, 2014, para 38

⁹⁹ Stormont House Agreement, 2014, para 31

approaches include the ECtHR's effective participation of victims, and the involvement of their next-of-kin, in an investigation. The ECtHR has noted that, where possible, 'the victim should be able to participate effectively in the investigation',¹⁰⁰ and that in all cases 'the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests'.¹⁰¹

48. Additionally, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has stated that a 'victim-centred approach' requires the 'meaningful participation' of victims in measures designed 'to promote "truth, justice, reparations, and guarantees of non-recurrence"'.¹⁰² The UN Special Rapporteur has noted that '[s]uch meaningful participation can take different forms. To illustrate, truth-seeking requires the active participation of individuals who wish to express their grievances and report on the facts and underlying causes of the violations and abuses which occurred. Truth-seeking will only be regarded a justice measure if civil society, in particular victims organizations, is adequately represented in the composition of a truth commission. Prosecutions, for their part, can only serve as actual justice measures if the victims and their families are effectively involved in the processes and provided with the necessary information relevant to their participation in proceedings'.¹⁰³

49. Furthermore, the UN Approach to Transitional Justice, states as a guiding principle, that measures should '[e]nsure the centrality of victims in the design and implementation of transitional justice processes and mechanisms'.¹⁰⁴

50. The SHA provides that '[t]he HIU will have dedicated family support staff who will involve the next of kin from the beginning and provide them with expert advice and other necessary support throughout the process'.¹⁰⁵ The ECtHR has found violations of the procedural element of the ECHR, Article 2, where 'the investigating authorities failed properly to acquaint the applicant with the results of the investigation'.¹⁰⁶ However, the ECtHR has held that the possibility of sensitive issues surrounding an investigation means there cannot be

¹⁰⁰ *Mocanu and Others v. Romania*, Application Nos. 10865/09, 45886/07 and 32431/08, 17 September 2014, para 324

¹⁰¹ *Jordan v. the United Kingdom*, Application No. 24746/94, 04 August 2011, para 109

¹⁰² UNGA, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. A/HRC/21/46 (2012) para 10 and 54

¹⁰³ UNGA, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. A/HRC/21/46 (2012) para 54

¹⁰⁴ UN Guidance Note of the Secretary-General, 'United Nations Approach to Transitional Justice', 2010, p2

¹⁰⁵ Stormont House Agreement, 2014, para 33

¹⁰⁶ *Karandja v. Bulgaria*, Application No. 69180/01, 7 January 2011, para 67

'an automatic requirement under [ECHR] Article 2 that a deceased victim's surviving next-of-kin be granted access to the investigation as it goes along. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures'.¹⁰⁷ The ECtHR has clarified that a violation of procedural element of ECHR, Article 2 occurs where victims are denied access to information 'for no valid reason'.¹⁰⁸

51. The SHA references ECHR, Article 2, requiring 'the [NI] Executive ... take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements'.¹⁰⁹ ECHR, Article 2, contains a procedural obligation to provide an effective investigation into alleged violations or abuses of the right to life. These investigations must be prompt, thorough and effective, provided through independent and impartial bodies. They must be open to public scrutiny and involve victims and their next-of-kin. They must also be capable of leading to the identification and punishment of perpetrators, of establishing the truth, and of providing an effective remedy.¹¹⁰

52. The SHA provides for the HIU to undertake the investigation of 'outstanding Troubles-related deaths'.¹¹¹ The requirements for an ECHR, Article 2, compliant investigation are also applicable to those cases raising allegations under ECHR, Article 3.¹¹² The NIHRC advises that similar ECHR compliant provisions must be made for the effective official investigation of other serious violations or abuses of human rights, beyond the right to life, such as allegations falling under the prohibition on torture, cruel, inhuman or degrading treatment or punishment.¹¹³ A single institution need not be responsible for the investigation of all such allegations. Under the IRG provision in the SHA there is, however, an acknowledgement that '[t]he UK and Irish Governments recognise that there are outstanding investigations and allegations into Troubles-related incidents, including a number of cross-border incidents. They commit to co-operation with all bodies involved to enable their effective operation, recognising their distinctive functions, and to bring forward legislation where

¹⁰⁷ Ramsahai and Others v. The Netherlands, Application No. 52391/99, 15 May 2007, para 347; also see McKerr v. The United Kingdom (2002) 34 EHRR 20, at 129

¹⁰⁸ Eremiášová and Pechová v. The Czech Republic, Application No. 23944/04, 16 May 2012, para 149

¹⁰⁹ Stormont House Agreement, 2014, para 31

¹¹⁰ See Jordan v. The United Kingdom, Application No. 24746/94, 04 August 2001, para 106-9

¹¹¹ Stormont House Agreement, 2014, para 30

¹¹² Assenov and Others v. Bulgaria, Application No. 90/1997/874/1086, 28 October 1998, para 102; Mocanu and Others v. Romania, Application Nos. 10865/09, 45886/07 and 32431/08, 17 September 2014, para 319-325

¹¹³ ECHR, Article 3

necessary.¹¹⁴ The implementation measures to deliver the bodies and services contained within the SHA will determine how this acknowledgment is taken forward.

53. Her Majesty's Inspectorate of Constabulary (HMIC) inspection of the HET [Historical Enquiries Team] noted that it was 'satisfied that the HET is mindful of Article 3 ECHR and reports possible breaches in its consideration of cases.'¹¹⁵ The SHA package of measures should not regress from protection provided through the former HET. However, if the HIU adopts the same standard as the HET, it appears that there will be no investigations into allegations of violations of ECHR, Article 3, of its own right by the HIU.
54. ECHR, Article 2, has been held to be engaged in cases of enforced disappearance.¹¹⁶ The ECtHR has clarified that 'it is only in exceptional circumstances that physical ill-treatment by State agents which does not result in death may disclose a violation of Article 2'.¹¹⁷ The SHA recognises the existence of 'outstanding investigations and allegations into Troubles-related incidents'.¹¹⁸ This heightens the importance of ensuring that ECHR, Article 3, allegations are effectively investigated.
55. It is noted that the HET was tasked 'to assist in bringing a measure of resolution to those families of victims whose deaths are attributable to "the troubles" between 1968 and the signing of The Belfast Agreement in April 1998'.¹¹⁹ The SHA implementation process should define the exact timeframe for the HIU to work to. Individuals may submit that violations and abuses occurred before 1968 and after 10 April 1998 which require an ECHR, Articles 2 and 3, compliant investigation. Violations and abuses which have occurred after 10 April

¹¹⁴ Stormont House Agreement, 2014, para 55

¹¹⁵ Her Majesty's Inspectorate of Constabulary, Inspection of the Police Service of Northern Ireland Historical Enquiries Team, 2013, p96

¹¹⁶ Enforced Disappearances can cover both state and non-state actors. See the Rome Statute, Article 7(i), which states that "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.' The UK has neither signed nor ratified the subsequent International Convention for the Protection of All Persons from Enforced Disappearance. In *Aslakhanova and Others v. Russia*, Application Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, the ECtHR noted: 'As mentioned above, the Court has regularly found violations of the same rights [ECHR, Articles 2,3,5 and 13] in similar cases (more than 120 judgments have been adopted up to September 2012).'

¹¹⁷ *Ciorcan and Others v. Romania*, Application Nos. 29414/09 and 44841/09, 27 January 2015, para 98; also see *Kitanovski v. The Former Yugoslav Republic of Macedonia*, Application No. 15191/12, 22 January 2015 para 52

¹¹⁸ Stormont House Agreement, 2014, para 55

¹¹⁹ Her Majesty's Inspectorate of Constabulary, Inspection of the Police Service of Northern Ireland Historical Enquiries Team (2013), p7

1998 are subject to the rule of criminal law independent of the provisions contained in the Belfast (Good Friday) Agreement 1998.

56. The HIU is to have full policing powers for criminal investigations, and will have powers equivalent to the PONI in respect of cases transferred from them.¹²⁰ These two elements of the work of the HIU are to have operational independence.¹²¹ However, this may create two internal systems with varying powers afforded to each function. It is important that the implementation measures allow these two systems to dovetail.

57. The Council of Europe Committee of Ministers welcomed the previous Haass 'proposal to create a single, investigative mechanism' as part of a package of measures to 'bring meaningful and positive change to the investigation of legacy cases'.¹²² The HIU will have equivalent powers to the PSNI and PONI,¹²³ which may address certain issues, including the transfer of information between the two bodies, which at times has been problematic,¹²⁴ and address some concerns highlighted in HMIC's Inspection Report of the HET. The Report found multiple failures of consistency across processes, working practices, and the interpretation of the law.¹²⁵ The two elements of the work (from HET and PONI) will have operational independence, and (coronial) legacy inquests will continue as a separate process.¹²⁶

58. The SHA provides that '[t]he HIU will consider all cases in respect of which HET and PONI have not completed their work, including HET cases which have already been identified as requiring re-examination.'¹²⁷ The SHA further provides that '[f]amilies may apply to have other cases considered for criminal investigation by the HIU if there is new evidence, which was not previously before the HET, which is relevant to the identification and eventual prosecution of the perpetrator.'¹²⁸

59. The NIHRC advises that the implementation measures should empower the HIU with ability to open an investigation beyond the two

¹²⁰ Stormont House Agreement, 2014, para 36

¹²¹ Stormont House Agreement, 2014, para 32

¹²² Council of Europe, Committee of Ministers, Cases No. 25, 1201st meeting – 5 June 2014, Cases against the United Kingdom, para 3. The Haass Proposal is available at <http://www.northernireland.gov.uk/haass.pdf> <last accessed 03/09/15>

¹²³ Stormont House Agreement, 2014, para 36

¹²⁴ NI Police Ombudsman, Police Ombudsman takes legal action against the PSNI, see <https://www.policeombudsman.org/Media-Releases/2014/Police-Ombudsman-takes-legal-action-against-the-PS#sthash.IDaJ8GLb.dpuf> <last accessed 03/09/15>

¹²⁵ Her Majesty's Inspectorate of Constabulary, Inspection of the Police Service of Northern Ireland Historical Enquiries Team, 2013

¹²⁶ Stormont House Agreement, 2014, para 32

¹²⁷ Stormont House Agreement, 2014, para 34

¹²⁸ Stormont House Agreement, 2014, para 34

grounds outlined above.¹²⁹ Consideration should be given to empowering the HIU to open an investigation of its own motion. This may arise, for example, where new evidence arises and a family were not to apply to the HIU to investigate. The ECtHR has stated that '[i]t cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Nonetheless, given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further.'¹³⁰ The ECtHR further provides 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.'¹³¹

60. The UK Government 'makes clear that it will make full disclosure to the HIU',¹³² and that '[w]hen cases are transferred from HET and PONI, all relevant case files held by those existing bodies will be passed to the new body.'¹³³ Furthermore, 'necessary arrangements will be put in place to ensure the HIU has the full co-operation of all relevant Irish authorities, including disclosure of information and documentation. This will include arrangements for cooperation between criminal investigation agencies in both jurisdictions and arrangements for obtaining evidence for use in court proceedings. Where additional legislation is required, it will be brought forward by the Irish Government.'¹³⁴

61. The SHA provides, in relation to the disclosure of information, that '[i]n order to ensure that no individuals are put at risk, and that the Government's duty to keep people safe and secure is upheld, Westminster legislation will provide for equivalent measures to those that currently apply to existing bodies so as to prevent any damaging onward disclosure of information by the HIU.'¹³⁵ A national security limitation on the disclosure of information to, or by, the HIU may be created.

62. The transfer of information must meet the standards of an effective investigation under ECHR, Articles 2 and 3, which includes

¹²⁹ Stormont House Agreement, 2014, para 34

¹³⁰ Brecknell v. The United Kingdom, Application No. 32457/04, 27 February 2008, para 70

¹³¹ Brecknell v. The United Kingdom, Application No. 32457/04, 27 February 2008, para 71

¹³² Stormont House Agreement, 2014, para 37

¹³³ Stormont House Agreement, 2014, para 36

¹³⁴ Stormont House Agreement, 2014, para 39

¹³⁵ Stormont House Agreement, 2014, para 37

thoroughness and promptness.¹³⁶ The capacity of the PSNI and PONI will need to be enhanced to ensure they can transfer all relevant case files and information to the HIU. The financial annex to the SHA states that the UK 'Government recognises the burden that this work [to address 'The Past'] puts on the PSNI'.¹³⁷ The HIU will also require the capacity to process and store case files and information it receives. The work undertaken by the PSNI, PONI, and other public bodies to identify and transfer information to the HIU, and the receipt of this information by the HIU, will form the opening stages of any future investigation then undertaken by the HIU.

