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Truth, Amnesty and Prosecutions: Models for dealing with the past

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Amnesties, Prosecutions and the Public
Interest in the Northern Ireland

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TRUTH, AMNESTY AND PROSECUTIONS: MODELS FOR DEALING WITH THE PAST

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Introduction

This brief document is one of a range produced by the authors as part of an ongoing project *Amnesties, Prosecutions and the Public Interest in the Northern Ireland Transition*.¹ This project, funded by the Arts and Humanities Research Council (AHRC), is a partnership between Queen's University Belfast School of Law, the Transitional Justice Institute at the University of Ulster and the local NGO Healing Through Remembering. Drawing upon previous comparative work conducted by McEvoy and Mallinder (with Brice Dickson), this project is designed to provide legal, historical and international information to local stakeholders on dealing with the past related issues in order to let people 'make up their own mind' on these difficult and sensitive matters.

Over the past year the team have been meeting with victims, ex-security force personnel, former combatants, civil society groups, criminal justice leaders and all the main political parties to discuss these matters. At these meetings, we made an offer to all parties to make publicly available information on any technical aspects of these debates that might be useful for the ongoing public discussion. While there are of course very diverse views on these issues, a common feature of many of our discussions over the past year has been the desire for clear and accessible information.

At a number of these encounters, we have been asked to provide 'models' as to how the issues of truth, prosecution and amnesty might intersect as part of efforts to deal with the past in Northern Ireland. In response to those requests, below are four possible models which chart how these issues might be managed. Before looking in detail at the models, it is important to note a number of issues that underpin all of the models.

Requirements of the European Convention of Human Rights

The British and Irish governments are parties to the European Convention of Human Rights. As such, they are required to abide by this convention and decisions issued by the European Court of Human Rights. With respect to Articles 2 (right to life) and 3 (freedom from torture and ill-treatment), the Court has found that not only must states refrain from committing these violations, but where they have been committed, states must also conduct investigations. Through its case law, the Court

¹ To review the range of documents associated with the project including our submission to the Panel of the Parties of the NI Executive please visit <http://blogs.qub.ac.uk/amnesties/resources/>

has repeatedly found that to comply with the convention, these investigations must be:

- Effective
- Prompt
- Transparent
- Independent

With respect to effective investigations, the Court's case law requires that **independent, official investigations** be conducted when individuals have been killed as a result of the use of force. In *Finucane v UK*, the Court said

What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.²

In *Nachova and others v Bulgaria*, the Court further noted that

In cases concerning the use of force by State agents, it must take into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the relevant legal or regulatory framework in place and the planning and control of the actions under examination.³

The European Convention on Human Rights is only binding on state parties. This means that it creates obligations for the state in relation to the acts or omissions of state actors. This includes instances where there are allegations of collusion or the state was aware that an individual was a risk and failed to take sufficient measures to protect them. In a few cases, the Court has also held that Article 2 creates obligations in relation to killings committed by non-state actors:

the obligation [to investigate Article 2 violations] is not confined to cases where it has been established that the killing was caused by an agent of the State. ... [T]he mere fact that the authorities were informed

² European Court of Human Rights, *Case of Finucane v The United Kingdom* (2003), Reports of Judgments and Decisions 2003-VIII, para 67.

³ European Court of Human Rights, *Case of Nachova and others v Bulgaria* (2005) Reports of Judgments and Decisions 2005-VII, para 93.

of the murder ... gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation.⁴

Furthermore, for any truth recovery process to be politically viable in Northern Ireland, it should investigate both the actions of state and non-state actors.

The court's case law has been clear however that the duty to investigate does **not** amount to a duty to prosecute. Instead, in *Finucane v UK*, the Court acknowledged the substantial challenges to prosecuting historic cases in Northern Ireland:

It cannot be assumed in such cases that a future investigation can usefully be carried out or provide any redress, either to the victim's family or to the wider public by ensuring transparency and accountability. The lapse of time and its effect on the evidence and the availability of witnesses inevitably render such an investigation unsatisfactory or inconclusive, by failing to establish important facts or put to rest doubts and suspicions.⁵

Similarly, in *Brecknell v UK*, the Court emphasised that there is 'no absolute right' for victims 'to obtain a prosecution or conviction and the fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such'.⁶

With respect to amnesty, in the 2012 *Tarbuk v Croatia* case, the Court argued that

even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public.⁷

This suggests that an amnesty or 'stay on prosecutions' would comply with the European Convention on Human Rights **provided that** effective, prompt, independent and transparent investigations were conducted.

⁴ European Court of Human Rights, *Case of Yasa v Turkey* (1998) Reports 1998-VI, para 100. See also *Ergi v Turkey* (1998) Reports 1998-IV, para 82.

⁵ European Court of Human Rights, *Case of Finucane v The United Kingdom* (2003), Reports of Judgments and Decisions 2003-VIII, para 89.

⁶ European Court of Human Rights, *Case of Brecknell v The United Kingdom* (2007) All ER(D) 416 (Nov), para 66.

⁷ European Court of Human Rights, *Case of Tarbuk v Croatia* (2012) Application no. 31360/10, para 50.

Interpreting the Models

In putting forward these models, we have drawn on a range of international sources of information, British and Irish experience of managing different styles of inquiries into the past and our practical experience as academics who have conducted extensive comparative research. We do not claim that these offer fully developed practice models with regard to truth recovery. They are designed to be broadly explanatory options to give readers a sense of the ways in which truth commissions or other truth recovery bodies are commonly linked to prosecutions, amnesty or use immunity.

