AMNESTY INTERNATIONAL PUBLIC STATEMENT

United Kingdom/Northern Ireland: Haass proposals on dealing with the past

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The Northern Ireland Executive published a draft Agreement on 31 December 2013 containing proposals on a way forward in relation to three issues of contention in Northern Ireland: parades and protests; flags, symbols and emblems; and how to deal with the past. The publication of the draft Agreement followed several months of intense negotiations between the five executive parties in Northern Ireland (the Panel of Parties), chaired by Richard Haass, a former US diplomat, and vice-chaired by Meghan O'Sullivan. The draft Agreement could not be finalized because the Panel of Parties could not reach agreement before the expiry of the deadline set for the end of 2013. However, Amnesty International believes that in general the draft proposals on the past are a solid basis from which to proceed with efforts to deliver truth and justice for victims and their families and urges the Northern Ireland political parties and the UK government to take them forward through legislation.

In September 2013, Amnesty International released a report titled "Northern Ireland: Time to Deal with the Past", which assessed the work of mechanisms currently in place to investigate past human rights abuses by armed groups, and human rights violations by state actors committed during the three decades of political violence.[1] The report concluded that the existing mechanisms were inherently deficient and too often failed to deliver truth and justice to victims and their families. Amnesty International has called for a new comprehensive approach to the past that would be capable of fully and effectively investigating the violations and abuses committed by all sides and would contribute to securing truth and justice for victims.[2]

Despite the lack of a final Agreement, Amnesty International believes that the Haass draft proposals on dealing with the past represent an important step forward. Indeed, the introduction to the draft Agreement itself emphasizes that the time to rise to the challenge of the past is now, as *"Northern Ireland does not have the luxury of putting off this difficult, but potentially transformative, task any longer."*[3]

This statement outlines Amnesty International's views on the draft proposals to establish two new mechanisms to address the past: the Historical Investigation Unit (HIU) and the Independent Commission for Information Retrieval (ICIR).

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[1] See Amnesty International report, Northern Ireland: Time to Deal with the Past, AI Index EUR 45/004/2013, 12 September 2013. As a human rights organization Amnesty International's focus in the context of addressing the past in Northern Ireland has been on victims of human rights abuses and violations and their rights to truth, justice and reparation. The organization draws on a range of international and regional human rights law and standards in defining a victim of a human rights violation or abuse, including the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the United Nations 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.

[2] Amnesty International sent copies of the report to the Panel of Parties as its official submission to help inform the parties' discussion on 'dealing with the past', met with the vice-chair of the Talks in September, and held meetings with some of the political parties, including with designated Talks delegates.

[3] Proposed Agreement 31 December 2013, An Agreement among the Parties of the Northern Ireland Executive on parades, select commemorations, and related protests; flags and emblems; and contending with the past (hereafter the Proposed Agreement), page 20.

The Historical Investigations Unit

The draft Agreement states that "*In any society, holding people accountable for breaking the law is a fundamental responsibility of government. Doing so consistently and even-handedly reinforces belief in the integrity of government and reassures citizens that their society is safe, fair, and just".*[4] To that end, and noting to some extent the shortcomings in the current system in place to investigate historical cases, the draft Agreement proposes the establishment of a Historical Investigations Unit.

The HIU would be a new body, established through legislation, and charged with reviewing and investigating deaths that occurred in the course of the political violence. The proposals make clear that the HIU should be *"led by a trusted figure with relevant investigative or legal experience and a reputation for integrity and independence"*.[5] This person would be appointed by the Northern Ireland Policing Board, which would also oversee the HIU and be responsible for receiving and addressing complaints from the public and others affected by its work.

The HIU would take over the cases that currently lie with the Historical Enquiries Team (HET) and the Police Ombudsman for Northern Ireland (PONI); the two main bodies currently carrying out investigations into deaths.[6] Cases would have an initial review by the HIU and where the unit concluded that there were grounds for a criminal investigation, it would then carry out an investigation, with full police powers.[7] According to the draft Agreement, these powers would enable the HIU to conduct investigations that are compliant with Article 2 (the right to life) of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Where appropriate based on the evidence, the HIU would then refer cases directly to the Public Prosecution Service for further action. The HIU would review all cases involving deaths, with families being able to choose whether or not they wished to engage with the process. At the end of the process a report would be provided to the families who want one, outlining the extent of information known about the case. Those who were seriously injured would also have access to the HIU; this is a welcome proposal and the first time that the rights of people with serious injuries have been acknowledged in the design of an investigatory mechanism in Northern Ireland.[8]