63. The SHA states that '[r]ecent domestic and European judgments have demonstrated that the legacy inquest process is not providing access to a sufficiently effective investigation within an acceptable timeframe.'¹³⁸ The SHA will maintain coronial legacy inquests 'as a separate process to the HIU',¹³⁹ and 'improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements.'¹⁴⁰

64. The Northern Ireland High Court also noted in January 2014 that:

'If the existing legacy inquests are to be brought to a conclusion under the present system someone could easily be hearing some of these cases in 2040.'¹⁴¹

65. The Council of Europe Committee of Ministers noted in June 2014 that:

'the excessive delay in inquest proceedings' and invited the UK 'to provide information on any timetable or concrete steps planned for [the announced review of Northern Ireland coronial law]'.¹⁴²

66. The Northern Ireland Court of Appeal noted in October 2014 that:

'Despite the unsatisfactory nature of the present coronial system no material step has been taken to address this lamentable state of affairs and there is no realistic prospect of the Assembly legislating to resolve this situation before the expiry of its present mandate in

¹³⁶ See *Jordan v. The United Kingdom*, Application No. 24746/94, 04 August 2001, para 106-9

¹³⁷ Stormont House Agreement, Financial Annex, 2014, p2

¹³⁸ Stormont House Agreement, 2014, para 31

¹³⁹ Stormont House Agreement, 2014, para 31

¹⁴⁰ Stormont House Agreement, 2014, para 31

¹⁴¹ In *The Matter of Three Applications by Hugh Jordan for Judicial Review*, Jordan's Applications 13/002996/1; 13/002223/1; 13/037869/1 [2014] NICA, para 122

¹⁴² See the McKerr Group of Cases, Council of Europe, Committee of Ministers, Cases No. 25, 1201st meeting – 5 June 2014, para 5

May 2016. In those circumstances it may well be close to 2020 before appropriate legislation which reflects the impact of the ECHR is put in place.¹⁴³

67. In May 2015 the Northern Ireland Minister of Justice took action to assign judges 'to take responsibility for some of the legacy inquests'¹⁴⁴
68. The Northern Ireland Minister of Justice has indicated that the SHA proposal for the HIU will take until the autumn of 2016 to fully implement.¹⁴⁵ Interim investigations into Troubles' related deaths will in the meantime be carried out by the Legacy Investigations Branch of the PSNI. The UK House of Parliament, Joint Committee on Human Rights, has stated that '[a]s well as having fewer resources at its disposal than its predecessor, the Legacy Investigations Branch cannot itself satisfy the requirements of Article 2 ECHR because of its lack of independence from the police service.'¹⁴⁶ The UK has failed to implement ECtHR judgments stipulating measures to achieve an effective investigation into 'Troubles-related' deaths since 2001,¹⁴⁷ and this failure is itself resulting in new findings of violations against the UK.¹⁴⁸ The NIHRC has regularly raised concerns over these procedural violations of ECHR, Articles 2 and 3.¹⁴⁹ Further delays in providing effective investigations means the UK's shortcomings constitute an ongoing violation of the procedural limb of ECHR, Articles 2 and 3.
69. The SHA states that '[i]n order to ensure expeditious investigations, the HIU should aim to complete its work within five years of its establishment.'¹⁵⁰ Given the number of outstanding cases and the limited progress to date, the UK Parliament Joint Committee on Human Rights has noted that 'the arbitrary limit of 5 years for the life of the HIU is not necessarily consistent with Art 2 ECHR as investigation of the hundreds of outstanding cases may well take longer than the 5

¹⁴³ In *The Matter of Three Applications by Hugh Jordan for Judicial Review*, Jordan's Applications 13/002996/1; 13/002223/1; 13/037869/1 [2014] NICA, para 119

¹⁴⁴ Northern Ireland Assembly, Official Report (Hansard), Monday 18 May 2015, Volume 104, No 7, p35 available at <http://data.niassembly.gov.uk/HansardXml/plenary-18-05-2015.pdf> <last accessed 03/09/15>

¹⁴⁵ Northern Ireland Assembly, Official Report (Hansard), Monday 18 May 2015, Volume 104, No 7, p34, available at <http://data.niassembly.gov.uk/HansardXml/plenary-18-05-2015.pdf> <last accessed 03/09/15>

¹⁴⁶ House of Lords, House of Commons, Joint Committee on Human Rights, Human Rights Judgments, Seventh Report of Session 2014-15, HL Paper 130, HC 1088, 11 March 2015

¹⁴⁷ See the McKerr Group of Cases, Council of Europe, Committee of Ministers, Cases No. 25, 1201st meeting – 5 June 2014, Cases against the United Kingdom

¹⁴⁸ See *Hemsworth v. The United Kingdom*, Application No. 58559/09, 16 October 2013

¹⁴⁹ NIHRC, Submission on CAT, 2013, paras 8.6-8.12; NIHRC, Submission on ICCPR, 2015, para 6.5-6.9

¹⁵⁰ Stormont House Agreement, 2014, para 40

years allocated.¹⁵¹ However the obligation to investigate exists independently from a body designed to meet the obligation. The termination of the HIU after five years will not result in the closure of cases and does not affect human rights obligations requiring an effective investigation under ECHR, Article 2, in unresolved cases and in cases where new evidence arises.

70. To ensure the SHA complies with human rights obligations the implementation of the HIU should take into account the following:

- **What is meant by 'victim-centred' with regard to the ECtHR and UN approaches (para 47-49);**
- **The need to secure the participation victims and the next-of-kin in an investigation (para 47 and 50-51);**
- **Recognition of the obligations which arise under ECHR, Article 3 (para 52-54);**
- **The timeframe for the HIU to operate within (para 55);**
- **The source of casework (addressing the ability for cases to be transferred by the PSNI and ability to reopen all cases where the investigatory process was flawed) (para 56-59);**
- **Disclosure and the national security limitation (para 60-62);**
- **How the HIU will receive information from PONI and the PSNI (para 62);**
- **The coronial system meeting human rights obligations (para 63-67); and**
- **The timeliness in establishing the HIU to meet ECHR, Articles 2 and 3, procedural obligations (para 68).**

Independent Commission on Information Retrieval (ICIR)

71. The ICIR is to be established by the 'UK and Irish Governments' to 'enable victims and survivors to seek and privately receive information about the (Troubles-related) deaths of their next of kin.'¹⁵²

72. The right to the truth can be fulfilled outside the realm of the criminal justice process.¹⁵³ The right to the truth is a customary

¹⁵¹ Further see House of Lords, House of Commons, Joint Committee on Human Rights, Human Rights Judgments, Seventh Report of Session 2014-15, HL Paper 130, HC 1088, 11 March 2015, para 3.7

¹⁵² Stormont House Agreement, 2014, para 41

¹⁵³ UN Commission on Human Rights, Promotion and Protection of Human Rights, Impunity, Report of the Independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc.

international law,¹⁵⁴ which contains both an individual and collective right. The individual has the right to know what happened to him/her or their family member, and 'society as a whole has both a right to know and a responsibility to remember.'¹⁵⁵ The right to the truth includes knowing the 'full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.'¹⁵⁶ The right to the historical truth has been highlighted by the ECtHR, emphasising 'the efforts that every country must make to debate its own history openly and dispassionately'.¹⁵⁷ Victims' rights include the right to a remedy which itself contains satisfaction.¹⁵⁸ Satisfaction includes the 'public disclosure of the truth'.¹⁵⁹

73. The ICIR will enable victims and survivors to seek and privately receive information about the (Troubles-related) death of their next of kin.¹⁶⁰ The ICIR will contribute evidence to the report on patterns and themes. There may be a need to address further whether or not the ICIR will itself make the information public at a later stage. In addition, once the information has been privately received by the next-of-kin, those individuals receiving this information may seek to make it public.

E/CN.4/2005/102/Add.1 (2005), Principle 4; UN Office of the High Commissioner for Human Rights, Rule-of-law Tools for Post-conflict States, Truth commissions, 2006, p5
¹⁵⁴ UN Commission on Human Rights, Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration, of Justice, Impunity, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy UN Doc. E/CN.4/2006/52 (2006), para 23

¹⁵⁵ UN GA Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Right to the truth UN Doc. A/HRC/12/19 (2009) para 5; Also see Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Human Rights Council, Human Rights and Transitional Justice UN Doc. A/HRC/RES/12/12 (2009), p3; Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91 (2006) para 58

¹⁵⁶ Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91 (2006) para 59

¹⁵⁷ *Monnat v. Switzerland*, Application No. 73604/01, 21 December 2006, para 64

¹⁵⁸ UN GA, 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, UN Doc. A/RES/60/147 (2006), para 18, and UN Commission on Human Rights, Promotion and Protection of Human Rights, Impunity, Report of the Independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1 (2005), Principle 34 and 35, although guarantees of non-repetition are addressed separately to Reparation

¹⁵⁹ UN GA, 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, UN Doc. A/RES/60/147 (2006), para 22

¹⁶⁰ Stormont House Agreement, 2014, para 41

The public release of the truth is an obligation contained within the collective right of society to the truth, the historical truth, and the right to a remedy.

74. The ICIR will provide information on situations which resulted in a death.¹⁶¹ Information on violations and abuses on other matters, including enforced disappearances and torture or cruel, inhuman or degrading treatment or punishment may not be collected or released in the first place.¹⁶² The implementation measures need to address what will happen to the information gathered after the five year timeframe, which may engage further human rights.
75. The SHA provides that '[t]he ICIR's remit will cover both jurisdictions [UK and Ireland] and will have the same functions in each. It will be entirely separate from the justice system. The ICIR will also be free to seek information from other jurisdictions, and both governments undertake to support such requests.'¹⁶³
76. The SHA states that '[t]he ICIR will be held accountable to the principles of independence, rigour, fairness and balance, transparency and proportionality.'¹⁶⁴ The SHA also states that '[t]he ICIR will be given the immunities and privileges of an international body',¹⁶⁵ and 'would not be subject to judicial review, Freedom of Information, Data Protection and National Archives legislation, in either jurisdiction.'¹⁶⁶ An exemption from the Freedom of Information Act 2000 means the ICIR would not be under an obligation to publically release any information. On the other hand, personal data would not be protected under the Data Protection Act 1998. There is a need to address the storage of personal data, which raises questions for the UK were they to create the ICIR outside the provisions contained within Convention 108 and the European Data Protection Directive. It appears that the UK Information Commissioner would not have an oversight function in relation to the ICIR, which combined with an exemption on judicial review, means there would be no oversight body, and a corresponding lack of accountability.
77. The SHA provides the ICIR with the power to limit or redact the information before it is received by individuals, stating that '[t]he ICIR will not disclose the identities of people who provide information.'¹⁶⁷ If the information to be released contained details which could put the

¹⁶¹ Stormont House Agreement, 2014, para 41

¹⁶² See previous footnote 134 on the definition of an enforced disappearance

¹⁶³ Stormont House Agreement, 2014, para 45

¹⁶⁴ Stormont House Agreement, 2014, para 50. Also see the overarching principles contained within para 21.

¹⁶⁵ Stormont House Agreement, 2014, para 47

¹⁶⁶ Stormont House Agreement, 2014, para 47

¹⁶⁷ Stormont House Agreement, 2014, para 49

life of an individual in danger, state obligations under ECHR, Article 2, the right to life, would be engaged to prevent the its release in a form which could cause such a risk. However CFR, Article 7(2), provides that '[e]veryone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.' Following assessment, access to the truth (through the right to the truth and the historical truth) and to personal data may be limited to protect individuals from potential violations or abuses of the right to life, the prohibition on torture or cruel, inhuman or degrading treatment or punishment, and the right to privacy, which could arise from the release of the unfettered truth.

78. The SHA provides that '[t]he ICIR will not disclose information provided to it to law enforcement or intelligence agencies and this information will be inadmissible in criminal and civil proceedings. These facts will be made clear to those seeking to access information through the body.'¹⁶⁸

79. There will also be an obligation on how the ICIR satisfies the veracity of information received before transferring it to victims, the IRG, or possibly to the public. Information may be provided to the ICIR in good or bad faith.¹⁶⁹ This may require a procedure to establish the veracity of the information provided to mitigate the potentially harmful impact on those receiving the information. The right to the truth is premised on 'the truth', and providing incorrect information presented as the truth may therefore violate this right. The provision of information later found to be untrue or inaccurate could cause secondary victimisation, although highlighting the limitations in sharing information from a third party, the truth of which could not be fully verified, would go some way to mitigating this. The provision of information later found to be untrue which did not go through a process to establish the veracity of the information shared could, in the most extreme circumstances, constitute a violation of human rights law if the anguish caused met the threshold of mental suffering under the prohibition on torture or cruel, inhuman or degrading treatment or punishment. Mental suffering, as protected by ECHR, Article 3, 'is caused by "creating a state of anguish and stress by means other than bodily assault".'¹⁷⁰

80. The SHA provides that '[i]ndividuals from both the UK and Ireland will be able to seek information from the ICIR.'¹⁷¹ The implementation

¹⁶⁸ Stormont House Agreement, 2014, para 46. See Human Rights Appendix I on Victims' Rights, specifically Access to Justice, p32, 35-36

¹⁶⁹ UN GA 'Cultural Rights, Note by the Secretary-General' UN Doc. A/68/296 (2013), para 6

¹⁷⁰ *Iljina and Sarulienė v. Lithuania*, Application No. 32293/05, 15 June 2011, para 47

¹⁷¹ Stormont House Agreement, 2014, para 42

process should clarify whether this term only includes those geographically located in the UK and/or Ireland when they apply to the ICIR, or whether it includes victims who may currently live elsewhere.

81. Notable conflict-related events occurred outside the UK and Ireland, which created victims across the world.¹⁷² The implementation process should consider a definition which is inclusive of all victims, as the Victims and Survivors (Northern Ireland) Order 2006 does not contain a geographical limitation on the definition of victim.
82. The SHA provides that '[o]nce established, the body will run for no longer than 5 years.'¹⁷³ There is no human rights requirement for a time limited mandate. The right to the truth means that '[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.'¹⁷⁴ The ECtHR recognises the right to the historical truth and notes 'the efforts that every country must make to debate its own history openly and dispassionately'.¹⁷⁵ Such a right, and the corresponding obligation, only strengthen with the passage of time so the repeat of events like the 'Troubles' can be avoided. The right to a remedy contains, under reparations, a public disclosure of the truth,¹⁷⁶ and guarantees of non-repetition.¹⁷⁷ Human rights obligations in relation to the right to the truth will continue to exist after the ICIR's five year mandate expires.

¹⁷² Including the Australians killed in the Netherlands on 27 May 1990

¹⁷³ Stormont House Agreement, 2014, para 43

¹⁷⁴ UN Commission on Human Rights, Promotion and Protection of Human Rights, Impunity, Report of the Independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1 (2005) Principle 2

¹⁷⁵ Monnat v. Switzerland, Application No. 73604/01, 21 December 2006, para 64

¹⁷⁶ UN GA, 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, UN Doc. A/RES/60/147 (2006), para 22

¹⁷⁷ UN GA, 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, UN Doc. A/RES/60/147 (2006) and the Guidelines of the Committee of Ministers of the Council of Europe, Principle 18, and see UN Commission on Human Rights, Promotion and Protection of Human Rights, Impunity, Report of the Independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1 (2005), Principle 34, and The Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, Part XVI; UN Committee against Torture, General Comment 3: Implementation of article 14 by States parties (2012) UN Doc. CAT/C/GC/3, para 2; Article 19 of The Declaration on Enforced Disappearance; The European Convention on the Compensation of Victims of Violent Crimes Article 1;; United Nations Human Rights Committee, General Comment 31 on

83. The SHA provides that ' [a]ny potential evidence base for patterns and themes should be referred to the IRG from any of the legacy mechanisms',¹⁷⁸ and could consequently help fulfil the right to the truth after the ICIR's role comes to a close. The obligations under the right to the truth will still exist when the ICIR's mandate ends.
84. The SHA states that '[t]he ICIR will not disclose the identities of people who provide information. No individual who provides information to the body will be immune from prosecution for any crime committed should the required evidential test be satisfied by other means.'¹⁷⁹ Similar measures were provided for in the Northern Ireland Arms Decommissioning Act 1997 and the Northern Ireland (Location of Victims' Remains) Act 1999. There is a need for the implementation process to decide on how individuals will provide information, and whether groups, organisations, and communities will be able to provide information.
85. **To ensure the SHA complies with human rights obligations the implementation of the ICIR should take into account the following:**
- **What will happen to the information once it is provided to an applicant (para 73);**
 - **Whether information on incidents which did not result in death will be collected and/or released (para 74);**
 - **What will happen to the information once the 5 year mandate ends (para 74);**
 - **Accountability measures (para 76);**
 - **Limiting or redaction of information (para 77);**
 - **The need to clarify how the veracity of the information will be investigated (para 79);**
 - **The eligibility of individuals outside, or not from, the UK and Ireland to apply to the body for information (para 80-81); and**
 - **Whether (in addition to individuals) groups, organisations, and communities will be able to provide information (para 84).**