Many other elements of truth recovery design are highly significant to ensuring that such an institution meets the needs of victims and society, and can operate in an effective and impartial manner. These elements include issues such as the composition of those who are tasked with overseeing such a body and the staff who are employed by it, the power of the institution to make or recommend reparations for victims, the duration of the institution's operations and its levels of funding. Although the authors recognise the importance of these elements, they are beyond the scope of this paper because as noted above, we are responding to requests to develop models solely on the question of how justice and amnesty can fit into truth recovery design.

The models presented below are therefore heuristic approaches designed to help inform the political conversation. They should not be regarded as entirely mutually exclusive. Elements of each may be borrowed in designing a suitable way forward and some of the pros and cons may be relevant to more than one model.

The four models below are drawn from the international experience of how these issues have been addressed in other contexts (see bibliography) and from our conversations and interactions with local actors in Northern Ireland over the past year.

Model 1: 'Stay on Prosecutions'

This model draws on the recent proposals by the Attorney General that legislation be enacted at Stormont, and possibly Westminster, to end all prosecutions, inquests and public inquiries related to the Troubles. This model would have a number of components:

- The stay on prosecutions would apply to all crimes committed by state and non-state actors
- Offenders would be shielded from criminal liability automatically and would not be required to participate in any truth recovery processes in exchange for their immunity
- Where individuals have already been convicted of conflict-related offences, those convictions would still stand

As amnesty laws are generally defined by the objective of bringing to an end the possibility of criminal (and sometimes civil) liability for a specific group of people or offences, the Attorney General's proposals amount to an unconditional amnesty for historic cases.

From international models, a truth recovery process may follow a pre-existing amnesty. However, the Attorney General's proposals did not recommend that any formal investigative body be established. Instead, he recommended that public archives be made available to victims, historians and journalists.

Pros

- As the Attorney General acknowledged when announcing his proposals, the prospect of successful prosecutions for historic cases is slim and is growing less and less each year. Introducing a legislative stay on prosecutions would formally recognise what is already a de facto reality.
- In formalising that there would be no further investigations or prosecutions of historic cases, this proposal would create a climate of certainty and remove any 'false hope' from the relevant victims.
- The existing processes to deal with the past focus predominantly on investigating allegations against state actors, even though they were only directly responsible for approximately 10 per cent of conflict-related deaths. Closing down all investigations would end this imbalance.
- The considerable archives held by the Public Prosecution Service relating to crimes committed by state and non-state actors cannot currently be made

available to victims, researchers or the general public while there is still a prospect of prosecutions. By formally ending all prosecutions, this potentially rich source of information could be opened, subject to controls to protect the right the life and national security.

- The removal of the threat of prosecution might create a space where offenders are more willing to admit their actions. This could occur through informal truth recovery work conducted by non-governmental organisations, interviews with journalists or researchers, or through offenders publishing their own memoirs.
- The recent CJINI report⁸ indicated that the existing processes to deal with the past cost the state approximately £30 million per annum. These proposals would be considerably reduce those costs, some institutions would cease to exist and others would drop their mandate to consider historic cases. As a result, only victims support bodies and the Commission for the Location of Victims' Remains (CLVR) would continue to work on dealing with the past. Indeed with regard to the CLVR, concerns have been expressed by some families of the disappeared that, in a context where all other past-related initiatives had been closed, there might be a significant political impetus towards 'mothballing' the CLVR as well.

Cons:

- Although amnesty measures may be permissible under the European Convention on Human Rights, an end to all investigations as the Attorney General proposed would not (in our view) be Article 2 compliant.
- The Attorney General's proposals were met with strong condemnation from victims' organisations, human rights campaigners and all the political parties with the exception of the NI21. Regardless the terminology used, many appeared to view these proposals as an unconditional amnesty.
- It is unlikely that the political parties will be willing to agree to this model.
- A formal decision to end investigations of the past is unlikely to end victims' desire for truth and accountability.
- A 'stay on prosecutions' would not prevent stories related to the past continually filtering in public discourse, albeit in an unmanaged fashion. Such a failure to 'manage' the past carries with the risk of political instability.

⁸ Criminal Justice Inspection Northern Ireland, *A Review of the Cost and Impact of Dealing with the Past on Criminal Justice Organisations in Northern Ireland* (2013) available at <http://www.cjini.org/TheInspections/Inspection-Reports/Latest-Publications.aspx?did=1283>

Model 2: Truth Commission and Amnesty

The breadth of international experience concerning the establishment and running of truth commissions provides considerable information that would inform this model. Specifically, a commission would be established and tasked with examining events that occurred during the conflict in and about Northern Ireland. Depending on its mandate, the commission would investigate individual cases and specific events; the causes, context, and consequences of violence; as well as patterns of abuse and thematic issues (e.g. collusion, allegations of IRA ethnic cleansing along the border). After consultation, the commission would be established by new legislation put forward by the two governments, but as an independent institution free from interference by either the British or the Irish government. The commission would sit in Northern Ireland, but arrange to take evidence from a range of affected communities. Its remit would be sufficiently broad to examine events that occurred in relation to the conflict in and about Northern Ireland anywhere on these islands, or indeed overseas. The commission would incorporate the current work of the Historical Enquiries Team, the historical investigations of the Office of the Police Ombudsman NI and the inquest system for conflict-related killings.