The proposals for the establishment of the HIU represent an important step forward in securing truth and justice for victims of human rights abuses and violations. The Agreement recognizes - both explicitly and implicitly - that the investigatory system currently in place is inadequate. It highlights the need for a mechanism that is capable of carrying out investigations that are compliant with Article 2 of the ECHR in an independent manner and which can command the confidence of the entire community in Northern Ireland. Given this, Amnesty International believes that the proposal for the HIU contained in the Agreement provides a solid basis on which progress can - and should - be made to introduce legislation that will finally establish an effective investigatory mechanism that is capable of securing a measure of truth and justice for victims of human rights abuses and violations.

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[4] The Proposed Agreement, page 24.

[5] The Proposed Agreement, page 28.

[6] For further detail of these two mechanisms see Amnesty International report, Northern Ireland: Time to Deal with the Past, AI Index EUR 45/004/2013, 12 September 2013.

[7] This refers to cases which to date have not been reviewed by the Historical Enquiries Team or by the Police Ombudsman for Northern Ireland, which will be reviewed first. After these reviews have been completed families will have the opportunity to request the HIU to carry out a new review of any previous Historical Enquiries Team or Police Ombudsman case; such requests may be granted if meaningful flaws are found in the earlier investigation or if significant new information has come to light.

[8] The draft Agreement proposes that in a case involving a death where someone was injured HIU will also provide a general report that will be given to all of those injured in the same event should they desire it. Then once all cases involving deaths have had a review and if resources permit, the HIU will conduct reviews and investigations into cases involving severe injuries.

There remain, however, some areas where further clarification or changes to the proposals should be considered.[9] For example, there is a need for explicit guarantees of sufficient resources so that the HIU can carry out its work promptly and effectively. The draft Agreement recognizes the need for the substantial investment of financial and other resources in implementing the proposals and that the Northern Ireland Executive would need to play its part in securing these resources. However, the UK government would also have a crucial role to play in providing financial and other resource support to ensure that the HIU would be able to function effectively. The UK government is obliged under international law to ensure that investigations are carried out in a manner that is consistent with international human rights law and standards. It is imperative that it support the establishment of the proposed new independent investigatory mechanism and commit to providing it with the necessary resources. As a number of cases have cross-border implications and connections, it would also be important that any bodies established have the full support and cooperation of the Irish government and its agencies.

The importance of guaranteeing sufficient resources is starkly highlighted by the caveat in the Agreement that the HIU would conduct reviews and investigations into cases involving serious injuries only "*if resources permit*".[10] A lack of resources should not be used as a reason to deny those who were seriously injured the possibility of a review of their case where there are grounds to do so.

Further clarification is also required with respect to access to intelligence information held by the Police Service of Northern Ireland (PSNI) and other relevant bodies. The draft Agreement states that "*the HIU will begin its work on each case with a review of the case's existing file and any associated intelligence that may be held by the PSNI.*"[11] Consideration will need to be given to ensuring an effective and independent procedure capable of guaranteeing that all relevant intelligence in every case is made available to the HIU.[12] More generally, there must be clarification of the HIU's ability to compel witnesses and documents. Though it is clear that HIU would have police powers to carry out criminal investigations, it is also important that it have powers to compel witnesses and documents in all cases that it will review – including those where no criminal investigation is expected to take place. The HIU should also have access to intelligence information or other material held by other bodies, including the Ministry of Defence, the security services, and other government departments and public bodies. This is vital to ensuring that all HIU reviews are thorough and effective.

Despite these outstanding questions, Amnesty International believes that the proposals for the HIU provide a solid basis on which to proceed with efforts to deliver at last an effective and independent investigatory mechanism. Amnesty International urges the Northern Ireland political parties, and the UK and Irish governments, to ensure that momentum is not lost and to use these proposals as the basis for new legislation that will provide for an investigatory mechanism that fully complies with the UK's international human rights obligations. The new mechanism should energetically pursue the search for evidence that could identify those responsible and be used to hold them accountable.

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[9] A further example where clarification is needed would include why it is all historic cases currently being pursued by the PSNI have been excluded from the HIU's remit.

[10] The Proposed Agreement, page 27.

[11] The Proposed Agreement, page 27.