Implementation and Reconciliation Group

86. The SHA provides that '[a]n Implementation and Reconciliation Group (IRG) will be established to oversee themes, archives and

The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (2004) CCPR/C/21/Rev.1/Add. 13, para 16

¹⁷⁸ Stormont House Agreement, 2014, para 51

¹⁷⁹ Stormont House Agreement, 2014, para 49

information recovery. After 5 years a report on themes will be commissioned by the IRG from independent academic experts. Any potential evidence base for patterns and themes should be referred to the IRG from any of the legacy mechanisms, who may comment on the level of co-operation received, for the IRG's analysis and assessment. This process should be conducted with sensitivity and rigorous intellectual integrity, devoid of any political interference.¹⁸⁰

87. The IRG contains two distinct functions: a scrutiny role, and a research role. In its scrutiny role, it is to oversee processes rather than bodies. The implementation process should clarify the relationships between the IRG and both the ICIR and HIU, and how the IRG will engage with information held by these bodies. The implementation process should clarify the relationship between the IRG and the OHA, which will both have research functions.¹⁸¹

88. The right to the truth includes knowing the 'full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.'¹⁸² Preparing a report on themes and patterns can contribute to a greater understanding of what happened and why, and can help to prevent ongoing and future violations and abuses.¹⁸³

89. The SHA provides that '[i]n the context of the work of the IRG, the UK and Irish Governments will consider statements of acknowledgement and would expect others to do the same.'¹⁸⁴ Public apologies form an important part of satisfaction within the right to a remedy.¹⁸⁵ Providing a remedy to victims of human rights violations and abuses by state and non-state actors can be assisted through processes of acknowledging and apologising. Apologies are an important element contained within victims' rights, but alone are not enough to satisfy human rights obligations. Acknowledgements could also take the form of truth-telling, meeting a human rights-based approach as part of measures to fulfil the right to the truth, the historical truth, and to a remedy.¹⁸⁶

¹⁸⁰ Stormont House Agreement, 2014, para 51

¹⁸¹ Stormont House Agreement, 2014, para 25

¹⁸² Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91 (2006) para 59

¹⁸³ See Non-repetition, Human Rights Appendix I, p34

¹⁸⁴ Stormont House Agreement, 2014, para 53

¹⁸⁵ UN Commission on Human Rights, Promotion and Protection of Human Rights, Impunity, Report of the Independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1 (2005), para 48

¹⁸⁶ See Human Rights Appendix I, p26-35,

90. The SHA also requires that '[a]ny potential evidence base for patterns and themes should be referred to the IRG from any of the legacy mechanisms'.¹⁸⁷ The implementation process should clarify that the ICIR is not restricted to providing evidence solely to victims and survivors about the deaths of the next-of-kin, and can provide evidence to the IRG.¹⁸⁸ In addition, unlike the ICIR, which is clearly established as an international body, the IRG is not established in a similar manner. Consequently the IRG could be subject to domestic legislation such as the Freedom of Information Act 1998, and judicial review, which is pertinent if the IRG is accessing information held by the ICIR.
91. The SHA states that '[p]romoting reconciliation will underlie all of the work of the IRG. It will encourage and support other initiatives that contribute to reconciliation, better understanding of the past and reducing sectarianism'.¹⁸⁹ Promoting reconciliation is a welcome approach to dealing with 'The Past'.¹⁹⁰
92. The SHA provides that '[t]he UK and Irish Governments recognise that there are outstanding investigations and allegations into Troubles-related incidents, including a number of cross-border incidents. They commit to co-operation with all bodies involved to enable their effective operation, recognising their distinctive functions, and to bring forward legislation where necessary'.¹⁹¹ This paragraph acknowledges outstanding human rights violations and abuses beyond ECHR, Article 2. The obligations for an effective investigation exist under ECHR, Article 3,¹⁹² and other human rights require an investigation on allegations of violations or abuses.¹⁹³ However, as the IRG does not contain an investigatory power there is a need to clarify how these obligations link to the HIU and ICIR.
- 93. To ensure the SHA complies with human rights obligations the implementation of the IRG should take into account the following:**

¹⁸⁷ Stormont House Agreement, 2014, para 51

¹⁸⁸ Stormont House Agreement, 2014, para 41 provides that '[t]he objective of the ICIR will be to enable victims and survivors to seek and privately receive information about the (Troubles-related) deaths of their next of kin.'

¹⁸⁹ Stormont House Agreement, 2014, para 52

¹⁹⁰ UN, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Analytical study on human rights and transitional justice, UN Doc. A/HRC/12/18 (2009)_para 59

¹⁹¹ Stormont House Agreement, 2014, para 55

¹⁹² See Human Rights Appendix I, p6-9

¹⁹³ See Human Rights Appendix I, p6-9

- **Its relationship with other SHA bodies and services and existing bodies dealing with the past (para 87);**
- **How the IRG will receive/seek information from other legacy bodies, including the ICIR (para 90); and**
- **The acknowledgement that there are outstanding investigations and allegations into Troubles-related incidents beyond ECHR, Article 2 (para 92).**

Human Rights Engaged by the Stormont House Agreement

Appendix I

- The right to life
- The prohibition on torture or cruel, inhuman or degrading treatment or punishment
- The right to liberty and security
- The right to private and family life
- Freedom of expression (including the right to the historical truth)
- The right to private and family life (in relation to defamation and personal information)
- The right to the protection of personal data
- Victims' Rights
 - The right to the truth
 - The right to a remedy (the right to reparations, the right to redress)
 - Access to justice
- The right to culture
- The right to health
- Human rights and good governance
- The extra-territorial application of human rights obligations

The right to life

The ICCPR, Article 6(1) states:

'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

The ECHR, Article 2 states:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

A state must 'not only ... refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction'.¹⁹⁴ Violations occur when public authorities do not meet this positive obligation and do 'all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.'¹⁹⁵

A state must protect an individual from 'a real and immediate risk to life of which they have or ought to have knowledge.'¹⁹⁶

The Charter of Fundamental Rights of the European Union (CFR), Article 2(1), further states:

'Everyone has the right to life.'

The prohibition on torture or cruel, inhuman or degrading treatment or punishment

The prohibition on torture or cruel, inhuman or degrading treatment or punishment is codified in a number of international documents and is universally accepted as a *jus cogen*.¹⁹⁷

The ICCPR, Article 7 states:

¹⁹⁴ L.C.B. v. The United Kingdom, Application No. 14/1997/798/1001, 9 June 1998, para 36

¹⁹⁵ Osman v. The United Kingdom, Application No. 87/1997/871/1083, 28 October 1998. ECHR, Article 2 'covers not only intentional killing but also situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life.' See Ciorcan and Others v. Romania, Application Nos. 29414/09 and 44841/09, 27 January 2015, para 97. Consequently situations which do not result in a death may be subject to ECHR, Article 2, although the ECtHR has highlighted that 'it is only in exceptional circumstances that physical ill-treatment by State agents which does not result in death may [result in] a violation of Article 2'. See Ciorcan and Others v. Romania, Application Nos. 29414/09 and 44841/09, 27 January 2015, para 98; also see Kitanovski v. The Former Yugoslav Republic of Macedonia, Application No. 15191/12, 22 January 2015, para 52

¹⁹⁶ Osman v. The United Kingdom (Application No. 87/1997/871/1083) 28 October 1998, para 116

¹⁹⁷ A *jus cogen* is a fundamental, overriding principle of international law, from which no derogation is ever permitted. (See https://www.law.cornell.edu/wex/jus_cogens <last accessed 03/09/15>). UN Committee Against Torture, General Comment No. 2, Implementation of article 2 by States parties 2008 UN Doc. CAT/C/GC/2, para 1; also see the House of Lords Judgment in R v. Bow Street Metropolitan Stipendiary Magistrate and others, Ex Parte Pinochet Ugarte (No. 3) [2000] 1 AC 147 where there was no dispute over the inclusion of torture as a peremptory norm in international law. Further see Prosecutor v. Furundžija, Case No. IT-95-17/1 - ICTY (1998) para 153-157, which are quoted in A(FC) and others (FC) v. Secretary of State [2005] UKHL 71, para 33. In the following paragraph 34 Lord Bingham of Cornhill states 'As appears from the passage just cited, the jus cogens erga omnes nature of the prohibition of torture requires member states to do more than eschew the practice of torture.'

‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’

The CAT requires ‘that all acts of torture are offences under its criminal law’ which should be ‘punishable by appropriate penalties’.¹⁹⁸

The ECHR, Article 3, and CFR, Article 4, state:

‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

The right to liberty and security

The ICCPR, Article 9, states:

1. ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.’

The UN Human Rights Committee has noted that ‘[t]he right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained.’¹⁹⁹ There is some overlap with the right to life, ICCPR, Article

¹⁹⁸ Article 4

¹⁹⁹ UN Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 (2014) para 9; also see UN Human Rights Committee, William Eduardo Delgado Páez v. Colombia, Communication No. 195/1985, UN Doc. CCPR/C/39D/195/1985 (1990) para 5.5 UN Human Rights Committee, Carlos Dias v. Angola, Communication No. 711/1996, UN Doc. CCPR/C/68/D/711/1996 (2000)

6,²⁰⁰ but protection under the right to liberty and security, ICCPR, Article 9, 'may be considered broader to the extent that it also addresses injuries that are not life-threatening.'²⁰¹ The UN Human Rights Committee notes States must 'take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors.'²⁰² Threats need not be direct messages as such, but can be much more general in nature, and arise from factors present in a state, including patterns of violence.²⁰³ Furthermore, states 'must take both measures to prevent future injury and retrospective measures, such as enforcement of criminal laws, in response to past injury.'²⁰⁴

The ECHR, Article 5, states:

1. 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;
 - b. the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against

para 8.3; UN Human Rights Committee, *Rodger Chongwe v. Zambia*, Communication No. 821/1998, UN Doc. CCPR/C/70/D/821/1998 (2000) para 5.3

²⁰⁰ UN Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 (2014) para 55

²⁰¹ UN Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 (2014) para 55

²⁰² UN Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 (2014) para 9

²⁰³ UN Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 (2014) para 9

²⁰⁴ UN Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 (2014) para 9

whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'

CFR, Article 6, further states:

'Everyone has the right to liberty and security of person.'

The right to private and family life

The ICCPR, Article 17, states:

- a) 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- b) Everyone has the right to the protection of the law against such interference or attacks.'

The ECHR, Article 8, states:

- 1) 'Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The right to a private and family life includes the right to physical, moral, and psychological integrity of a person.²⁰⁵ The ECtHR has stated that ‘treatment which does not reach the severity of [ECHR] Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity’.²⁰⁶

ECHR, Article 8 includes positive obligations which ‘may involve the adoption of measures even in the sphere of the relations of individuals between themselves.’²⁰⁷

CFR, Article 7, further states:

‘Everyone has the right to respect for his or her private and 25 family life, home and communications.’

Procedural obligations

In addition to the substantive right to life and the prohibition on torture, human rights law requires that allegations of violations or abuses of this nature are investigated. This is often referred to as the procedural limb of the right. A failure to conduct a compliant investigation can lead to a violation. The UN Human Rights Committee has highlighted the ‘general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.’²⁰⁸ The CAT requires a ‘prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed’,²⁰⁹ and the UN Principles on the Effective Prevention and Investigation on Extra-legal, Arbitrary and Summary Executions requires a ‘thorough, prompt and impartial investigation’ in all cases where complaints are made suggesting an unnatural death.²¹⁰ The UN Human Rights Committee has found that the failure to initiate an independent

²⁰⁵ *Botta v. Italy*, Application No. 153/1996/772/973, 24 February 1998, para 32; *Costello-Roberts v. The United Kingdom*, Application No. 13134/87, 25 March 1993, para 34; *Bensaid v. The United Kingdom*, Application No. 44599/98, 6 May 2001, para 46

²⁰⁶ See *Bensaid v. The United Kingdom*, Application No. 44599/98, 6 May 2001, paras 46-47; *Storck v. Germany*, Application No. 61603/00, 16 September 2005, para 143

²⁰⁷ *Szula v. The United Kingdom*, Application No. 18727/06, 4 January 2007, The Law Section, para 1

²⁰⁸ Human Rights Committee, General Comment 31, Nature of the General Legal Obligations on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 15; Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 6 (1994), para 4

²⁰⁹ CAT, Article 12

²¹⁰ Principles on the Effective Prevention and Investigation on Extra-legal, Arbitrary and Summary Executions (1989) U.N. Doc. E/1989/8, Principle 9

investigation into allegations of threats to life or bodily integrity constitutes a violation of ICCPR, Article 9(1).²¹¹

ECHR, Article 13 includes a general procedural obligation to provide an 'effective remedy'. In addition, the ECtHR has articulated, in relation to ECHR, Articles 2 and 3, that 'an "effective remedy" entails, 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'.²¹²

The ECtHR requires that such an investigation must include the following essential elements:

1. the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence'.²¹³
2. an investigation 'should be capable of leading to the identification and punishment of those responsible',²¹⁴ and as a result States 'must have taken the reasonable steps available to them to secure the evidence concerning the incident';²¹⁵
3. '[a] requirement of promptness and reasonable expedition is implicit',²¹⁶
4. 'there must be a sufficient element of public scrutiny of the investigation or its results';²¹⁷
5. 'the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests',²¹⁸

²¹¹ UN Human Rights Committee, *Rodger Chongwe v. Zambia*, Communication No. 821/1998, UN Doc. CCPR/C/70/D/821/1998 (2000) para 5.3; UN Human Rights Committee, *Jayawardena v. Sri Lanka*, Communication No. 916/2000, UN Doc. A/57/40 at 234 (2002) para 7.3; UN Human Rights Committee, *Rajapakse v. Sri Lanka*, Communication No. 1250/2004, UN Doc. CCPR/C/87/D/1250/2004 (2006) para 9.7; UN Human Rights Commission, *Njaru v. Cameroon*, Communication No. 1353/2005, UN Doc. CCPR/C/89/D/1353/2005 (2007) para 6.3; UN Human Rights Committee, *Gunaratna v. Sri Lanka*, Communication No. 1432/2005, UN Doc. CCPR/C/95/D/1432/2005 (2009) para 8.4;

²¹² *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, para 98; *McCann v. the United Kingdom* Application No. 18984/91, 27 September 1995, para 161

²¹³ *Jordan v. The United Kingdom*, Application No. 24746/94, 04 August 2001, para 106; in respect of torture see *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39690/09, 13 December 2012, para 184