In exploring how amnesty can be embedded within a truth commission, Model 2 draws explicitly from truth commissions that were empowered to grant or recommend an amnesty for clearly specified categories of crimes, in particular, South Africa,⁹ Grenada,¹⁰ Timor Leste (twice),¹¹ Kenya,¹² and Liberia.¹³ This model can be distinguished from model 3 (below) by a number of features. In Model 2:

- Offenders would be *encouraged* to come forward voluntarily rather than compelled. The amnesty mechanism would be used to incentivise participation by former combatants and members of the security forces and intelligence services. The commission would be required to engage in outreach to raise awareness of the process.

⁹ Promotion of National Unity and Reconciliation Act 1995 (South Africa).

¹⁰ Grenada's Truth and Reconciliation Commission was established under the Commissions of Inquiry Act 1990, Section 2. The amnesty process is detailed in Truth and Reconciliation Commission, *Report on certain political events which occurred in Grenada 1976-1991*, Volume 1, Part 7 (2001).

¹¹ United Nations Transitional Administration in East Timor, Regulation No. 2001/10 on the Establishment of a Commission for Truth, Reception and Reconciliation in East Timor (2001) Section 32; Terms of Reference for the Commission on Truth and Friendship between Indonesia and Timor Leste (2006) Section 14(c)(i).

¹² Truth, Justice and Reconciliation Act 2008 (Kenya) Part 3.

¹³ Truth and Reconciliation Commission Act 2005 (Liberia) Section 26(g).

- In response to concerns from some sectors in Northern Ireland society regarding what they regard as ‘the myth of equivalency’ between state and non-state actors, this model would envisage separate panels to review applications from state and non-state actors, as illustrated in Figure 1. The panels to review amnesty applications and, where appropriate, hold hearings would be separate from the panels that engage with victims.
- The legislation would clearly specify what crimes or groups of offenders are eligible for amnesty.
- To obtain an amnesty, state and non-state actors would be required to submit pro forma amnesty application forms.
- Depending on the nature of the crimes or incidents they are involved with, they may also be required to meet with the commission. These meetings could be part of a dialogue that develops during the life of the commission.
- To be granted an amnesty, applicants would be required to disclose fully the truth about their actions and cooperate fully with the work of the commission. This was the approach taken in South Africa, where amnesty was granted only in respect of acts, omissions or offences that were fully disclosed to the Truth and Reconciliation Commission. This created an incentive for offenders to disclose *all* their criminal acts. Model 2 follows a similar approach in that the amnesty would only cover criminal acts disclosed by the offender.
- Testimony from state and non-state actors would not simply be taken ‘at face value’. To ascertain whether their testimony was truthful, all information provided would be rigorously interrogated and crosschecked against all available corroborating sources (including potentially intelligence information) and victim testimony.
- The truth commission mandate should provide clear guidance to the investigative body on the nature of the information that offenders would be required to disclose to make a complete application, including whether they should supplement written submissions with documentary and physical evidence. This guidance should be applied uniformly to all applications to ensure the fairness of the process.
- A successful amnesty application would negate both criminal and civil liability for the disclosed offences. However, and crucially, it would not represent a

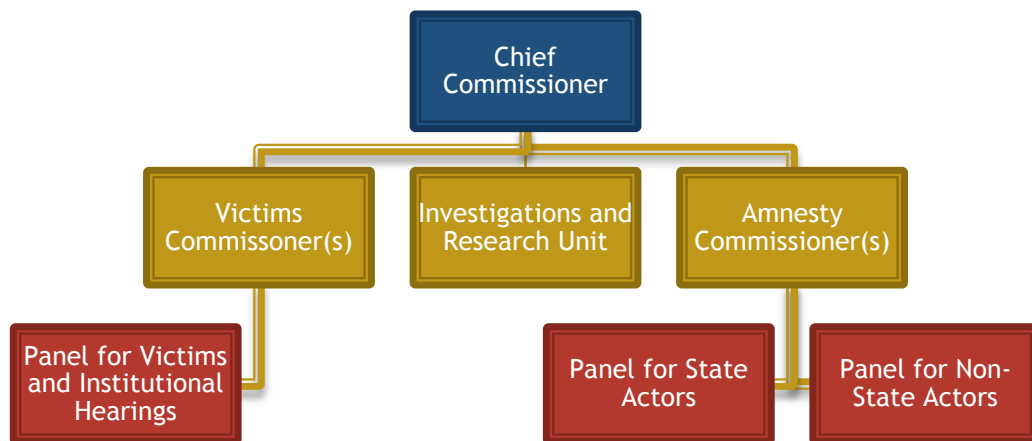
denial that the crimes had actually occurred. Such an amnesty would not represent an effort to re-write history.¹⁴

- It is envisaged that the legal effects of a successful amnesty application would be different for state and non-state actors. For non-state actors, the primary benefit would be the expunging of criminal records.
- For state actors, the primary benefit would be that once a state actor had fulfilled the responsibilities associated with providing information to the commission, they would no longer be required to cooperate with the current range of open-ended 'case by case' mechanisms for dealing with the past.
- Where an amnesty applicant did not fully cooperate with the commission, amnesty would be denied, depending on the circumstances, they could be charged with perjury or contempt, and they could also be liable for prosecution if other future evidence of their criminal acts is forthcoming.
- Individuals who are denied amnesties would have the right to appeal.
- Truth commissions that offer or recommend amnesty, generally also have the power to subpoena individuals to appear before the commission and produce documents. Truth Commissions can also require witnesses to testify under oath.
- Where witnesses are compelled to testify, commissions are expected to respect the privilege against self-incrimination and to guarantee use immunity (see Model 3) with respect to compelled evidence. They would also usually offer confidentiality and/or anonymity to witnesses where it is in the public interest to do so or where the witnesses might be endangered by their identity or testimony becoming public.

