A REVIEW OF INTERNATIONAL HUMAN RIGHTS LAW RELEVANT TO THE PROPOSED ACNOWLEDGEMENT & ACCOUNTABILITY FORUM FOR ADULT SURVIVORS OF CHILDHOOD ABUSE

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Contents

INTRODUCTION

This report contains the findings of a review of the areas of international human rights law likely to be most relevant to the work of the proposed Acknowledgement and Accountability Forum for adult survivors[2] of childhood abuse in Scotland ("the Forum"). It will not deal with domestic Scots or UK legislation or common-law, nor with rights and obligations under European Community law and the Third Pillar of the European Union.

At the time of writing, the Forum is a proposal only, and so the major parameters have yet to be set, including its purposes, the type of information it might receive or proactively collect, and what practical outcomes will be expected of it. The nature, scope and circumstances of childhood abuse will not be fully known unless and until survivors recount their experiences. The extent to which survivor and the State want the Forum to be part of an overall remedy is unknown at this stage. Part of the purpose of this document is to assist the discussions and decisions of those who will define these issues. On this basis, certain necessary assumptions were used in the review so as to provide a human rights perspective on the potential implications of various choices of Forum design. These were:

1. The type of conduct (whether actions of omissions) from which the survivors suffered will fall within the Scottish Office (1998) interagency guidance definition of child abuse: physical injury, sexual abuse, non-organic failure to thrive, emotional abuse and physical neglect. The Scottish Office definition of abuse is referred to throughout and has informed the consideration of the relevant international human rights law framework. However it is recognised that there is some debate over the value of that definition. For example the Historical Abuse Systemic Review report by Tom Shaw[3] points to the variety of definitions of abuse used in Scotland in

[2] Throughout, this paper refers to "survivors" on the understanding that this term is most frequently used in Scotland by those individuals who have experienced abuse as children themselves. International human rights law is built on the foundation that all individuals are born free and equal in dignity and rights. The choice of terminology is therefore motivated primarily by the importance of self-identification.

[3] Throughout reference to Shaw, refer to Tom Shaw, *Historical Abuse Systemic Review: residential schools and children's homes in Scotland 1950-1995*, Scottish Government, 2007.

addition to the Scottish Office definition, including e.g. that by Lothian and Borders Joint Police/social work protocol.[4] In his review Shaw considered domestic law over the majority of the relevant period (in particular the Young Persons (Scotland) Act 1937, [5] Children Act 1948, Children (Scotland) Act 1995) and pointed to a consistency of definitions of abuse. Shaw recognised the *"risk of imposing 21st Century perspectives"*[6] onto historic conduct. Nevertheless, looking at the list of prohibited conduct in the 1937 Act[7], Shaw concludes that most conduct which would today be considered abuse was included already at that time:

> *"It's all too easy to apply today's standards, understanding and expectations to the services provided yesterday, and it's important to avoid that risk. However, across the review period, the legislation largely made it clear what the required responses were from the people who provided residential child care, to ensure the welfare and safety of the children in their care. It also specified the limits of punishment. If the legislation* [had] *been honoured in spirit and letter when it was being implemented, if the work of residential schools and children's homes had been supervised and managed as expected, then it's reasonable to conclude that the incidence of abuse would have been lower and the experiences and outcomes for many*

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4 Ibid, pp 23-24

5 Definitions of abuse in domestic laws from 1937 onwards in Shaw pp 39 et seq.

6 Shaw, p 33.

7 Children and Young Persons' (Scotland) Act 1937, Section 12 Cruelty to persons under 16

"(1) If any person who has attained the age of sixteen years and has the custody, charge, or care of any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of an offence…

(2) For the purposes of this section - (a) a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging he has failed to take steps to procure it to be provided under the Acts relating to the relief of the poor…

(7) Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to him."

would have been better." [8]

Taking the Scottish Office definition as a guide, but recognising that international human rights commentators have pointed to the *"arbitrary"* definitions of abuse applied in domestic systems,[9] this paper points to conduct, analogous to the categories in the Scottish Office guidance which was, or could be considered, internationally prohibited at different points throughout the relevant period. International human rights standards are living instruments, and the European Court of Human Rights too has reiterated the evolution over time of standards of ill-treatment.[10] However it is important to recognise that the review of prohibited conduct (in Part B), based on international human rights law, is a minimum threshold. Given the findings of the Shaw Review, the forum may be best recommended to base its consideration of prohibited conduct both on developing international understanding as supplemented where appropriate by domestic law in operation at the relevant time.