²¹⁴ *Jordan v. The United Kingdom*, Application No. 24746/94, 04 August 2001, para 107

²¹⁵ *Jordan v. The United Kingdom*, Application No. 24746/94, 04 August 2001, para 107; *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, para 98; *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39690/09, 13 December 2012, para 182-3

²¹⁶ *Jordan v. The United Kingdom*, Application No. 24746/94, 04 August 2001, para 108

²¹⁷ *Jordan v. The United Kingdom*, Application No. 24746/94, 04 August 2001, para 109

²¹⁸ *Jordan v. the United Kingdom*, Application No. 24746/94, 4 August 2011, para 109

Although the above principles were established in ECHR, Article 2, right to life cases, the ECtHR has confirmed that these essential elements of an investigation also apply to cases under ECHR, Article 3.²¹⁹

In relation to ECHR, Article 2, the ECtHR has stated that the form of the investigation 'may vary in different circumstances' as the responsibility for the form lies with the State.²²⁰ The ECtHR has noted that 'whatever form the investigation takes, the available legal remedies, taken together, must amount to legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress.'²²¹ The fact that an investigation may end 'without concrete, or with only limited, results is not indicative of any failings as such.'²²²

The ECtHR has also stated that '[i]t cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Nonetheless, given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further.'²²³ The ECtHR further provides 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.'²²⁴

The ECtHR has stated, with regards to both ECHR, Articles 2 and 3, that whichever mode of investigation is employed 'the authorities must act of their own motion'.²²⁵ It has been clarified that the obligation to investigate is one of means and not of result,²²⁶ and that 'there is no

²¹⁹ Assenov and Others v. Bulgaria, Application No. 90/1997/874/1086, 28 October 1998, para 102

²²⁰ McShane v. The United Kingdom, Application No. 43290/98, 28 May 2002 para 94 and Jordan v. The United Kingdom, para 105

²²¹ Ciobanu v. The Republic of Moldova, Application No. 62578/09, 24 February 2015, para 33

²²² Brecknell v. The United Kingdom, Application No. 32457/04, 27 February 2008 para 66. Also see McCartney v. The United Kingdom, Application No. 34575/04, 27 February 2008; McGrath v. The United Kingdom, Application No. 34651/04, 27 February 2008; O'Dowd v. The United Kingdom, Application No. 34622/04, 27 February 2008; Reavey v. The United Kingdom Application No. 34640/04, 27 February 2008.

²²³ Brecknell v. The United Kingdom, Application No. 32457/04, 27 February 2008, para 70

²²⁴ Brecknell v. The United Kingdom, Application No. 32457/04, 27 February 2008, para 71

²²⁵ Finucane v. The United Kingdom, Application No. 29178/95, 01 October 2003, para 67; Mocanu and Others v. Romania, Application Nos. 10865/09, 45886/07 and 32431/08, 17 September 2014, para 321

²²⁶ Avsar v. Turkey, Application No. 25657/94, 10 July 2001 para 394; Mocanu and Others v. Romania, Application Nos. 10865/09, 45886/07 and 32431/08, 17 September 2014, para 321

absolute right to obtain the prosecution or conviction of any particular person.²²⁷

The ECtHR has ruled that an effective investigation must be capable of 'establishing the truth.'²²⁸ The ECtHR has noted that when 'the authorities have not assisted the applicant in her search for the truth about the whereabouts of [a missing relative], which has led it to find a breach of Articles 3 and 13 in her respect, the Court considers that an award of compensation is also justified in [the applicant's] favour'.²²⁹ The ECtHR has also found 'a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of ... missing persons who disappeared in life-threatening circumstances.'²³⁰

The interplay between the procedural element of the ECHR, Article 2 and Article 3 is such that the ECtHR has made it clear that it often 'does not deem it necessary to make a separate finding under Article 3 in respect of the alleged deficiencies of the investigation, since it examines this aspect under the procedural aspect of Article 2 ... and under Article 13'.²³¹

The right to a family life under ECHR, Article 8 does not contain an investigative procedural obligation similar to ECHR, Articles 2 and 3. However, ECHR, Article 13 still requires an effective remedy. In addition, the ECtHR has noted that it 'has not excluded the possibility that the 'positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation'.²³²

Freedom of expression

ICCPR, Article 19, provides:

1. 'Everyone shall have the right to hold opinions without interference.

²²⁷ Szula v. The United Kingdom, Application No. 18727/06, 4 January 2007, see Section 1, The Law; Brecknall, para 66

²²⁸ El-Masri v. The Former Yugoslav Republic of Macedonia, Application No. 39690/09, 13 December 2012, para 193

²²⁹ Kurt v. Turkey, Application No. 15/1997/799/1002, 25 May 1998, para 175

²³⁰ Cyprus v. Turkey, Application No. 25781/94, 10 May 2001, para 136; also see Aslakhanova and Others v Russia, Application Nos. 2944/06, and 8300/07, 50184/07, 332/08, 42509/10, 29 April 2013, para 122.

²³¹ Bazorkina v. Russia, para 136, and see Janowiec, para 179; Indeed in the case of Mocanu and Others v. Romania, Application Nos. 10865/09, 45886/07 and 32431/08, 17 September 2014, paras 314-326 and Kitanovski v. The Former Yugoslav Republic of Macedonia, Application No. 15191/12, 22 January 2015 paras 83-86, the ECtHR jointly considered the procedural obligations of ECHR, Articles 2 and 3; also see Alecu and Others v. Romania, Application No. 56838/08, 27 January 2015, para 36,

²³² Szula v. The United Kingdom, Application No. 18727/06, 4 January 2007, The Law Section, para 1

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a. For respect of the rights or reputations of others;
 - b. For the protection of national security or of public order (ordre public), or of public health or morals.'

Any limitation of ICCPR, Article 19, must respect ICCPR, Article 5(1), which provides that:

'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.'

The UN Human Rights Committee has noted that 'other articles that contain guarantees for freedom of opinion and/or expression, are [ICCPR] articles 18, 17, 25 and 27.'²³³ The UN Human Rights Committee has clarified that ICCPR, Article 19(2), 'includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others',²³⁴ and 'protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression.'²³⁵

The UN Human Rights Committee provides that ICCPR, 'Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies are as indicated in paragraph 7 of this general comment. The designation of such bodies may also include other entities when such entities are carrying out public functions.'²³⁶

²³³ UN Human Rights Committee, General Comment No. 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) para 4

²³⁴ UN Human Rights Committee, General Comment No. 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) para 11

²³⁵ UN Human Rights Committee, General Comment No. 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) para 12

²³⁶ UN Human Rights Committee, General Comment No. 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) para 18. Paragraph 7 reads:

The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has clarified that a restriction under ICCPR, Article 19(3), must be '[p]rovided by law, which is clear, unambiguous, precisely worded and accessible to everyone', '[p]roven by the State as necessary and legitimate to protect the rights or reputation of others; national security or public order, public health or morals', and '[p]roven by the State as the least restrictive and proportionate means to achieve the purported aim'.²³⁷ The UN Human Rights Committee notes that to be necessary and proportional, a state 'must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.'²³⁸ The UN Special Rapporteur provides '[i]n addition, any restriction imposed must be applied by a body that is independent of political, commercial or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the right of access to an independent court or tribunal.'²³⁹ The UN Human Rights Committee has stated that 'the scope of [ICCPR, Article 19] paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with provisions of [ICCPR] article 19, paragraph 3 and article 20.'²⁴⁰

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 4,²⁴¹ obliges states:

'The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities. The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.' For public functions in Northern Ireland, see the Human Rights Act 1998, Section 6 and Human Rights Act 1998 (Meaning of Public Function) Bill

²³⁷ UN GA, Promotion and protection of the right to freedom of opinion and expression, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/67/357 (2012) para 41

²³⁸ UN Human Rights Committee, General Comment No. 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) para 35

²³⁹ UN GA, Promotion and protection of the right to freedom of opinion and expression, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/67/357 (2012) para 42

²⁴⁰ UN Human Rights Committee, General Comment No. 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) para 11

²⁴¹ The UK entered a declaration on CERD, Article 4, stating 'the United Kingdom wishes to state its understanding of certain articles in the Convention. It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only in so far as it may

'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof'.

ICCPR, Article 20(2) states:

1. 'Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'²⁴²

The UN Human Rights Committee has stated that ICCPR 'Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.'²⁴³ The UN Human Rights Committee also provides that '[w]hat distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19.'²⁴⁴

consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4. Further, the United Kingdom interprets the requirement in article 6 concerning 'reparation or satisfaction' as being fulfilled if one or other of these forms of redress is made available and interprets 'satisfaction' as including any form of redress effective to bring the discriminatory conduct to an end. In addition it interprets article 20 and the other related provisions of Part III of the Convention as meaning that if a reservation is not accepted the State making the reservation does not become a Party to the Convention.'

²⁴² The UK entered a declaration on ICCPR, Article 20, stating 'The Government of the United Kingdom interpret article 20 consistently with the rights conferred by articles 19 and 21 of the Covenant and having legislated in matters of practical concern in the interests of public order (ordre public) reserve the right not to introduce any further legislation. The United Kingdom also reserve a similar right in regard to each of its dependent territories.'

²⁴³ UN Human Rights Committee, General Comment No. 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) para 50

²⁴⁴ UN Human Rights Committee, General Comment No. 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) para 51. 'The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more

The Rabat Plan of Action notes that the ICCPR, Article 20, requires a high threshold for the imposition of any limitation because, as a matter of fundamental principle, the limitation of free speech must remain an exception and that incitement to hatred must refer to the most severe and deeply felt form of opprobrium.²⁴⁵ In order to assess the severity of the hatred, the Rabat Plan of Action advises a six-part threshold test similar to the CERD Committee's direction on Article 4, requiring a government to look at the: social and political context; position of the speaker within society; intent as opposed to recklessness; content of the speech; reach of the speech in terms of size of its audience; and, likelihood that the incited act would be committed.²⁴⁶

The CERD Committee recently offered an additional perspective on the relationship between freedom of expression and racist hate speech when it noted that 'racist hate speech potentially silences the free speech of its victims.'²⁴⁷

The Council of Europe has defined hate speech as 'all forms of expressions which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.'²⁴⁸ The Council of Europe has further noted that 'interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria. Moreover, in accordance with the fundamental requirement of the rule of law, any limitation of, or interference with, freedom of expression must be subject to independent judicial control. This requirement is particularly important in cases where freedom of

specific.' UN GA, Report of the International Law Commission, Fifty-eighth session, UN Doc. A/61/10 (2006) para 251

²⁴⁵ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Rabat, Morocco (5 October 2012), paras 18 and 22

²⁴⁶ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Rabat, Morocco (5 October 2012), para 22; See UN Committee on the Elimination of Racial Discrimination, General Recommendation 15, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993) UN Doc. HRI/GEN/1/Rev.6 at 204 (2003); Also see *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981, UN Doc. CCPR/C/OP/2 at 25 (1984) para 8(b) and *L.K. v. The Netherlands*, Communication No. 4/1991, UN Doc. A/48/18 at 131 (1993) para 6.3

²⁴⁷ UN Committee on the Elimination on Racial Discrimination, General Recommendation No. 35, Combating racist hate speech, UN Doc. CERD/C/GC/35 (2013) para 28

²⁴⁸ Council of Europe, Committee of Ministers, Recommendation No. R(97)20, 30 October 1997, Scope

expression must be reconciled with respect for human dignity and the protection of the reputation or the rights of others.²⁴⁹

The ECtHR has stated, in light of tolerance and respect for the equal dignity of all constituting the foundations of a democratic, pluralistic society, that 'it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued'.²⁵⁰

The Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities found, when considering the previously proposed Programme for Cohesion, Sharing and Integration,²⁵¹ that the approach 'to treat sectarianism as a distinct issue rather than as a form of racism problematic, as it allows sectarianism to fall outside the scope of accepted anti-discrimination and human rights protection standards'.²⁵²

ECHR, Article 10, states:

1. 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others [and] for preventing the disclosure of information received in confidence'

Any limitation of ECHR, Article 10, must respect ECHR, Article 17, which states:

²⁴⁹ Council of Europe, Committee of Ministers, Recommendation No. R(97)20, 30 October 1997, Principle 3

²⁵⁰ *Gündüz v. Turkey*, Application No. 35071/97, 14 June 2004, para 40; Also see *Norwood v. The United Kingdom*, Application No. 23131/03, 16 November 2004, ECtHR admissibility decision; and *Jersild v. Denmark*, Application No. 15890/89, 23 September 1994, para 31 and the dissenting opinions

²⁵¹ Northern Ireland Office of the First Minister, and Deputy First Minister, Programme for Cohesion, Sharing and Integration, Consultation Document (2010)

²⁵² The Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on the United Kingdom adopted on 30 June 2011, (2011) Doc. ACFC/OP/III(2011)006 para 126

‘Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’

Alongside the ECHR stands the CFR. CFR, Article 11, provides that:

1. ‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.’

Any limitation of CFR, Article 11, must respect CFR, Article 52, which states:

1. ‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

...

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

The ECtHR has adopted a three part test on the limitation of qualified human rights, which includes ECHR, Article 10. First, the interference must be prescribed in law. Second, the aim of the restriction must be legitimate. Finally, the limitation must be necessary in a democratic society.

The test of ‘necessity in a democratic society’ requires the Court to determine whether the interference corresponds to a ‘pressing social need’ and whether it was ‘proportionate to the legitimate aim pursued.’²⁵³ In examining the legitimacy of the interference with the right to freedom of expression the Court must consider the content and the context of the

²⁵³ See *Wingrove v. The United Kingdom* [1996] ECHR 60 at 53; *Aydin and Ors. V. Turkey*, Application Nos. 49197/06, 23196/07, 50242/08, 60912/08, 14871/09, 2013 p48-49; *Lehideux and Isorni v. France* (1998) 30 EHRR 665, at 51; *Mouvement Raillien Suisse v Switzerland* [2012] ECHR 1598, at 48; *Vejdeland v. Sweden* [2012] ECHR 242, at 51

expression in light of the case as a whole.²⁵⁴ The protection of the rights of others is a legitimate aim, in light of this the ECtHR has noted that ‘it must be accepted that the need to protect [ECHR rights] may lead States to restrict other rights or freedoms likewise set forth in the [ECHR]. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a “democratic society”.’²⁵⁵

In deciding whether an action is necessary in a democratic society, the ECtHR affords the State a margin of appreciation. This margin is flexible depending on the rights at stake and the nature of the issues. In reference to the ‘margin of appreciation’, the ECtHR in *Handyside v. UK* stated, by ‘reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.’²⁵⁶

The margin of appreciation afforded to the State in these circumstances often depends upon the nature of the expression. For example, there is little scope for restriction under ECHR, Article 10(2), in the context of political debate or questions of public interest.²⁵⁷ However, where the statement is gratuitously offensive to an object of veneration or liable to offend intimate personal convictions limits are permissible.²⁵⁸ The obligation on the State to promote tolerance and mutual respect can, therefore, set limits to the free exercise of the freedom of expression.²⁵⁹

The right to private and family life (with a focus on privacy)

ICCPR Article 17 states:

1. ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.’