¹⁴ This issue is well illustrated in a recent case examining the impact of the granting of amnesty by the South African Truth and Reconciliation Commission. The case concerned Robert McBride, a controversial former member of Umkhonto we Sizwe (MK), the military wing of the African National Congress (ANC). Mr McBride bombed a bar in Durban in 1986 in which three civilians were killed and 69 people injured and was convicted of murder and sentenced to death. He was subsequently released as part of the political negotiations, and applied for and was granted an amnesty by the TRC. In 2003, Mr McBride was in line for a senior policing appointment, and *The Citizen* newspaper (which was vehemently opposed to his appointment) published a number of critical articles referring to him as a murderer and a criminal. Mr McBride sued for defamation, arguing that the amnesty granted to him meant that he could not be so described. The Constitutional Court found against Mr McBride, arguing that: 'The statute's aim was national reconciliation, premised on full disclosure of the truth. It is hardly conceivable that its provisions could muzzle truth and render true statements about our history false. It further concluded that although the amnesty in effect expunged the murder in terms of its impact on Mr McBride's civic right to employment, to run for office, and so forth, it did not mean that newspapers or citizens had to conduct discourses on the past as if events had not happened.' See *Citizen v. McBride*, Case CCT 23/10, Judgment of the Constitutional Court of South Africa, [2011] ZACC 11.

Additional design challenges might include whether the commission is empowered to meet with offenders in public and/or in private; whether the amnesty process includes mechanisms to enable victims to communicate the impact of the crimes on their lives, to challenge offender statements, and where victims would like to, to participate in restorative meetings with offenders that are mediated by the commission; and whether truth commission reports could name offenders who had been granted amnesty. Figure 1 illustrates the structure of a truth recovery process incorporating amnesty:

Figure 1: Truth Commissions and Amnesty



Pros

- A robust truth commission, even with the powers to grant amnesty for violations of Article 2 of the European Convention of Human Rights, has the potential to deliver effective independent investigations that if properly implemented would satisfy the investigative requirements of Article 2.
- Amnesty may encourage former state actors and non-state actors to come forward and offer full disclosure.
- Testimony from even a comparatively small number of former combatants and state actors would contribute to a more information being revealed than would be possible if the commission relied solely on archival records or victim testimony.
- It should also lead to richer testimony rather than compelling hostile witnesses.
- Where even a small number of offenders voluntarily discuss their actions, their stories can provide a unique source of information on the institutional contexts

and vertical command structures which gave rise to and perpetuated violence during the Troubles.

- A multiplicity of voices would improve the legitimacy and the public standing of the truth commission and 'narrow the space for permissible lies'.
- The fact that state and non-state actors were participating in a voluntary process would be an important symbolic act of reconciliation.
- Unlike Model 1, by requiring individuals to account for their actions, this model offers a greater degree of offender accountability.

Cons

- Where the chances of historical prosecutions are slim, ex-combatants and state actors will be less likely to apply for amnesty.
- There are challenges in corroborating offender testimony, particularly where documentary evidence is missing or unreliable, which is predominantly the case for crimes committed by non-state actors.
- As with Model 1, the use of 'amnesty' is likely to attract political controversy.
- Where the amnesty outcomes include not just immunity from criminal or civil proceedings, but also the possibility of the erasing conflict-related criminal records or the reducing impediments to ex-prisoners with conflict-related convictions in accessing employment, goods, facilities and services, this may make the amnesty more difficult to accept for some victims and survivors.
- Based upon the experiences of other jurisdictions, it is possible that individualised amnesty processes may become overly legalistic.

Model 3: Truth, Investigation and Use Immunity

Where a truth commission or other investigative body has the power to compel testimony from individuals, it may offer ‘use immunity’ to witnesses. According to Black’s Law Dictionary, ‘*use immunity prohibits the witness’ compelled testimony and its fruits from being used in any manner in connection with the criminal prosecution of the witness*’ (emphasis added). Use immunity provisions are designed to protect the rights of witnesses who are requested or compelled to testify. Rather than undermining human rights, this provision is designed to protect the right against self-incrimination that is enshrined in international human rights law¹⁵ and the domestic law of most countries.

In contrast to amnesties, which are internationally controversial, use immunity even for genocide, war crimes and crimes against humanity is widely accepted in international law and policy. For example, it is an established feature of the work of the international criminal tribunals for the Former Yugoslavia and Rwanda which dealt exclusively with the most serious international crimes including war crimes, genocide and crimes against humanity.¹⁶ It is also enshrined in the rules of procedure and evidence which govern the conduct of the International Criminal Court – which again only deals with the most serious of international crimes.¹⁷ It is also explicitly recognised by the United Nations as one of the elements which may be necessary to the establishment of a viable truth commission.¹⁸

Many of the generic features of a truth recovery bodies are outlined in Model Two above. The key difference with regard to this model is the fact that state actors, former combatants and others could be *compelled* to appear before the truth recovery body rather than encouraged to appear voluntarily in the hope of an amnesty. Again, it is precisely because of the compellability of witnesses that ‘use immunities’ would be required in order to protect the rights of such witnesses. In making the case in favour of such methods in his seminal overview on Tribunals of Inquiry Lord Salmon argued;

¹⁵ See e.g. International Covenant on Civil and Political Rights, Article 14(3)(g). The privilege against self-incrimination is not specifically mentioned in the fair trial proceedings detailed in Article 6 of the European Convention on Human Rights. However, the European Court of Human Rights has found that it may be read as implicit in Article 6. See e.g. *Funke v France*, 1993, 16, EHRR, 297.