2. The work of the Forum could potentially cover child abuse dating back at least to the 1920s.

3. The range of purposes that survivors and policy makers might choose for the Forum would potentially include:

- The recounting of experiences by survivors;
- Creating a historical record of survivors experiences and / or researching the nature, scope and circumstances of the phenomenon;
- Publishing a report which may or may not make conclusions regarding the facts and effects of individual survivor's experiences, and which may pronounce on the existence of alleged violations of human rights;
- Making recommendations as to remedies and policy reform

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[8] Shaw, p 103.

[9] See Peter Newell and Rachel Hodgkin, *Implementation Handbook for the Convention on the Rights of the Child*, third edition, UNICEF, 2007, (hereafter UNICEF Implementation Handbook), p 249.

[10] In *Selmouni v France* (1999) for example the ECtHR stated clearly that *"[c]ertain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future."* The Court emphasised "*the increasingly high standard being required in the area of the protection of human rights and fundamental liberties"*.

- Providing a range of redress measures or facilitating access for survivors to measures provided by other State or non-State bodies.

4. The range of care placements which will be considered during the forum will not be unduly restricted. Shaw concluded that it was very difficult to define types of placements of children in institutions due to the many different terms used. The Shaw Review covered (at least) local authority or voluntary children's homes, residential (approved) schools, residential care, remand homes, special schools, institutions for children with physical or mental disabilities, poor homes and others. While the forum and other remedies could be extended to foster carers and abuse in other settings, including the home, this paper provides a general human rights legal framework which can be applied to determining conduct, responsibility and remedies. Where it is limited to certain settings this is either implicit in the nature of the standards or is made explicit.

5. Restriction to **children**: it is assumed in this paper that the forum process is directed to abuse perpetrated against children. However, recognising that, under the law of Scotland, majority is currently reached at 16 for most purposes, and that this has been subject to variance over the relevant period, a decision may be made to include within the purview of the forum all of those who were in fact in care as children and young people (whether over the age of majority or not). In any event any age based restriction should be based on reasonable and objectively justifiable criteria. It is recommended, at least, that the forum consider for this purpose a child to be anyone under the age of 18, as envisaged by the UN Convention on the Rights of the Child, Article 1.[11]

Part A of the review sets out the general framework of relevant applicable law and standards. It is divided into three separate time periods for a logical analysis.

Part B deals with the international law and standards relevant to the core

[11] Article 1 of the CRC includes the qualifier "unless under the law applicable to the child, majority is attained earlier."

issues that the Forum intends to deal with: child abuse and the potential responsibility of the State, private institutions and individuals.

Looking to the future, Part C discusses the human rights aspects of implementing such a Forum, including its possible interrelationships with ongoing or future domestic criminal and civil actions.

Finally, Part D brings together implications and challenges for the design and operation of the Forum, with a view to complying with the UK's international human rights obligations.

PART A APPLICABLE LAW & RELEVANT STANDARDS

The time period that will be covered by the proposed Forum is not yet known. The following three periods were therefore selected on the basis that they offer a logical way in which to see the framework of applicable international law[12] and human rights standards.

1. Pre 1953

There were no binding legal obligations under treaty, customary law or general principles of international law in this period regulating the treatment of States' *own nationals* in peacetime[13] save for the minority protection rights efforts after World War I[14] and some treaties of the International Labour Organisation, and the question of an internationally wrongful act creating obligations to remedy does not arise.[15]

Even if no positive legal obligation existed this does not mean however that no relevant international guidance exists pointing to analogous *standards* of acceptable conduct on the part of State bodies and officials that may constitute a useful guideline.

While not binding, the 1924 League of Nations Declaration on the Rights of

[12] Article 38 (1) of the Statute of the International Court of Justice is used here as the generally accepted expression of the sources of international law: International conventions (treaties), Custom, General principles of law and, as a subsidiary source, judicial decisions and scholarship.

[13] International law norms relating to the prohibition of wartime abuses against civilians (including one's own nationals, see Common Article 3 to the Geneva Conventions) predate 1953.