²⁵⁴ *Lehideux and Isorni v. France* (1998) 30 EHRR 665, at 51; *Mouvement RAILLIEN Suisse v Switzerland* [2012] ECHR 1598, at 69; *Kania and Kittel v. Poland*, No.35105/04, 21 June 2011, at 41

²⁵⁵ *Chassagnou and Others v. France* (2000) 29 EHRR 615, at 113

²⁵⁶ *Handyside v. the United Kingdom*, (1980) 1 EHRR 737, at 48

²⁵⁷ *Brasilier v. France* (2006) No.71343/01, at 41 and *Wingrove v. the United Kingdom* [1996] ECHR 60, at 58

²⁵⁸ *Wingrove v. the United Kingdom* [1996] ECHR 60, at 52, 58

²⁵⁹ Wiater, P, *Intercultural Dialogue in the Framework of European Human Rights Protection*, Council of Europe Publishing, 2010, p. 80

The UN Human Rights Committee has stated that 'Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation.'²⁶⁰ The UN Human Rights Committee has provided that the right contained within ICCPR, Article 17, 'is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons.'²⁶¹

The UN Human Rights Committee has clarified that 'every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public [authorities] or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.'²⁶²

ECHR, Article 8, provides that:

1. 'Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

ECHR, Article 8, is a qualified right, and can be limited, through paragraph 2, in a similar manner to ECHR, Article 10.

The UK House of Parliament Joint Committee on Human Rights has stated '[t]he right to respect for private life in Article 8 ECHR imposes a positive obligation on the State to ensure that its laws provide adequate protection against the unjustified disclosure of personal information.'²⁶³

²⁶⁰ UN Human Rights Committee, General Comment No. 16 (1988), UN Doc. HRI/GEN/Rev.1 at 21 (1994), para 1 and 11

²⁶¹ UN Human Rights Committee, General Comment No. 16 (1988), UN Doc. HRI/GEN/Rev.1 at 21 (1994), para 1

²⁶² UN Human Rights Committee, General Comment No. 16 (1988), UN Doc. HRI/GEN/Rev.1 at 21 (1994), para 10

²⁶³ UK House of Parliament Joint Committee On Human Rights Fourteenth Report, 2 Data protection and the Human Rights Act, para 11, <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/72/7205.htm> <last accessed 03/09/15>

The ECtHR has addressed data protection and human rights in relation to ECHR, Article 8. The ECtHR has stated in relation to medical records that '[t]he protection of personal data, particularly medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention ... The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention'.²⁶⁴ The UK Government Joint Committee on Human Rights has noted '[t]he same comments could be made in respect of personal data of any kind held by any organ of the State.'²⁶⁵ The ECtHR has taken a similar approach in relation to access to other forms of data relating to, social services, national security, judicial authorities, and employment.²⁶⁶

The UK Government Joint Committee on Human Rights has noted that '[t]he obligation to provide personal data, the release of personal data without consent, and the collection and storage of personal data all amount to interferences with an individual's right to respect for his or her privacy. Whether or not such interferences amount to a breach of Article 8 will depend on an assessment of whether the disclosure was "in accordance with the law", necessary in a democratic society for a legitimate aim (in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others), and proportionate. The adequacy of the safeguards in the overall regime is central to this assessment.'²⁶⁷

The ECHR does not explicitly contain a right to reputation. However the ECtHR has stated in an Article 10 case that reputation is 'a right which is protected by Article 8 of the Convention as part of the right to respect for private life.'²⁶⁸ The ECtHR has also noted that 'the Court must verify whether the authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in this type of case, namely, on the one hand, freedom of

²⁶⁴ M.S. v. Sweden, Application No. 74/1996/693/885, 27 August 1997, para 41

²⁶⁵ UK Government, Joint Committee on Human Rights, Fourteenth Report, Data protection and the Human Rights Act, 14 March 2008, para 8

²⁶⁶ See S. and Marper v. The United Kingdom, Application No.s 30562/04 and 30566/04, 4 December 2008; Radu v. The Republic of Moldova, Application No. 50073/07, 15 July 2014; Leander v. Sweden, Leander v. Sweden, Application No. 9248/81, 26 March 1987; Copland v. The United Kingdom, Application No. 62617/00, 03 July 2007; Gillberg v. Sweden, Application No. 41723/06, 3 April 2012

²⁶⁷ UK Government, Joint Committee on Human Rights, Fourteenth Report, Data protection and the Human Rights Act, 14 March 2008, para 9

²⁶⁸ Chauvy and Others v. France, Application No. 64915/01, 29 September 2004, para 70

expression protected by Article 10 and, on the other, the right of the persons attacked by the book to protect their reputation ... protected by Article 8'.²⁶⁹ The ECtHR has further clarified that 'a person's right to protection of his or her reputation is encompassed by Article 8 as being part of the right to respect for private life.'²⁷⁰

Recently the ECtHR has identified criteria grounds for consideration when balancing ECHR, Articles 8 and 10, in cases concerning alleged violations of privacy under ECHR, Article 8:

- i. Contribution to a debate of general interest
- ii. How well known is the person concerned and what is the subject of the report?
- iii. Prior conduct of the person concerned
- iv. Method of obtaining the information and its veracity
- v. Content, form and consequences of the publication
- vi. Severity of the sanctions imposed.²⁷¹

The ECtHR has subsequently utilised these privacy criteria grounds in cases brought concerning defamation under ECHR, Article 10.²⁷²

The current law on defamation in Northern Ireland has not kept pace with changes and reforms in the rest of the UK.²⁷³ In its 2008 concluding

²⁶⁹ *Chauvy and Others v. France*, Application No. 64915/01, 29 September 2004, para 70

²⁷⁰ *Pfeifer v. Austria*, Application No. 12556/03, 15 February 2008, para 35. This acknowledgement has not been total. The ECtHR in *Karako v. Hungary*, Application No. 39311/05, 28 July 2009 noted that 'reputation has only been deemed to be an independent right sporadically and mostly when the factual allegations were of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant's private life.' para 23 and that 'the purported conflict between Articles 8 and 10 of the Convention, as argued by the applicant, in matters of protection of reputation, is one of appearance only. To hold otherwise would result in a situation where – if both reputation and freedom of expression are at stake – the outcome of the Court's scrutiny would be determined by whichever of the supposedly competing provisions was invoked by an applicant.' para 17

²⁷¹ *Axel Springer AG v. Germany*, Application No. 39954/08, 7 February 2012, para 89-95. Also see *Von Hannover v. Germany (No. 2)*, Applications Nos. 40660/08 and 60641/08, 7 February 2012, para 108-113 (although this second case did not include ground iv.) For an overview see 'Case Law of the European Court of Human Rights Concerning the Protection of Personal Data', Strasbourg, 30 January 2013, http://www.coe.int/t/dghl/standardsetting/dataprotection/Judgments/DP%202013%20Case%20Law_Eng_FINAL.pdf <last accessed 03/09/15>

²⁷² *Print Zeitungsverlag GMBH v. Austria*, Application No. 26547/07, 10 January 2014 para 33-44. *Ristamaki and Korvola v. Finland*, Application No. 66456/09, 29 January 2014 para 48-59. *Ungvary and Irodalom KFT. v. Hungary*, Application No. 64520/10, 3 March 2014 para 45 and 64-69. The first of these identified grounds is of special importance to the ECtHR, see *Mosley v. The United Kingdom*, Application No. 48009/08, 10 May 2011, para 129-130

²⁷³ See Human Rights Committee, Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland (2008) UN Doc.

observations on the UK's Sixth Periodic Report on compliance with the ICCPR the UN Human Rights Committee stated that it 'is concerned that the State party's practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism."... The State party should re-examine its technical doctrines of libel law, and consider the utility of a so-called "public figure" exception, requiring proof by the plaintiff of actual malice in order to go forward on actions concerning reporting on public officials and prominent public figures...' ²⁷⁴

The Defamation Act 2013 raises the threshold for bringing a defamation claim and a defence of publication on a matter of public interest has been introduced in England & Wales. The Defamation Act 2013 is not, however, applicable to Northern Ireland and the law governing defamation in Northern Ireland remains unchanged, based on the Defamation Act (Northern Ireland) 1955. ²⁷⁵

Defamation laws can stand at the forefront of the balancing act between freedom of expression and the right to privacy (right to reputation). The Human Rights Committee has stated that:

'Defamation laws must be crafted with care to ensure that they comply with [ICCPR, Article 19] paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party. States parties should consider the

CCPR/C/GBR/CO/6 para 25. It is important to note that the recommendation of the UN Human Rights Committee applies to the entire jurisdiction of the United Kingdom, including Northern Ireland. At the time of the UN Human Rights Committee's recommendation the law governing defamation in Northern Ireland and England & Wales, whilst in separate legal instruments, was directly comparable. Whilst the law in England & Wales has now been 'rebalanced' the imbalance which existed during the time of the Committee's recommendations remains present in Northern Ireland.

²⁷⁴ UN, Concluding observations of the Human Rights Committee on sixth periodic report submitted by the United Kingdom UN Doc. CCPR/C/GBR/CO/6 (2008) para 25

²⁷⁵ As amended by subsequent legislation and interpreted through jurisprudence. See Northern Ireland Law Commission, Consultation Paper, Defamation Law in Northern Ireland NILC 19 (2014)

decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.²⁷⁶

Right to the protection of personal data

CFR, Article 7, states that '[e]veryone has the right to respect for his or her private and family life, home and communications' and CFR, Article 8, states that:

1. 'Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.'²⁷⁷

The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows (as amended by the Additional Protocol) (Convention 108) regulates the collection and processing of personal data, and the transborder flow of this data. Convention 108 is explicitly designed to protect the right to privacy.²⁷⁸ Convention 108, Article 5, provides that 'personal data undergoing automatic processing shall be:

- a. obtained and processed fairly and lawfully;
- b. stored for specified and legitimate purposes and not used in a way incompatible with those purposes;
- c. adequate, relevant and not excessive in relation to the purposes for which they are stored;
- d. accurate and, where necessary, kept up to date;

²⁷⁶ UN Human Rights Committee, General Comment No. 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) para 47

²⁷⁷ For a greater explanation of this right, see Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, Official Journal of the European Union, 14.12.2007, C 303/20-21. This explanation states that Directive 95/46/EC and Regulation (EC) No 45/2001, which preceded this Convention, contain conditions and limitations for the exercise of the right to the protection of personal data.

²⁷⁸ Preamble and Article 1

- e. preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.’

Convention 108, Article 2(a), articulates that personal data ‘means any information relating to an identified or identifiable individuals’.²⁷⁹

Automatic processing includes ‘the following operations if carried out in whole or in part by automated means: storage of data, carrying out of logical and/or arithmetical operations on those data, their alteration, erasure, retrieval or dissemination’.²⁸⁰

Convention 108, Article 3(1), provides that ‘[t]he Parties undertake to apply this convention to automated personal data files and automatic processing of personal data in the public and private sectors.’

Convention 108, Article 6, provides measures for special categories of data (sensitive data), stating ‘[p]ersonal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.’

Convention 108, Article 9, provides for exceptions and restrictions, stating:

1. ‘Derogation from the provisions of Articles 5, 6 and 8 of this convention shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society in the interests of:
 - a. protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences;
 - b. protecting the data subject or the rights and freedoms of others.
2. Restrictions on the exercise of the rights specified in Article 8, paragraphs b, c and d, [additional safeguards for the data subject] may be provided by law with respect to automated personal data files used for statistics or for scientific research purposes when there is obviously no risk of an infringement of the privacy of the data subjects.’

The Additional Protocol to Convention 108 states that state parties ‘shall provide for one or more authorities to be responsible for ensuring compliance with the measures in its domestic law giving effect to the principles’ contained with Convention 108 listed above, and the Additional Protocol.²⁸¹ Such authorities should have ‘powers of investigation and

²⁷⁹ [UK Ratification 26/8/1987] Article 2(a)

²⁸⁰ Article 2(c)

²⁸¹ Article 1(1)

intervention, as well as the power to engage in legal proceedings or bring to the attention of the competent judicial authorities violations of provisions of domestic law giving effect to the principles' contained with Convention 108 listed above, and the Additional Protocol.²⁸² Furthermore, '[e]ach supervisory authority shall hear claims lodged by any person concerning the protection of his/her rights and fundamental freedoms with regard to the processing of personal data within its competence.'²⁸³ The Additional Protocol requires that such a body be independent, and its decisions appealable.²⁸⁴

The EU has the competency to legislate on data protection matters.²⁸⁵ EU Directive 95/46/EC – The Data Protection Directive states that "'the data subject's consent" shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.'²⁸⁶ The Data Protection Directive, Article 9, also states that 'Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV [transfer of personal data to third countries] and Chapter VI [supervisory authority] for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.'