[12] This issue is particularly pertinent given that processes for accessing PSNI intelligence on historic cases have previously given rise to concern. The inspection of the Historical Enquires Team (HET) by Her Majesty's Inspectorate of Constabulary (HMIC) highlighted this matter as a particular area of concern which had undermined the body's independence. The HMIC report raised concerns that the HET's intelligence unit was staffed largely by former RUC or PSNI employees, and similarly that staff in the PSNI intelligence branch – effectively the gatekeepers for intelligence passed to the HET – have included former RUC special branch officers. The HMIC thus recommended: *"Given the sensitivity of intelligence matters in the context of Northern Ireland the HET needs to do everything it can to make sure its independence is safeguarded. For this reason, it would be preferable to institute some independent procedure for guaranteeing that all relevant intelligence in every case is transmitted for the purposes of review, to ensure compliance with the Article 2 standard."* (HMIC, *Inspection of the Police Service of Northern Ireland Historical Enquiries Team*, 3 July 2013, page 22-23).

The Independent Commission for Information Retrieval

The draft Agreement recognizes the need of victims to know as much as possible about the circumstances of their case and, with this in mind, proposes the establishment of an Independent Commission for Information Retrieval (ICIR) to contribute to truth recovery. Victims and the immediate families of victims would be able to register with the ICIR a request for information about any violent incident connected to the conflict. The ICIR would then reach out to designated intermediaries in organizations and governments, who would then seek out individuals within their networks who may have information relevant to the request. After the ICIR has determined that it has learned all it reasonably can, its staff would prepare a private report for the victim or victim's family conveying the information it has gleaned regarding that specific case.

The draft Agreement also envisions an internal unit within the ICIR to analyse particular patterns or themes of importance arising from the political violence.[13] The draft Agreement provides examples of relevant themes that the ICIR could examine, including:

- alleged collusion between governments and loyalist and republican armed groups;
- the reported targeting of off-duty UDR soldiers, prison officers, and reservist Royal Ulster Constabulary officers;
- whether the Republic of Ireland provided a 'safe haven' to members of republican armed groups; and
- the mistreatment of detainees and prisoners.

Amnesty International fully recognizes the value of having a mechanism that can effectively contribute towards truth recovery, both for individual victims and for society more generally. Many of the victims and relatives whom Amnesty International has met with in Northern Ireland have expressed a strong desire for the truth. They want to know the full story of what happened either to them or to a relative, to understand why the events leading to injury or loss of life occurred, and to have the harm and wrong they have suffered acknowledged. With the passage of time, the pursuit of normal avenues of justice for many families has become increasingly difficult, but they should still be able to access as much information as can be found in order to know the truth to the fullest extent possible. With that in mind, Amnesty International considers that proposals in the Agreement for a separate truth recovery process provide a good basis on which to pursue further discussions. However, it believes that the powers and remit of the ICIR as conceived in the Agreement need to be strengthened in a number of areas.

According to the draft Agreement, the process of information retrieval by the ICIR would be facilitated by empowering it to offer a form of protection to persons who give statements to it (described as 'limited immunity' in the proposals). The use of protected statements recognizes the importance of truth recovery for families as it aims to facilitate the possibility of the disclosure of information which – without these protections - would otherwise be unlikely to become available to a victim or his or her family. As the draft Agreement stresses, the protection offered would not amount to an amnesty for an individual, but would guarantee that statements - or information and evidence within them - given to the ICIR would be inadmissible in any criminal or civil actions against an individual who provided a statement to ICIR or any person named in such a statement. The proposals' provision for the use of such "protected statements" would not provide protection against prosecution or the pursuit of civil damages, based on evidence derived from other sources.

Such protection can thus be distinguished from amnesties or general immunities, which are never acceptable – and which Amnesty International would always oppose - as they deny victims the right to an effective remedy for the abuses and violations they suffered and can perpetuate impunity. Amnesty International accordingly expects that the HIU, in its role as the

[13] The need to investigate patterns of violations and abuses was highlighted in the Amnesty International report, Northern Ireland: Time to Deal with the Past, AI Index EUR 45/004/2013, 12 September 2013, page 45-51.

complementary process to the ICIR, will vigorously pursue evidence that could serve as a basis for criminal prosecution in appropriate cases, thus providing victims with justice and avoiding the possibility that the new mechanism would contribute to impunity.