¹⁶ See eg International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 90(e).

¹⁷ Rules of Procedure and Evidence of the International Criminal Court, Rule 74.

¹⁸ UN Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (2009) 34.

No doubt the extension of a witness's immunity entails the risk that a guilty man may escape prosecution. This would be unfortunate but it is surely much more important that everything reasonably possible should be done to enable a Tribunal to establish and proclaim the truth about a matter which is causing a nationwide crisis of confidence than that a guilty man should go free.¹⁹

In addition to its widespread usage internationally, use immunity guarantees are a familiar tool in UK and Irish law as mechanisms which are used to facilitate investigations into allegations of past abuses. In the common law tradition, normally such guarantees that the evidence he/she gives cannot be used against a particular witness come in the form of letter from the Attorney General, triggered by a request from the Chair of the relevant inquiry. As James Beer QC explains;

Many recent inquiries have requested that the Attorney General provide an undertaking prohibiting the use of evidence provided to the inquiry in future criminal proceedings. The aim of the undertaking is to allow witnesses to give evidence freely, knowing they are not at risk of subsequent prosecutions on the basis of it, and to ensure that inquiries are not delayed or obstructed by witnesses invoking the privilege against self-incrimination.²⁰

Thus for example, such undertaking featured in inquiries such as the Ladbroke Grove Rail Inquiry (into the Paddington Railway crash in which 31 people were killed) the Macpherson Inquiry (into police investigation of Mr Stephen Lawrence's murder) and the Baha Mousa Inquiry (into the death of an Iraqi civilian while in military custody in Basra, Iraq). The principal caveat to such guarantees usually relates to the giving of false evidence to the inquiry. By way of illustration, in the Baha Mousa Inquiry, the Attorney General gave an undertaking that;

No evidence a person may give before the Inquiry, will be used in evidence against that person in any criminal proceedings or for the purpose of deciding whether to bring such proceedings ... Where any such evidence is provided to the Inquiry by a person, it is further undertaken that, as against that person, no criminal proceedings shall be brought (or continued) in reliance upon evidence which is itself the

¹⁹ Lord Sir Cyril Salmon, *Tribunals of Inquiry* (Oxford University Press, 1967) 17.

²⁰ Jason Beer QC (ed) *Public Inquiries* (Oxford University Press, 2011) 326.

product of an investigation commenced as a result of the provision by that person of such evidence.²¹

Equivalent guarantees have given in the operation of a number of past-related inquiries during the Northern Ireland conflict and transition. For example, the Cameron Commission which was established in 1969 to investigate civil disturbances from October 1968, operated under a guarantee given by the Attorney General on behalf of the government of Northern Ireland. That guarantee was that:

(1) No statement made to the Commission of Enquiry, whether orally or in writing, will be used as the basis of a prosecution against the maker of the statement or for the purpose of prosecution of any person or body of persons. (2) No such statement will be used in evidence in any criminal proceedings...²²

In a similar fashion the public inquiries into the events of Bloody Sunday, the murder of Robert Hamill and Rosemary Nelson were all underpinned by similar undertakings from the Attorney General. The Billy Wright Inquiry chose not to request such an undertaking but informed its witnesses that individual requests, supported by reasons, would be considered. Again by way of illustration, regarding the Bloody Sunday Inquiry, the UK Attorney General gave:

An undertaking in respect of any person who provides evidence to the Inquiry, that no evidence he or she may give before the Inquiry relating to the events of Sunday 30 January 1972, whether orally or by written statement, nor any written statement made preparatory to giving evidence, nor any document produced by that person to the Inquiry, will be used to the prejudice of that person in any criminal proceedings (or for that purpose of investigating or deciding whether to bring such proceedings) except proceedings where he or she is charged with having given false evidence in the course of this Inquiry or with having conspired with, aided, abetted, counsel procured, suborned or incited any other person to do so.²³

²¹ Letter from Attorney General Kristin Jones, 31 December 2008, 'The Baha Mousa Inquiry: Self-Incrimination'. The letter went on to indicate that the guarantee did not apply where to prosecutions for civil or military offences, where a person was charged with having given false evidence to the Inquiry or conspired with others to do the same. Available at

http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings1.pdf, Annex A.
²² Lord Cameron, *Report of the Disturbances in Northern Ireland*. Cmnd 532 (HMSO, 1969), Chapter One, paragraph 4. Available at <http://cain.ulst.ac.uk/hmso/cameron.jpg>

²³ Attorney General Press Release, 25 February 1999, available at <http://bloody-sunday-inquiry.org.uk>

Similar mechanisms exist in the Irish Republic and a range of other common law jurisdictions. For example, section 8 of the Tribunals of Inquiry (Evidence) (Amendment) Act 2002 in the Republic provides that 'A statement or admission made by a person before an investigator shall not be admissible as evidence against the person in any criminal proceedings'.²⁴ A number of inquiries in the Republic have offered different versions of immunity for witnesses giving evidence. Most germane for current purposes is the immunity offered by the Smithwick Tribunal (investigating allegations of collusion in the deaths of RUC Officers Harry Breen and Bob Buchanan). That tribunal has operated under equivalent provisions and indeed the UK Attorney General gave an undertaking that no criminal proceeding would result in the United Kingdom against persons as result of admissions they had made to the Tribunal which was of course taking place in the Republic.²⁵

The deployment of this style of truth recovery does not necessarily rule out future prosecutions but the emphasis of such a model is to focus primarily on truth recovery. This can be contrasted with Model 4 which explicitly seeks to facilitate prosecutions.