The Court of Justice of the European Union (CJEU) has highlighted the need for balance when interpreting CFR, Article 8.²⁸⁷ The CJEU has balanced CFR, Article 8 (Protection of personal data) against Article 11 (Freedom of expression and information), and Article 13 (Freedom of the arts and sciences).²⁸⁸

The relationship between CFR, Articles 8 and 11, is covered by the Data Protection Directive, Article 9.²⁸⁹ The CJEU has stated that 'in order to achieve a balance between the two fundamental rights, the protection of

²⁸² [UK Signature 8/11/2001, the UK has not ratified this Convention] (The UK Mission at Geneva has stated, 'The UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow up with ratification in a short time thereafter.' See, UK Mission at Geneva, 'Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations agreed in June 2008' (March 2010) on recommendation 22 (France)), Article 1(2)(a)

²⁸³ Article 1(2)(b)

²⁸⁴ Article 1(3) and 1(4)

²⁸⁵ The Treaty on the Functioning of the European Union 2012 (Official Journal C 326, 26/10/2012 P. 0001 – 0390) Article 16

²⁸⁶ Article 2(h)

²⁸⁷ C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, 29 January 2008, para. 68

²⁸⁸ The CJEU has also balanced Article 8 against CFR, Article 17(1) (Protection of property)

²⁸⁹ European Union Agency for Fundamental Rights, Council of Europe, Handbook on European data protection law, April 2014, p23

the fundamental right to privacy requires that the derogations and limitations in relation to the protection of data provided for in the chapters of the directive referred to above must apply only in so far as is strictly necessary.²⁹⁰

A second strand in the relationship between CFR, Articles 8 and 11, arises from the right to receive information, contained within Article 11. The FRA has noted that '[u]nder EU law, the right of access to documents is guaranteed by Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (Access to Documents Regulation). Article 42 of the Charter and Article 15 (3) of the TFEU [Treaty on European Union and the Treaty on the Functioning of the European Union] have extended this right of access "to documents of the institutions, bodies, offices and agencies of the Union, regardless of their form". In accordance with Article (52) 2 of the Charter, the right of access to documents is also exercised under the conditions and within the limits for which provision is made in Article 15 (3) of TFEU. This right may come into conflict with the right to data protection if access to a document would reveal others' personal data. Requests for access to documents or information held by public authorities may therefore need balancing with the right to data protection of persons whose data are contained in the requested documents.²⁹¹ The CJEU has highlighted the balance required between Articles 8 and 11,²⁹² noting that 'interference with the right to data protection with respect to access to documents needs a specific and justified reason.'²⁹³

The European Data Protection Supervisor has stated that '[t]he right to protection of personal data and the right to public access to documents are two fundamental democratic principles which together enforce the position of the individual against the administration and which normally go along together very well. In those cases in which the underlying interests of these principles collide, a reasonable assessment should be made departing from the fact that both are of equal importance.'²⁹⁴ Accordingly, '[t]he right of access to documents cannot automatically overrule the right to data protection.'²⁹⁵

²⁹⁰ C-73/07, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, 16 December 2008, para 56, 61-62

²⁹¹ European Union Agency for Fundamental Rights, Council of Europe, Handbook on European data protection law, April 2014, p26

²⁹² C-28/08 P, *European Commission v. The Bavarian Lager Co. Ltd.*, 29 June 2010, para. 60, 63, 76, 78-79.

²⁹³ European Union Agency for Fundamental Rights, Council of Europe, Handbook on European data protection law, April 2014, p28

²⁹⁴ European Data Protection Supervisor, Public access to documents containing personal data after the Bavarian Lager ruling, available at https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/11-03-24_Bavarian_Lager_EN.pdf p15

²⁹⁵ European Union Agency for Fundamental Rights, Council of Europe, Handbook on European data protection law, April 2014, p28

The freedom of arts and science (CFR, Article 13) has been found by the ECtHR to be contained within ECHR, Article 10.²⁹⁶ The FRA notes, that consequently '[t]he right guaranteed by Article 13 of the Charter may also be subject to the limitations authorised by Article 10 of the ECHR'²⁹⁷ The use of data for scientific purposes is protected through Convention 108, Article 9, providing a special exception to permit the retention of scientific data for future use. Consequently, 'the subsequent use of personal data for scientific research shall not be considered an incompatible purpose.'²⁹⁸ The CJEU has also struck a balance CFR, Article 8 and Article 17(1) (the protection of property) and Article 8 (data protection).²⁹⁹

Consent is defined in the Data Protection Directive as 'any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.'³⁰⁰

The Working Party on the Protection of Individuals with regard to the Processing of Personal Data Opinion 15/2011 on the definition of consent,³⁰¹ provides that consent requires that a person must have capacity to consent,³⁰² and consent must be gained prior to the use of the data.³⁰³ Consent must be freely given,³⁰⁴ specific,³⁰⁵ and informed.³⁰⁶ To be informed, consent should use appropriate language,³⁰⁷ and be clear

²⁹⁶ Müller and Others v. Switzerland, Application No. 10737/84, 24 May 1988

²⁹⁷ European Union Agency for Fundamental Rights, Council of Europe, Handbook on European data protection law, April 2014, p30, with reference to Explanations Relating to The Charter of Fundamental Rights (2007/C 303/02) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF> and see Vereinigung bildender Künstler v. Austria, Application No. 68345/01, 25 January 2007, para 26

²⁹⁸ European Union Agency for Fundamental Rights, Council of Europe, Handbook on European data protection law, April 2014, p31

²⁹⁹ C-275/06, Productores de Música de España (Promusicae) v. Telefónica de España SAU, 29 January 2008, para. 54 and 60

³⁰⁰ Article 2(h)

³⁰¹ Adopted on 13 July 2011. This Opinion compiles European legislative documents. The Working Party was set up by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995

³⁰² The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p34

³⁰³ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p34

³⁰⁴ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

³⁰⁵ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

³⁰⁶ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

³⁰⁷ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

and sufficiently conspicuous so it cannot be overlooked.³⁰⁸ Consent related to material containing special or sensitive data (personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life) must be explicit.³⁰⁹ Consent related to data other than sensitive data must be unambiguous.³¹⁰ Consent can be withdrawn at a later stage.³¹¹ When drawing together existing material, the consent provided for this material must be studied to see if it is compatible with the new project. If there is new purpose to the use of the data, new consent should be sought before it is used.³¹²

The right to the historical truth

The ECtHR has recognised 'that it is an integral part of freedom of expression to seek historical truth'.³¹³ Freedom of expression is protected under ECHR, Article 10. The ECtHR has further highlighted 'the efforts that every country must make to debate its own history openly and dispassionately'.³¹⁴

The ECtHR has stated that 'it is not the Court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation'.³¹⁵ However, encouraging open debate has raised questions over individuals questioning clearly established historical facts, including the Holocaust. The ECtHR has stated that '[t]here can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust ... does not constitute historical research akin to a quest for the truth ... Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the [ECHR]'.³¹⁶

³⁰⁸ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

³⁰⁹ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

³¹⁰ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p35

³¹¹ The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p34

³¹² The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Opinion 15/2011 on the definition of consent, p34

³¹³ *Chauvy and Others v. France*, Application No. 64915/01, 29 September 2004, para 69; *Fatullayev v. Azerbaijan*, Application No. 40984/07, 4 October 2010, para 87; *Dzhugashvili v. Russia*, Application No. 41123/10, 9 December 2014, para 33

³¹⁴ *Monnat v. Switzerland*, Application No. 73604/01, 21 December 2006, para 64

³¹⁵ *Chauvy and Others v. France*, Application No. 64915/01, 29 September 2004, para 69; *Dzhugashvili v. Russia*, Application No. 41123/10, 9 December 2014, para 33

³¹⁶ *Garaudy v. France (dec.)* Application No. 65831/01, ECHR 2003-IX (translated)

The ECtHR has indicated that the passage of time is important when open discussion on the historical truth touches upon other human rights and limits on freedom of expression must be assessed. The ECtHR has stated that '[e]ven though remarks such as those by the applicant are always likely to reopen the controversy among the public, the lapse of time makes it inappropriate to deal with such remarks, fifty years on, with the same severity as ten or twenty years before.'³¹⁷

Victims' rights

The UN High Commissioner for Human Rights has noted that '[w]hen a period characterized by widespread or systematic human rights abuses comes to an end, people who suffered under the old regime find themselves able to assert their rights and to begin dealing with their past. As they exercise their newly freed voices, they are likely to make four types of demands of the transitional State, namely demands for truth, justice, reparations and institutional reforms to prevent a recurrence of violence.'³¹⁸ International law recognises victims' rights, including the right to the truth (right to know), the right to a remedy (right to reparations, right to redress), and access to justice.

Who is a Victim?

There is no single definition of a victim in human rights law. A number of instruments have defined the term victim as follows:

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides:

"Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.'³¹⁹

The UN Basic Principles and Guidelines for Victims include the family of a victim as victims themselves:

³¹⁷ Monnat v. Switzerland, Application No. 73604/01, 21 December 2006, para 64; See the cases of Orban and Others v. France, Application No. 20985/05, 15 January 2009; Dink v. Turkey, Application No.s 2668/07, 6102/08, 30079/08, 7072/09, and 7124/09, 14 September 2010; Karsai v. Hungary, Application No. 5380/07, 1 December 2009

³¹⁸ UN GA Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Right to the truth, 2009, UN Doc. A/HRC/12/19, para 4

³¹⁹ United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) UN Doc. A/RES/40/34, para 1

‘For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.’³²⁰

The EU Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations further provides:

‘In the guidelines, the term “victim” refers to a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by a serious human rights violation. The term “victim” may also include, where appropriate, the immediate family or dependants of the direct victim. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of the familial relationship between the perpetrator and the victim.’³²¹

The right to the truth (right to know)

The UN Principles to Combat Impunity states that ‘[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.’³²² These Principles further provide that ‘[i]rrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.’³²³

The Special Rapporteur on the independence of judges and lawyers has stated that the right to truth is customary international law,³²⁴ and ‘is both an independent right on its own and the means for the realization of other rights, such as the right to information, to identity, to mourning and

³²⁰ Para 8

³²¹ para 5; also see the definition contained within The EU Guidelines on the Protection of Victims of Terrorist Acts, I. Principles

³²² Updated Set of Principles to Combat Impunity, Principle 2

³²³ Updated Set of Principles to Combat Impunity, Principle 4

³²⁴ Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration, of Justice, Impunity, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy UN Doc. E/CN.4/2006/52, para 23

especially the right to justice.³²⁵ The OHCHR recognises the right to the truth as a 'stand-alone right' and a 'fundamental right of the individual and therefore should not be subject to limitations.'³²⁶

The right to the truth is both an individual and collective right. The OHCHR has noted 'that a person has a right to know the truth about what happened to him/her and that society as a whole has both a right to know and a responsibility to remember.'³²⁷

The OHCHR has clarified that '[t]he right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them. In cases of enforced disappearance ... secret executions and secret burial place, the right to the truth also has a special dimension: to know the fate and whereabouts of the victim.'³²⁸

The Council of Europe has recognised the right to the truth.³²⁹ The ECtHR has held that a State's failure to conduct an effective investigation 'aimed at clarifying the whereabouts and fate ...[of]... missing persons who disappeared in life-threatening circumstances' was a continuing violation of ECHR, Article 2.³³⁰ The ECtHR has also held that a persistent failure to account for the disappeared persons constituted a 'continuing violation of Article 3 [ECHR] in respect of the relatives of the ... missing persons.'³³¹ The ECtHR has 'emphasised the importance of the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental

³²⁵ Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration, of Justice, Impunity, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy UN Doc. E/CN.4/2006/52, para 61

³²⁶ Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91 (2006) para 60

³²⁷ UN GA Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Right to the truth, 2009, UN Doc. A/HRC/12/19, para 5; Also see Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Human Rights Council, Human Rights and Transitional Justice UN Doc. A/HRC/RES/12/12 (2009), p3; Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91 (2006) para 58

³²⁸ Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91 (2006) para 59

³²⁹ Council of Europe Parliamentary Assembly, Resolution 1868 (2012), The International Convention for the Protection of all Persons from Enforced Disappearance, para 6.1.4.

³³⁰ Cyprus v. Turkey 2001 IV ECtHR 1 (2001) para 136

³³¹ Cyprus v. Turkey 2001 IV ECtHR 1 (2001) para 158

as that of the right to life'.³³² It also underlined in *El-Masri v. The Former Yugoslav Republic of Macedonia* 'the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.'³³³

The right to the truth often overlaps with the right to information. The UN Basic Principles and Guidelines for Victims provides that 'victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.'³³⁴ EU Directive 2012/29 articulates a range of information which should be offered to victims 'without unnecessary delay' including 'any decision not to proceed with or to end an investigation or not to prosecute the offender' and information 'about the state of the criminal proceedings'.³³⁵

The ECtHR has found violations of the procedural element of the ECHR, Article 2 where 'the investigating authorities failed properly to acquaint the applicant with the results of the investigation'.³³⁶ However, the ECtHR has held that the possibility of sensitive issues surrounding an investigation means there cannot be 'an automatic requirement under Article 2 that a deceased victim's surviving next-of-kin be granted access to the investigation as it goes along. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures'.³³⁷ The ECtHR has clarified that a violation of procedural element of ECHR, Article 2 occurs where victims are denied access to information 'for no valid reason'.³³⁸

*The right to a remedy (the right to reparations, the right to redress)*³³⁹

³³² Association "21 Decembre 1989" and Others v. Romania, Application No. 33810/07, 25 May 2011, para 144

³³³ *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09 13 December 2012 para 191

³³⁴ Article 24

³³⁵ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 6(1)(a) and 6(2)(b)

³³⁶ *Karandja v. Bulgaria*, Application No. 69180/01, 7 January 2011, para 67

³³⁷ *Ramsahai and Others v. The Netherlands*, Application No. 52391/99, 15 May 2007, para 347; also see *McKerr v. The United Kingdom* (2002) 34 EHRR 20, at 129

³³⁸ *Eremiášová and Pechová v. The Czech Republic*, Application No. 23944/04, 16 May 2012, para 149

³³⁹ For an explanation on the use of these terms, see UN ECOSOC, Civil and Political Rights, The right to a remedy and reparation for victims of violations of international human rights and humanitarian law, Note by the High Commissioner for Human Rights, Annex, Report of the Second Consultative Meeting on the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human

International human rights law requires an effective remedy where an individual's rights or freedoms have been violated. The legal source of the right to a remedy is dependent upon the origin of the right violated; for example a violation of a right under the ICCPR (e.g. Article 6, the right to life) is subject to the ICCPR, Article 2(3), which obligates States:

- a) 'To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted.'