Amnesty International recognizes that there is precedent for the use of protected statements in the context of certain public inquiries in the UK (including those examining cases pertaining to Northern Ireland). The aim of such protection is both to protect the individual's right against self-incrimination and to facilitate or encourage greater disclosure by a witness during a fact-finding inquiry.[14] For example, in both the Bloody Sunday Inquiry and the Baha Mousa Inquiry undertakings were provided by the Attorney General that no evidence given by a witness would be used against him or her in any subsequent criminal or civil proceeding.[15] In addition, in regard to truth commissions, the Office of the United Nations High Commissioner for Human Rights has noted:

> *"It may also be necessary to empower a truth commission to grant use immunity to a perpetrator who testifies before the commission. While this does not provide 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. In short, truth commissions and other processes aimed at realizing the "right to truth" may be facilitated by granting perpetrators use immunity or reduced sentences for their testimony, but may not grant total immunity."*[16]

The proposals for the ICIR provide not only protection against self-incrimination for the person giving the evidence, but extends the protection so that the statements or evidence within them also cannot be used against third parties. Though Amnesty International understands the reasons why protection has been extended to third parties, the organization notes that this level of protection is not commonly provided in public inquiries in the UK and is concerned that this extension might limit the possibility for victims to seek and secure justice.

Amnesty International is also concerned about the proposals for a third layer of protection of information provided to the ICIR. This is that any *"raw information"* provided to ICIR *"will not be disclosed under any circumstances"* and, specifically, the ICIR *"will never inform law enforcement"* of any claimed links between certain events and other people who may have been involved.[17] This goes beyond the provision that statements or information would not be admissible in criminal and/or civil proceedings. Instead it allows for the scenario in which an individual could give anonymous evidence to the ICIR about a link of another individual to a different case and that information would remain forever secret. That information could never be passed to the HIU, for instance, as a possible avenue of inquiry, even though the HIU may at that very time be carrying out an investigation into the case. Amnesty International believes this provision has the potential to impede the possibility of both truth and justice for victims. More generally, while Amnesty International acknowledges that certain information may need to be redacted to protect individuals, it stresses that, in principle, the information which the ICIR obtains should be fully reflected in its thematic reports.

Moreover, in other contexts containing provisions for protected statements there have usually been coinciding powers of compulsion. Such powers are entirely absent from the proposals for the ICIR, which would operate on the basis of the voluntary cooperation of persons willing to give testimony. This is particularly important with respect to the role of the ICIR in the examination of patterns and policies, where its lack of powers to compel witnesses or the production of documents would significantly undermine its ability to come to informed

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[14] For further detail concerning the use of immunity provisions or protected statements in the context of public inquiries see Jason Beer, *Public Inquiries*, 2011, Oxford University Press, page 208-209 and 325–332.

[15] *Ibid.* page 327-328. See also Prof Kieran McEvoy and Dr Louise Mallinder, *Truth, amnesties and prosecutions: models for dealing with the past,* 3 December 2013, page 13-16.

[16] Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (2009).

[17] The Proposed Agreement, pages 31 and 34.

conclusions. If members of loyalist or republican armed groups, for example, cannot be compelled to appear and provide information about the motivation for, planning, and execution of an operation, the ICIR would be hampered in its ability to carry out a thorough inquiry and produce a comprehensive record of human rights abuses committed by armed groups. Likewise, an examination of torture and other ill-treatment of detainees, and whether state policy or state-sanctioned practices deliberately or indirectly gave rise to such unlawful conduct, would require robust investigation, including the possibility to compel witnesses and the production of documents. The lack of powers of compulsion for the ICIR contrasts with the previous proposals put forward by the Independent Consultative Group on the Past, which allowed for the use of protected statements, but proposed that the unit charged with thematic analysis would have powers of compulsion.[18]

Amnesty International also believes that further consideration should be given to whether it is appropriate for cases to be examined by both bodies simultaneously, or whether it would be preferable for cases to be reviewed and investigated first by the HIU, prior to entering a process of information retrieval. It will be important to ensure that as the two bodies carry out their work in the future there is no conflict between the search for truth and the search for justice, but rather that both mechanisms are able to effectively and energetically pursue these complementary elements.

Overall Amnesty International believes that the proposals for the HIU and ICIR are a positive development and have the potential to advance efforts to secure truth and justice for victims of human rights violations and abuses. Though work still needs to be done to ensure these mechanisms operate in compliance with international human rights standards, the momentum to address the past in Northern Ireland should not be lost. Politicians and other stakeholders must now commit to refining these proposals and ensuring that the establishment of effective mechanisms to deal with the legacy of the past becomes a reality.

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[18] Report of the Consultative Group on the Past, 2009, page 147-148.