The core components (some of which would overlap with elements of Model 4 below) are:

- In this model, all of those giving evidence would be treated as witnesses, therefore victims, state actors and non-state actors would all be afforded the same protections in terms of any admissions of criminal behaviour.
- Witnesses would be entitled to see documents to help them prepare to participate in hearings and would be entitled to independent legal representation.
- Given the presence of legal representatives, careful consideration would have to be given to develop mechanisms and working practices which would prevent the proceedings from becoming overly legalistic. Such mechanisms should be designed in collaboration with the Bar Council and Law Society. In addition, in order to ensure that costs did not become prohibitive, a fee arrangement could be negotiated which 'ring-fenced' a suitable amount of money for legal fees and ensured that these were capped at an appropriate level.
- Under this model, careful consideration should be given as to whether or not protected statements would only protect the person giving evidence (as is the norm) for most inquiries or whether the protection should be extended to evidence so that it could not be used to prosecute third parties (as with the

²⁴ Tribunals of Inquiry (Evidence) (Amendment) Act, No 7 of 2002, Section 8.

²⁵ Notice 09/01 available at <http://www.smithwicktribunal.ie/smithwick/HOMEPAGE.html>

Cameron Commission). In a context wherein a lot of individuals could potentially be compelled to give evidence to a truth recovery mechanism, there is an obvious risk that the process could become 'bogged down' if people were willing to discuss their own involvement in past events but unwilling to discuss the actions of others for fear that this might lead to the prosecution of former colleagues. Prosecution would still be possible for perjury.

- All testimony from whatever source would need to be verified, interrogated and cross-checked (similar to Model 2).

Figure 2 illustrates the structure of this model.

Figure 2: Truth Recovery and Use Immunity



Pros

- Such an approach (facilitating truth in return for immunity) has a long-established tradition both in international legal and transitional justice proceedings but also in the common law traditions of the United Kingdom and the Republic of Ireland.
- While this does not provide total immunity from prosecution for witnesses, it ensures that the evidence they provide before the truth commission cannot be used as evidence against them in a later criminal proceeding.
- This mechanism would facilitate the compulsion of witnesses to attend and give evidence 'where it is reasonable, just and necessary to do so and where there is

no manifest security risk to the compelled person'.²⁶ Granting the truth recovery body the power to compel witnesses might in turn increase public confidence in the operation of the institution.

- However, in such circumstances, it is difficult to envisage any successful truth recovery mechanism which did not offer some protection to witnesses against self-incrimination as a result of the evidence they might give to such a body.
- It would attract less controversy that often surrounds the use of the term amnesty, particularly since it follows models that have consistently featured in some existing processes in Northern Ireland to deal with the past.
- By requiring offenders to provide evidence before the commission, depending on resources, this model could facilitate engagement with larger numbers of state actors and non-state actors than may be possible under a voluntary amnesty scheme.
- It could enable the commission to compel high profile individuals to appear before a commission who may otherwise be reluctant to apply for amnesty.
- As this process is not reliant on the voluntary engagement of state actors and non-state actors, it could require subpoenaed individuals to testify in public or private hearings.
- As the scope of immunity is less than for an amnesty, this provision might be more acceptable to those who are opposed to leniency for conflict-related offences.

Cons

- Although many truth commissions recommend in their final report that there be criminal prosecutions or judicial investigations leading to possible prosecutions for the events that they have documented, the reality is that if evidence had been aired in a truth recovery process might make subsequent prosecutions all the more difficult.
- As noted above, an obvious challenge to immunity guarantees which are restricted only to the person giving the evidence is that more comprehensive truth recovery would probably require admissions about the involvement of other actors. However, for both state and non-state actors, if specific admissions by a witness of the involvement of others could be used for subsequent prosecutions against former colleagues or comrades, this might well inhibit the

²⁶ Mark Freeman *Truth Commissions and Procedural Fairness* (Cambridge University Press 2006) 252.

willingness of such witnesses to be completely frank and thus reduce the capacity for the truth recovery mechanism to maximise effective truth recovery.

- Public admissions by individuals of their involvement in previous human rights violations could in turn render such individuals vulnerable to future attack, thus raising Article 2 concerns about the protection of witnesses. Such considerations were advanced in order to support the anonymity granted to the soldier who gave evidence to the Bloody Sunday Inquiry. However, *in camera* hearings or the granting of anonymity and/or the screening of witnesses could in turn impact on the public credibility of any truth recovery mechanism – thus the striking of the balance must be handled sensitively.
- By treating all state and non-state actors as witnesses before the Commission, some state actors in particular might object to what they regard as ‘the myth of equivalency.’ To maximise buy-in from state parties, and their political supporters, it might be necessary to consider whether parallel processes for state and non-state actors which guaranteed them equal protection under the law could be devised.