The UN Human Rights Committee explains that the ICCPR, 'Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights, States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights'.³⁴⁰

The Permanent Court of International Justice stated '[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparations in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.'³⁴¹

The right to an effective remedy is also contained within the ECHR, Article 13 which states:

'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority

Rights and Humanitarian Law (Geneva, 20, 21, and 23 October 2003) UN Doc. E/CN.4/2004/57 (2003), para 37

³⁴⁰ Human Rights Committee, General Comment 31, Nature of the General Legal Obligations on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 15

³⁴¹ The Factory at Chorzów, (Claim for Indemnity)(Jurisdiction) Series A, No. 9, 26 July 1927, p21. A number of cases provide support for reparations being customary international law, see Palmagero Gold Fields 5 RIAA at 298 (1931), Spanish Zones of Morocco Claims 2 RIAA 615 (1925), Russian Indemnity 11 RIAA at 431 (1912), Martini 2 RIAA 975 at 1002

notwithstanding that the violation has been committed by persons acting in an official capacity.³⁴²

The ECtHR has noted that '[a]n effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law ... but if the infringement of the right to life is not intentional, Article 2 does not necessarily require such remedies; the State may meet its obligation by affording victims a civil-law remedy, either alone or in conjunction with a criminal-law one, enabling any responsibility of the individuals concerned to be established and any appropriate civil redress, such as an order for damages, to be obtained'.³⁴³ However the ECtHR has further noted that 'a civil action to obtain redress ... alone cannot be regarded as an effective remedy in the context of claims brought under Article 2',³⁴⁴ although noting that in systemic cases of disappearances by the State 'that criminal investigations were not an effective remedy'.³⁴⁵

The right to a remedy has been interpreted to include the following elements:

- 1) Equal and effective access to justice;³⁴⁶
- 2) Adequate, effective, and prompt reparation;
- 3) Access to relevant information concerning violations and reparations mechanisms;³⁴⁷
- 4) Cessation of any on-going violation.³⁴⁸

³⁴² ECHR, Article 13 has not been incorporated into domestic law by virtue of the Human Rights Act 1998; also see The Charter of Fundamental Rights of the European Union, Article 47

³⁴³ Ciobanu v. The Republic of Moldova, Application No. 62578/09, 24 February 2015, para 32

³⁴⁴ Malika Yusupova and Others v. Russia, Application Nos. 14705/09, 4386/10, 68860/10 and 70695/10, 15 January 2015, para 170

³⁴⁵ Aslakhanova and Others v Russia, Application Nos. 2944/06, and 8300/07, 50184/07, 332/08, 42509/10, 29 April 2013, para 217; also see Malika Yusupova and Others v. Russia, Application Nos. 14705/09, 4386/10, 68860/10 and 70695/10, 15 January 2015

³⁴⁶ As explored below

³⁴⁷ UN Basic Principles and Guidelines for Victims, Principle 11; Promotion and Protection of Human Rights, Impunity, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity E/CN.4/2005/Add.1; Aksoy v. Turkey, para 98; Iatridis v. Greece, Application No. 31107/96, 19 October 2000, para 33

³⁴⁸ Human Rights Committee, General Comment 31, Nature of the General Legal Obligations on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 15. The ECtHR has required specific remedial action in a number of cases including the restitution of land in Papamichalopoulos and Others v. Greece (Article 50), Application No. 14556/89, 31 October 1995, paras 38-9; Brumarescu v. Romania (Article 41), Application No. 28342/95, 23 January 2001, paras 22-3; The release of prisoners in Assanidze v. Georgia, Application No. 71403/01, 8 April 2004, para 203; Ilascu and Others v. Moldova and Russia, Application No. 48784/99, 8 July 2004, para 490; Also see Aslakhanova and Others v Russia, Application Nos. 2944/06, and 8300/07,

Reparation consists of:

- i) Restitution; Restitution should 'restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.'³⁴⁹
- ii) Compensation; Compensation 'should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law' including physical or mental harm, lost opportunities (employment, education, social benefits), moral damage, and costs for legal and medical assistance.³⁵⁰
- iii) Rehabilitation; Rehabilitation 'should include medical and psychological care as well as legal and social services.'³⁵¹
- iv) Satisfaction; Satisfaction includes '(a) an apology, (b) nominal damages, (c) in case of gross infringements of rights, damages reflecting the gravity of the infringement, (d) in cases of serious misconduct or criminal conduct, disciplinary action, or punishment

50184/07, 332/08, 42509/10, 29 April 2013, para 225-237, and para 238 where the ECtHR noted that 'it would appear necessary that a comprehensive and time-bound strategy to address the problems enumerated above (see paragraphs 223-237 above) is prepared by the Respondent State without delay and submitted to the Committee of Ministers for the supervision of its implementation.'

³⁴⁹ UN Basic Principles and Guidelines for Victims, para 19; Promotion and Protection of Human Rights, Impunity, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity E/CN.4/2005/Add.1, para 48;

³⁵⁰ UN Basic Principles and Guidelines for Victims, para 20

³⁵¹ UN Basic Principles and Guidelines for Victims, para 21; CAT, Article 14, states that victims should receive 'the means for as full rehabilitation as possible.' The Committee against Torture has clarified that CAT, Article 14, includes 'the provision of means for as full rehabilitation as possible for anyone who has suffered harm as a result of a violation of the Convention should be holistic and include medical and psychological care as well as legal and social services.' UN Committee against Torture, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3 of the Committee against Torture, Implementation of article 14 by States parties UN Doc. CAT/C/GC/3 (2012) para 11; Further see The Convention on the Rights of Persons with Disabilities (CRPD), Article 26; UN Human Rights Council, Torture and other cruel, inhuman or degrading treatment or punishment: rehabilitation of torture victims UN Doc. A/HRC/22/L.11 (2013) para 11-12; Council of Europe, Committee of Ministers, Recommendation Rec 2006(8) of the Committee Ministers to members states on assistance to crime victims, para 3.1

- of, those responsible',³⁵² and public memorials.³⁵³ It has also been interpreted to include the 'cessation of continuing violations' and the 'public disclosure of the truth'.³⁵⁴
- v) Guarantees of non-repetition;³⁵⁵ Guarantees of non-repetition 'includes institutional reforms tending towards civilian control of military and security forces, strengthening judicial independence, the protection of human rights workers, human rights training, the promotion of international human rights standards in public service, law enforcement, the media, industry, and psychological and social services.'³⁵⁶

There is both an individual and collective element to reparations, with the UN Basic Principles and Guidelines for Victims noting that 'States should endeavor to develop procedures to allow groups of victims to present collective claims for reparation and to receive reparation collectively, as appropriate.'³⁵⁷

Access to the relevant information about violations engages the right to information, as discussed above. It can also be interpreted to ensure victims have access to information about their rights and the availability of services.³⁵⁸ Access to a reparations mechanism obliges states to ensure that victims are able to access their right to a remedy. Such

³⁵² Promotion and Protection of Human Rights, Impunity, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity E/CN.4/2005/Add.1, para 48

³⁵³ Human Rights Committee, General Comment 31, Nature of the General Legal Obligations on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 16

³⁵⁴ UN Basic Principles and Guidelines for Victims, para 22

³⁵⁵ UN Basic Principles and Guidelines and the Guidelines of the Committee of Ministers of the Council of Europe, Principle 18, and see The UN Principles to Combat Impunity, Principle 34, and The Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, Part XVI; UN Committee against Torture, General Comment 3: Implementation of article 14 by States parties (2012) UN Doc. CAT/C/GC/3, para 2; Article 19 of The Declaration on Enforced Disappearance; The European Convention on the Compensation of Victims of Violent Crimes Article 1; 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 (2005), Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005; Human Rights Committee, General Comment 31, Nature of the General Legal Obligations on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 16

³⁵⁶ Office of the High Commissioner for Human Rights, Rule-of-law Tools for Post-conflict States, Reparations programmes, 2008, p7-8

³⁵⁷ Principle 13

³⁵⁸ EU Directive 2012/29, Article 9; UN Basic Principles and Guidelines for Victims, Principle 15; Council of Europe, Committee of Ministers, Recommendation Rec(2006)8, para 5.2, Human Rights Council, Torture and other cruel, inhuman or degrading treatment or punishment: rehabilitation of torture victims, (2013), UN Doc. A/HRC/22/L.11/Rev.1, para 16

access can be achieved through access to justice, or an alternative and/or complementary mechanism, which could be incorporated in DDR programmes.

Access to justice

Justice is often narrowly conceived as constituting only criminal proceedings. However justice is a much broader legal concept and includes civil, administrative and criminal processes, all of which should be responsive to the specific needs of victims.

Transitional justice 'is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.'³⁵⁹ Transitional justice 'consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations.'³⁶⁰

The UN Basic Principles and Guidelines for Victims highlights 'the right to access justice and fair and impartial proceedings',³⁶¹ and notes that states must provide 'equal and effective access to justice ... irrespective of who may ultimately be the bearer of responsibility for the violation'.³⁶² The state has a procedural obligation to provide access to justice, which includes access to a criminal justice process, but can also extend to other forms of justice including transitional justice processes.

Access to justice includes access to mechanisms to achieve justice, including civil, criminal, and administrative means, and requires that the relevant judicial or administrative processes are responsive to the specific needs of victims.³⁶³ It also requires the dissemination 'through public and private mechanisms, information about all available remedies for gross violations of international human rights law'.³⁶⁴

³⁵⁹ UN, Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, March 2010, p2

³⁶⁰ UN, Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, March 2010, p2

³⁶¹ Para 12

³⁶² Para 3(c) and 11(a)

³⁶³ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principles 4, 6; also see The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para 12(b)-(d)

³⁶⁴ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para 12(a); also see EU Directive 2012/29, Article 9; UN Basic Principles and Guidelines for Victims, Principle 15; Council of Europe, Committee of Ministers, Recommendation Rec(2006)8, para 5.2, Human Rights Council,

Access to justice further includes 'access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law.'³⁶⁵ This includes accessing other victims' rights, such as the truth and a remedy, through DDR programmes.

Further Rights

Right to culture

The right to culture forms an intrinsic part of the human rights framework and is specifically protected by the ICESCR. Reference to cultural rights is also made in CERD, CEDAW, CRC, and CRPD, which each protect the right to participate in cultural life.

The ICESCR, Article 15(1)(a) requires state parties 'recognize the right of everyone ... [t]o take part in cultural life'. ICESCR, Article 15(3), obliges states 'undertake to respect the freedom indispensable for scientific research and creative activity.'

The UN Committee on Economic, Social and Cultural Rights (CESCR) has recognised 'that the term "everyone" in the first line of [ICESCR] article 15 may denote the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group'.³⁶⁶ The UN CESCR 'considers that culture, for the purpose of implementing article 15 (1)(a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.'³⁶⁷

Torture and other cruel, inhuman or degrading treatment or punishment: rehabilitation of torture victims, (2013), UN Doc. A/HRC/22/L.11/Rev.1, para 16

³⁶⁵ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para 12

³⁶⁶ UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 9

³⁶⁷ UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 13

The UN CESCR highlights that ICESCR, Article 15, contains the specific legal obligations to respect, protect, and fulfil the right,³⁶⁸ centred on availability, accessibility, acceptability, adaptability and appropriateness.³⁶⁹

The obligations to respect and protect require non-interference with the exercise of cultural practices and access to cultural goods and services and steps to prevent third parties from interfering with the right. The obligation to fulfil includes '[a]dopting policies for the protection and promotion of cultural diversity, and facilitating access to a rich and diversified range of cultural expressions, including through, inter alia, measures aimed at establishing and supporting public institutions and the cultural infrastructure necessary for the implementation of such policies'.³⁷⁰ The UN Special Rapporteur in the field of cultural rights has noted that '[m]useums and curators may face particular difficulties when they are subject to political control and financial pressure and it is crucial to ensure their independence within the framework of the right to freedom of opinion and expression, as set out in articles 19 and 20 of the International Covenant on Civil and Political Rights.'³⁷¹

The UN CESCR has provided that '[a]vailability is the presence of cultural goods and services that are open for everyone to enjoy and benefit from', and accessibility 'includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination.'³⁷² The independent expert in the field of cultural rights has stated that '[t]he right to participate in cultural life implies that individuals and communities have access to and enjoy cultural heritages that are meaningful to them, and that their freedom to continuously (re)create cultural heritage and transmit it to future generations should be protected.'³⁷³ The UN CESCR has noted that '[a]cceptability entails that

³⁶⁸ UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 6

³⁶⁹ UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 16

³⁷⁰ UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 52(a)

³⁷¹ UN, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, Memorialization processes, UN Doc. A/HRC/25/49 (2014) para 75

³⁷² UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 16(b); Also see UNESCO Universal Declaration on Cultural Diversity (Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its thirty-first session on 2 November 2001), Article 5

³⁷³ UN Human Rights Council, Report of the independent expert in the field of cultural rights, Farida Shaheed, UN Doc. A/HRC/17/38 (2011) para 34

the laws, policies, strategies, programmes and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved. In this regard, consultations should be held with the individuals and communities concerned in order to ensure that the measures to protect cultural diversity are acceptable to them'.³⁷⁴

Furthermore '[a]daptability refers to the flexibility and relevance of strategies, policies, programmes and measures adopted by the State party in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities'.³⁷⁵ In addition, '[a]ppropriateness refers to the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples.'³⁷⁶

The UN CESCR has highlighted the general and core legal obligations contained within ICESCR, Article 15, as an economic, social and cultural right. The right must be exercised without discrimination,³⁷⁷ and a state is required 'to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized ... by all appropriate means, including the adoption of legislative measures.'³⁷⁸ Retrogressive measures are prohibited,³⁷⁹ and the right is subject to a minimum core obligation.³⁸⁰ The minimum core

³⁷⁴ UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 16(c)

³⁷⁵ UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 16(d)

³⁷⁶ UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21(2009), para 16(e)

³⁷⁷ UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 44; Also see UN CESCR General Comment No. 3, The nature of States parties' obligations (Art 2(1) of the covenant) (Fifth session, 1990) UN Doc. E/1991/23 annex III at 86 (1991), para 5

³⁷⁸ International Covenant on Economic, Social and Cultural Rights 1966, Article 2(1), and see UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 45 and 60; Also see UN CESCR General Comment No. 3, The nature of States parties' obligations (Art 2(1) of the covenant) (Fifth session, 1990) UN Doc. E/1991/23 annex III at 86 (1991), para 9

³⁷⁹ International Covenant on Economic, Social and Cultural Rights 1966, Article 2(1), and see UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 65; Also see UN CESCR General Comment No. 3, The nature of States parties' obligations (Art 2(1) of the covenant) (Fifth session, 1990) UN Doc. E/1991/23 annex III at 86 (1991), para 9

³⁸⁰ UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural

obligation of ICESCR, Article 15, consists of taking legislative steps to guarantee non-discrimination, respecting 'the right of everyone to identify or not identify themselves with one or more communities, and the right to change their choice'. In addition, it includes taking legislative steps to 'eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to other cultures,' and to 'allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent'.³⁸¹

The ICESCR, Article 15, is not an absolute right and the UN CESCR has noted that 'no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope'.³⁸²

However, ICESCR, Article 4, provides that:

'the State may subject [rights contained within the ICCPR] only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'

The UN CESCR has stated that '[a]pplying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights. Such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the [ICESCR]. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed. The [CESCR] also wishes to stress the need to take into consideration existing international human rights standards on limitations that can or cannot be legitimately imposed on rights that are intrinsically linked to the right to take part in cultural life,

Rights)', UN Doc. E/C.12/GC/21 (2009), para 55; Also see UN CESCR General Comment No. 3, The nature of States parties' obligations (Art 2(1) of the covenant) (Fifth session, 1990) UN Doc. E/1991/23 annex III at 86 (1991), para 10

³⁸¹ UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 55. Also see UN Human Rights Council, Report of the independent expert in the field of cultural rights, Farida Shaheed, UN Doc. A/HRC/17/38 (2011) para 16; UN Human Rights Committee, General Comment 23, Article 27 (Rights of Minorities) UN Doc. CCPR/C/21/Rev.1/Add.5 (1994) para 7; and Human Rights Committee, *Angela Poma Poma v. Peru*, Communication No. 1457/2006, UN Doc. CCPR/C/95/D/1457/2006 para 7.6

³⁸² UN CESCR, 'General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/21 (2009), para 18

such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association.³⁸³

The International Covenant on Civil and Political Rights (ICCPR), Article 27, provides that:

‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’

The UN Human Rights Committee has stated that culture, as articulated in ICCPR, Article 27, ‘manifests itself in many forms’.³⁸⁴

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions states ‘[c]ultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.’³⁸⁵ The UNESCO Convention provides that state parties shall encourage individuals and social groups ‘to create, produce, disseminate, distribute and have access to their own cultural expressions’.³⁸⁶ The UNESCO Convention includes the principle of ‘equitable access’ which entails ‘[e]quitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding.’³⁸⁷ The importance of oral history is recognised by UNESCO which has established a programme to recognise ‘masterpieces of the oral and intangible heritage’.³⁸⁸

Additional protection for cultural rights can be found in The European Cultural Convention, Article 1, which states that ‘[e]ach Contracting Party

³⁸³ UN CESCR, ‘General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)’, UN Doc. E/C.12/GC/21 (2009), para 19

³⁸⁴ UN Human Rights Committee, General Comment 23, Article 27 (Rights of Minorities) UN Doc. CCPR/C/21/Rev.1/Add.5 (1994) para 7

³⁸⁵ Article 2(1) [UK Ratification 07/12/2007]

³⁸⁶ Article 7(1)(a)

³⁸⁷ Principle 7

³⁸⁸ <http://www.unesco.org/bpi/eng/unescopress/2001/01-71e.shtml> <last accessed 03/09/15>

shall take appropriate measures to safeguard and to encourage the development of its national contribution to the common cultural heritage of Europe.³⁸⁹ Furthermore, The Council of Europe Committee of Ministers has noted that ‘oral history, through which spoken testimony on recent historical events can make history come alive for young people, and which can offer the viewpoints and perspectives of those who have been omitted from the “historical record”’.³⁹⁰

The European Charter for Regional or Minority Languages (ECRML)³⁹¹ allows states to protect indigenous languages. The UK has committed to ‘the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in public and private life’, with regards to both the Irish language and Ulster Scots. The UK has made a number of further binding commitments in relation to the Irish language.³⁹² This includes, where justified and as far as reasonably possible, duties for public services to ensure the submission of oral or written applications in Irish,³⁹³ and ensuring bodies responsible for organising or supporting cultural activities make appropriate allowance for incorporating knowledge and use of the Irish language in their activities.³⁹⁴

The right to health

The ICESCR, Article 12, states that:

1. ‘The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - b) The improvement of all aspects of environmental and industrial hygiene;
 - c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

³⁸⁹ [UK Ratification 5/5/1955]

³⁹⁰ Council of Europe, Committee of Ministers, Recommendation Rec(2001)15 on history teaching in twenty-first-century Europe (Adopted by the Committee of Ministers on 31 October 2001 at the 771st meeting of the Ministers’ Deputies)

³⁹¹ [UK Ratification 27/3/2001]

³⁹² The Provisions of Part II (general objectives and principles) apply to both the Irish language and Ulster Scots. A total of 36 paragraphs in Part III (specific undertakings) are applicable to the Irish language following the UK’s ratification on 27 March 2001. No paragraphs of Part III apply to Ulster Scots as detailed in the UK’s ratification.

³⁹³ ECRML, Article 10(1)(a)(iv). Also applicable to the Irish language are 10(1)(c), 10(2)(b), 10(2)(e), 10(2)(f), 10(2)(g), 10(3)(c), 10(4)(a), 10(5)

³⁹⁴ ECRML, Article 12(1)(d). Also applicable to the Irish language are 12(1)(a), 12(1)(e), 12(1)(f), 12(1)(h), 12(2), and 12(3)

- d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.’

The UN CESCR has recognised that ICESCR, Article 12(2)(d), encompasses ‘both physical and mental [health, and] includes the provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care. A further important aspect is the improvement and furtherance of participation of the population in the provision of preventive and curative health services, such as the organization of the health sector, the insurance system and, in particular, participation in political decisions relating to the right to health taken at both the community and national levels.’³⁹⁵

The right to the highest attainable standard of health contains the specific legal obligations to respect, protect, and fulfil the right,³⁹⁶ centred on availability, accessibility, acceptability, and quality.³⁹⁷ As an economic, social, and cultural right, the right to health contains the concept of non-discrimination,³⁹⁸ progressive realisation to the maximum of available resources,³⁹⁹ non-retrogressive measures,⁴⁰⁰ and a minimum core obligation.⁴⁰¹

³⁹⁵ UN CESCR, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1rev.6 at 85 (2003) para 17

³⁹⁶ UN CESCR, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1rev.6 at 85 (2003) para 33

³⁹⁷ UN CESCR, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1rev.6 at 85 (2003) para 12

³⁹⁸ UN CESCR, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1rev.6 at 85 (2003) para 18-19; Also see UN CESCR General Comment No. 3, The nature of States parties’ obligations (Art 2(1) of the covenant) (Fifth session, 1990) UN Doc. E/1991/23 annex III at 86 (1991), para 5

³⁹⁹ UN CESCR, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1rev.6 at 85 (2003) para 30-31; Also see UN CESCR General Comment No. 3, The nature of States parties’ obligations (Art 2(1) of the covenant) (Fifth session, 1990) UN Doc. E/1991/23 annex III at 86 (1991), para 9

⁴⁰⁰ UN CESCR, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human*

The European Social Charter, Article 11, provides for '[t]he right to protection of health' stating:

'With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:

1. To remove as far as possible the causes of ill-health;
2. To provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. To prevent as far as possible epidemic, endemic and other diseases.'

The Secretariat to the European Social Charter has published an information document on the right to health, stating that '[t]he system of health care must be accessible to the entire population. To that end, states should take as their main criterion for judging the success of health system reforms effective access to health care for all, without discrimination, as a basic human right.'⁴⁰²

The victims' right to a remedy includes rehabilitation.⁴⁰³ Rehabilitation 'should include medical and psychological care as well as legal and social services.'⁴⁰⁴ CAT, Article 14, states that victims should receive 'the means for as full rehabilitation as possible.' The Committee against Torture has clarified that CAT, Article 14, includes 'the provision of means for as full rehabilitation as possible for anyone who has suffered harm as a result of a violation of the Convention should be holistic and include medical and psychological care as well as legal and social services.'⁴⁰⁵ The Convention on the Rights of Persons with Disabilities (CRPD),⁴⁰⁶ Article 26, obliges States 'enable persons with disabilities to attain and maintain maximum

Rights Treaty Bodies, UN Doc. HRI/GEN/1rev.6 at 85 (2003) para 32; Also see UN CESCR General Comment No. 3, The nature of States parties' obligations (Art 2(1) of the covenant) (Fifth session, 1990) UN Doc. E/1991/23 annex III at 86 (1991), para 9

⁴⁰¹ UN CESCR, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000) reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1rev.6 at 85 (2003) para 43-45; Also see UN CESCR General Comment No. 3, The nature of States parties' obligations (Art 2(1) of the covenant) (Fifth session, 1990) UN Doc. E/1991/23 annex III at 86 (1991), para 10

⁴⁰² Secretariat to the European Social Charter, The Right to Health and The European Social Charter (2009), at II.B

⁴⁰³ See previous Chapter

⁴⁰⁴ UN Basic Principles and Guidelines for Victims, para 21

⁴⁰⁵ UN Committee against Torture, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3 of the Committee against Torture, Implementation of article 14 by States parties UN Doc. CAT/C/GC/3 (2012) para 11

⁴⁰⁶ [UK Ratification 8 June 2009]

independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services.’ The UN Human Rights Council has recognised ‘the importance of full, holistic and specialized rehabilitation services, which include any necessary coordinated combination of medical and psychological care...’.⁴⁰⁷ The UN Human Rights Council has further noted that states should ‘consider making rehabilitation available to immediate family or dependents of the victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization’.⁴⁰⁸ The Council of Europe Committee of Ministers has noted that victims should be ‘assisted in all aspects of their rehabilitation, in the community, at home and in the workplace.’⁴⁰⁹

Human rights applicable to implementation measures

Bodies and institutions which fulfil a state’s human rights obligations engage human rights and good governance. Measures which fulfil victims’ right must also include victim participation.

Good governance consists of more than human rights,⁴¹⁰ but the links between good governance and human rights have been organised around four areas; strengthening democratic institutions, improving service delivery, the rule of law, and combating corruption.⁴¹¹ The UN OHCHR has noted that ‘good governance is the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of "good" governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights.’⁴¹²

⁴⁰⁷ UN Human Rights Council, Torture and other cruel, inhuman or degrading treatment or punishment: rehabilitation of torture victims UN Doc. A/HRC/22/L.11 (2013) para 12

⁴⁰⁸ UN Human Rights Council, Torture and other cruel, inhuman or degrading treatment or punishment: rehabilitation of torture victims UN Doc. A/HRC/22/L.11 (2013) para 11

⁴⁰⁹ Council of Europe, Committee of Ministers, Recommendation Rec 2006(8) of the Committee Ministers to members states on assistance to crime victims, para 3.1

⁴¹⁰ The OHCHR has identified good governance as at times considered to encompass full respect of human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance. See <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx> <last accessed 03/09/15>

⁴¹¹ Good Governance Practices for the Protection of Human Rights (United Nations publication, Sales No. E.07.XIV.10) (2007) p3

⁴¹² <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx> <last accessed 03/09/15> and see UN Human Rights Council, Report of the

The UN CESCR has stated that good governance 'is essential to the realization of all human rights'.⁴¹³ The former UN Commission on Human Rights found good governance to consist of transparency, responsibility, accountability, participation, and responsiveness to the needs of the people.⁴¹⁴ The UN Human Rights Council has further included the concepts of integrity, equality, efficiency, and competency.⁴¹⁵

The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has stated that the 'meaningful participation' of victims is necessary to integrate 'a victim-centred approach' throughout measures designed 'to promote "truth, justice, reparations, and guarantees of non-recurrence"'.⁴¹⁶ The Special Rapporteur has noted that '[s]uch meaningful participation can take different forms. To illustrate, truth-seeking requires the active participation of individuals who wish to express their grievances and report on the facts and underlying causes of the violations and abuses which occurred. Truth-seeking will only be regarded a justice measure if civil society, in particular victims organizations, is adequately represented in the composition of a truth commission. Prosecutions, for their part, can only serve as actual justice measures if the victims and their families are effectively involved in the processes and provided with the necessary information relevant to their participation in proceedings. Local or traditional methods of rendering justice, when compliant with international fair trial guarantees, can reach out to the local population so they recognize them as "justice". Reparations will only be successful if victims and civil society at large have been involved in the design of the schemes, so the measures are commensurate to the harm inflicted and contribute to the recognition of the victim as rights holders. Regarding guarantees of non-recurrence, institutional and personnel reform needs to have a firm grounding in the views of the population and specifically of the victims, who should be actively involved in the related processes so that legislation and institutions are built to prevent future violations and

United Nations High Commissioner for Human Rights on the role of the public service as an essential component of good governance in the promotion and protection of human rights UN Doc. A/HRC/25/27 (2013) para 5

⁴¹³ UN CESCR, General Comment 12, Right to adequate food (Twentieth session, 1999), UN Doc E/C.12/1999/5 (1999), para 23

⁴¹⁴ UN Human Rights Council, The role of good governance in the promotion of human rights, UN Doc. E/CN.4/RES/2000/64 (2000) para 1

⁴¹⁵ UN Human Rights Council, The role of good governance in the promotion and protection of human rights, UN Doc. A/HRC/RES/19/20 (2012)

⁴¹⁶ UNGA, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. A/HRC/21/46 (2012) para 10 and 54

public officials selected in a manner in which the principle of the rule of law is given force.⁴¹⁷

The extra-territorial application of human rights

The extra-territorial application of the ECHR has been established by the ECtHR,⁴¹⁸ and followed by the UK Supreme Court.⁴¹⁹ The ECtHR has interpreted ECHR, Article 1, which states that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention', and stated that 'the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts.'⁴²⁰ The exceptions to territoriality include:

- State agent authority and control; 'The [ECtHR] has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory ... the Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government ... It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored"'.⁴²¹
- Effective control over an area; 'Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action,

⁴¹⁷ UNGA, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. A/HRC/21/46 (2012) para 54

⁴¹⁸ Al-Skeini and Others v. The United Kingdom, Application No. 55721/07, 7 July 2011

⁴¹⁹ Smith and Others v. The Ministry of Defence [2013] UKSC 41

⁴²⁰ Al-Skeini and Others v. The United Kingdom, Application No. 55721/07, 7 July 2011, para 131-132; Also see Jaloud v. The Netherlands, Application No. 47708/08, 20 November 2014, para 139

⁴²¹ Al-Skeini and Others v. The United Kingdom, Application No. 55721/07, 7 July 2011, para 133-137

a Contracting State exercises effective control of an area outside that national territory.⁴²²

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Article 4(2), provides that '[e]ach State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, in the following cases:

- (a) When the alleged offender is a national of that State or a person who has his habitual residence in its territory;
- (b) When the victim is a national of that State.'

The UN Committee on the Rights of the Child has even recommended 'that the [UK] take steps to ensure that domestic legislation throughout the State party, including in its devolved administrations enables it to establish and exercise extraterritorial jurisdiction, without the criterion of double criminality, over all the offences under the Optional Protocol [to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography].'⁴²³

The EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims,⁴²⁴ Article 10, states:

1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 2 and 3 where:
 - (a) the offence is committed in whole or in part within their territory; or
 - (b) the offender is one of their nationals.

2. A Member State shall inform the Commission where it decides to establish further jurisdiction over the offences referred to in Articles 2 and 3 committed outside its territory, inter alia, where:
 - (a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;
 - (b) the offence is committed for the benefit of a legal person established in its territory; or
 - (c) the offender is an habitual resident in its territory.

3. For the prosecution of the offences referred to in Articles 2 and 3 committed outside the territory of the Member State concerned, each Member State shall, in those cases referred to in point (b) of paragraph 1,

⁴²² Al-Skeini and Others v. The United Kingdom, Application No. 55721/07, 7 July 2011, para 138-140

⁴²³ Committee on the Rights of the Child, Concluding observations on the report submitted by the United Kingdom of Great Britain and Northern Ireland under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rig

⁴²⁴ EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

and may, in those cases referred to in paragraph 2, take the necessary measures to ensure that its jurisdiction is not subject to either of the following conditions:

- (a) the acts are a criminal offence at the place where they were performed; or
- (b) the prosecution can be initiated only following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed.

This directive was implemented in Northern Ireland through the Criminal Justice Act (Northern Ireland) 2013 which amends the Sexual Offences Act 2003 to include a section on 'Offences committed in a country outside the United Kingdom'.⁴²⁵

⁴²⁵ Section 4