Model 4: Truth Recovery and Prosecutions

Truth commissions or similar bodies are mostly established in the early years of a political transition, when widespread criminal investigations have not yet been held. In some cases, criminal investigations begin concurrently with a truth commission or similar truth recovery body. However, more commonly, truth commissions operate in contexts where trials are not viable and may not be possible for many years due to the need to establish stability, build the capacity of the national justice system, and reform the legal professions. In such contexts, truth commissions are often designed to fill the 'vacuum left by an ineffective national justice system'.²⁷ They may also be intended to complement and facilitate eventual prosecutions. They can do this in the following ways:

- While the commission is ongoing, it may forward evidence of crimes to prosecutors on a confidential basis.
- If trials have already begun while the commission is operating, where appropriate, it may also provide the courts with exculpatory evidence relating to persons who have been charged.
- Following the completion of its work, the commission may refer to the national authorities on a confidential basis, the names of the alleged perpetrators, evidence collected or other information.
- Its final report may recommend prosecutions be conducted.
- Its final report may also recommend reforms to facilitate prosecutions.

In all these instances, the responsibility for initiating prosecutions continues to rest with the national prosecuting authorities.

To date, approximately 40 truth commissions have been created around the world and most of these bodies have recommended that prosecutions be pursued in their final reports, even though most truth commissions have offered some form of amnesty or use immunity for offender testimony. For example, the South African Truth and Reconciliation emphasised the importance of prosecutions for those offenders who did not apply for amnesty or for whom amnesty was denied.²⁸ In most cases, for reasons often outside the control of the truth commissions, very few prosecutions resulted from their recommendations.²⁹ There may also be instances

²⁷ Amnesty International, *Commissioning Justice: Truth Commissions and Criminal Justice* (2010)

²⁸ Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenges of Truth Commissions* (2nd ed, Routledge 2011) 93.

²⁹ *Ibid* 282-3.

where a truth commission actually harms the prospect of prosecutions by undermining the prospect of a fair trial by naming alleged perpetrators or by failing to preserve evidence adequately.³⁰

Even where criminal trials are not immediately viable, some human rights bodies have issued opinions stating that truth commissions are not an adequate substitute for prosecutions.³¹ This suggests that the possibility of future prosecutions should be protected while a truth commission is operating. However, these opinions relate predominantly to truth commissions that did not actively seek, and consequently, did not substantially receive offender testimony. Furthermore, as outlined in the introduction, the European Court of Human Rights does not require that prosecutions result from investigations of Article 2 violations.

If a truth commission or a similar truth recovery body was established in Northern Ireland, it would operate in a distinct context with respect to prosecutions in comparison to truth commissions established elsewhere. The primary difference is that the Historical Enquiries Team, which was established in 2005, had a mandate to review cases of conflict-related deaths and where there is sufficient evidence, to refer the case for criminal prosecution. However, the 1860 cases that it has reviewed since 2005 have only resulted in three convictions. This suggests that the possibility of prosecutions resulting from any future truth commission is limited.

Despite these challenges, retaining the possibility of prosecutions is important for many victims and their families, who may be deeply resistant to any form of leniency for perpetrators of serious crimes, even where it is offered in exchange for truth. Amnesty International supports this position by opposing the inclusion of any form of amnesty or use immunity in truth commission mandates, preferring instead that cooperation with a truth commission only be taken into account as a mitigating factor during sentencing in any subsequent trials.³² Taking account of the enduring demand for trials among some victims and human rights organisations, Model 4 seeks to explore how a future truth commission could be designed to maximise the

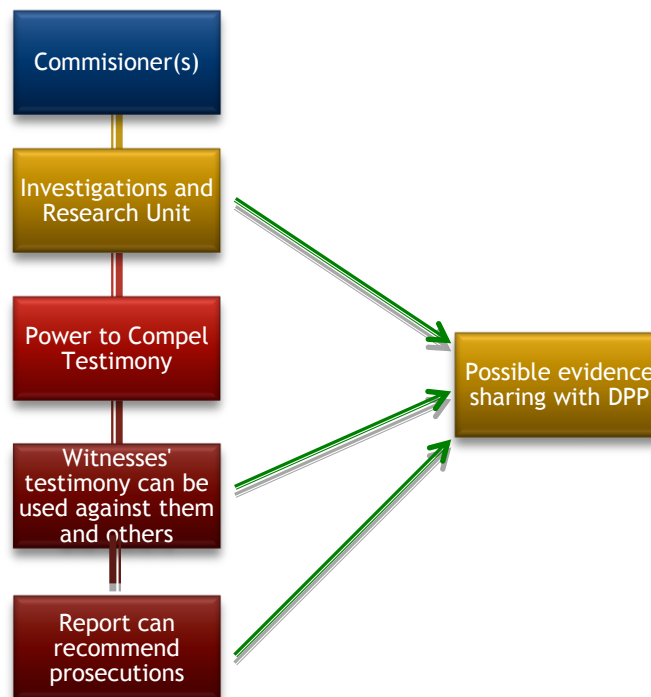
³⁰ Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press 2006) 83-4.

³¹ See eg Human Rights Committee, Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding observations of the Human Rights Committee: Chile, CCPR/C/CHL/CO/5, 17 April 2007, par. 9; Inter-American Commission on Human Rights, Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), 2 October 1992, para. 42-52, at para. 50; Inter-American Commission on Human Rights, Report No. 36/96, case 10.843 (Chile), 15 October 1996, para. 75 and 77.

³² Amnesty International, *Commissioning Justice: Truth Commissions and Criminal Justice* (2010)

potential for future criminal proceedings. Figure 3 illustrates how this model will be designed.

Figure 3: Truth Commission and Prosecutions



The core components of Model 4 are as follows:

- The commission would have the power to subpoena evidence and compel testimony, with penalties for non-compliance.
- All individuals who provide evidence to the commission, including victims and offenders would be treated as witnesses.
- When interviewing witnesses, the commission will need to conduct its investigations in a manner appropriate to the gathering of evidence that would be admissible for criminal proceedings. This may mean that commission investigators are required to interview some individuals under caution and it may mean that meetings with victims are more formal and legalistic that would otherwise be required.
- The truth commission must inform all witnesses of any possible uses or legal consequences of their statements including for example, whether their information may be forwarded to the Public Prosecution Service.
- Gathering evidence that may be used in criminal proceedings may also require that former police officers work within the commission.

- Where the commission believes that a witness may be the subject of future criminal proceedings, it may prefer to interview him or her in confidential, private meetings in order to avoid prejudicing any subsequent trials.
- Preserving the possibility of fair trial may also mean that the Commission prevents victims identifying perpetrators in public hearings and that the Commission itself refrains from naming names in its final report or public statements.
- Even if the commission is not empowered to offer use immunity, all witnesses including the alleged offenders should be guaranteed their rights, including the rights to remain silent; to not be compelled to testify against themselves; and to be presumed innocent. Alleged offenders should also have the right to legal representation.
- Where a witness might be endangered by his or her identity or testimony becoming public, or where it is in the public interest to do so, the commission may give guarantees of confidentiality or anonymity in order to protect the safety of individual witnesses. Such guarantees would preclude the commission identifying these individuals to the Public Prosecution Service and it may require them to redact any evidence that is transferred.
- Where compelled individuals provide false testimony under oath, they could be prosecuted for perjury.
- They could also face legal penalties where they fail to comply with a subpoena.
- During or upon conclusion of the commission's work, it may forward incriminating evidence to the Public Prosecution Service. If a commission is empowered to do this, it should have clearly established criteria for determining what evidence should be shared.
- In a statement provided by an individual to the truth commission is used as evidence to convict him or her in a subsequent criminal prosecution, then his or her previous cooperation with a truth commission should be a mitigating factor during sentencing which may lead to a reduction in the sentence.
- If appropriate, it may publicly call for prosecutions in its final report and it may make recommendations relating to the pursuit of prosecutions.
- Memorandums of understanding between the truth commission, the Public Prosecution Service and other criminal justice agencies should be developed to regulate cooperation between these bodies. This could, for example, determine if truth commission investigators would be permitted to interview individuals in prison or in pre-trial detention.

Pros

- Model 4 may result in a small number of prosecutions.
- Model 4 retains the possibility of justice that, even if prosecutions do not result, may be symbolically important for many victims and their families.
- Model 4 is less likely to attract political controversy than Models 1 and 2.
- By using investigative methods appropriate to gathering criminal evidence, the 'truth' produced by the commission may be viewed as more robust and methodologically sound.

Cons

- The absence of amnesty and use immunity, coupled with the possibility of prosecutions and the need to interview some witnesses under caution, will make it unlikely that alleged offenders will provide information relating to their own crimes and they may be less likely to provide evidence relating to the institutions within which they worked.
- The need to use investigative methods appropriate to the gathering of criminal evidence may result in encounters with victims being more legalistic and less sensitive to the way the victim want to tell their story and the details that they wish to emphasise.
- Individuals convicted of scheduled offences committed before 1998 would only serve a maximum of two years under the terms of the Good Friday Agreement.
- Retaining the possibility of prosecutions may preclude the Commission from accessing active case files held by the Public Prosecution Service.
- Where successful prosecutions of historic cases are unlikely, preventing a Commission from naming offenders may reduce the scope for non-judicial forms of accountability.
- The legalistic nature of this commission means that it is likely to be more expensive than the other models.
- The individualised focus on gathering criminal evidence for particular cases could mean that less consideration would be given to larger thematic issues – the causes, context and consequences of violence – which are the usual focus of a truth recovery process.
- If truth recovery body were tasked with investigating institutional responsibility, it may reasonably decide to investigate the role of state agencies (such as the police, military, security services and the Public Prosecution Service). However, given that prosecutions might result, this might well adversely impact on the

working relationships between such a truth recovery body and at least some of these bodies, the staff of which might ultimately be liable for prosecution.

Conclusion

As noted in the introduction to this brief report, we were asked by a number of political and civil society interlocutors to develop practical models on the intersection between truth, amnesties and prosecutions. Mindful of the local circumstances of Northern Ireland and traditional approaches to inquiries about the past in both the United Kingdom and the Republic of Ireland, these heuristic and somewhat overlapping models are designed to help inform local political and civil society debate. As was stressed earlier, our hope is that they will help to provide a framework within which to have a measured conversation on these difficult and sensitive issues.

Based on our experience as academics with significant familiarity of working on these issues locally and internationally, it is our view that it is possible to devise a bespoke method of truth recovery which is both technically robust (in terms of maximising the potential for truth) and legally compliant with international and domestic law in the United Kingdom and the Republic of Ireland.

Kieran McEvoy and Louise Mallinder, 3 December 2013

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