[14] In relation to the crime of torture, a norm of customary international law prohibiting its use probably crystallised between the 1948 Universal Declaration and 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (for e.g. *Filartega v Peña Irala* (1980) 630 F.2d 896)

[15] Some national laws and constitutions from the period protected individual rights to life, due process and freedom from torture and ill-treatment but it cannot be said that States regarded themselves as being under an *international* legal obligation to do so. The elements evidencing customary law norms protecting those rights are not established. As to general principles of law, leaving aside the issue of whether such principles can be legally binding on States in the absence of any treaty and customary norms determining their content and scope, while some States around the world including the UK may have included in their domestic law the protection of persons from the actions of State officials, it was not until the advent of the regional and global human rights treaties that this can be termed a general principle.

the Child (The Geneva Declaration) demonstrates the genesis of a child rights perspective at the international level. Among others, the Declaration contains the following general principles: *"…the orphan and the waif must be sheltered and succored; the child must be … protected against every form of exploitation"*.

The Universal Declaration of Human Rights of 1948[16] refers to the right to life, liberty and security of person (Article 2); the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 5); the right to an effective remedy (Article 8);[17] the right to a fair and public hearing by an independent and impartial tribunal, in the determination of his (or her) rights and obligations and of any criminal charge against him (or her) (Article 10); the right to protection against arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation (Article 12).

Despite the lack of real agreement about the content of an international minimum treatment standard, the protections applied in the cases of State responsibility for injury to foreign nationals since the 1920s provide a useful benchmark of a desirable standard of treatment[18] and would include *a positive obligation to protect from injury by third parties,[19] apprehend and punish those responsible,[20] provide compensation and ensure the protection of due process rights.[21]*

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[16] The Declaration was a Resolution of the United Nations General Assembly. Such resolutions do not create binding legal obligations even if they are unanimously adopted and States do not have a legal obligation to comply with their provisions. E.g. *Case Concerning East Timor*, (Portugal v Australia) judgment of 30 June 1995, paragraph 32. They may play a role in the creation of norms of customary international law, supra note 3.

While it is possible that articles 55 and 56 of the UN Charter (1946) create a legal obligation to engage in efforts to promote human rights which if violated might be actionable by other States Parties, the Charter cannot be said to have created legal obligations of States to individuals.

[17] The right to a remedy in the Universal Declaration relates to remedies for *" acts violating his fundamental rights granted him by the Constitution or by law"* (article 8) indicating that the right to a remedy depended at that time on the rights already forming part of the national law.

[18] An "international minimum standard" of treatment of foreign nationals emerged as a benchmark by which to judge whether a State has failed to do due diligence and so violated international law (e.g. *The Chattin Claim* (1927) 4 RIAA 282*)*.

[19] *The Youmans Claim* United States v Mexico (1926) 4 RIAA 110

[20] *The Janes Claim* United States v Mexico (1926) 4 RIAA 82; *The Noyes Claim* US v Panama (1933) 6 RIAA 308.

[21] *The Chattin Claim* (1927) 4 RIAA 282.

2. 1953 – 2000

The second period - between the coming into force of the European Convention on Human rights (ECHR) in 1953 and the Human Rights Act in 2000 is quite lengthy. It sees the assumption of various treaty obligations by the United Kingdom, the creation of customary law protection of core human rights, and developments in the creation of aspirational standards on the treatment of victims generally and the specific components of an acceptable remedy for human rights violations under international law.

While several other treaties came into force for the United Kingdom during this period, the ECHR is the principal international human rights instrument operating in the United Kingdom. UK courts and institutions have drawn a marker at 2nd October 2000, the date on which the Human Rights Act came into force as the date from which the protections in the ECHR could be relied upon by individuals in domestic proceedings. Courts have indicated[22] for example that for certain violations occurring before then, the authorities have no domestic obligation to provide the victim with a remedy that would fulfil the requirements of the ECHR, as interpreted by the European Court of Human Rights (ECtHR). In the House of Lords case of *Hurst*, for example, the requirement under Article 2 of the ECHR (right to life) to hold an effective public investigation into the circumstances surrounding a death[23] was not held to be applicable to an incident which took place in May 2000, before the entry into force of the Human Rights Act on 2 October 2000. According to the House of Lords, the crucial element of timing for the purposes of the investigation requirements was the time at which the incident took place, rather than the time at which the decision was made on the form of investigation (the latter decision was

[22] *R (on the application of Hurst) v Commissioner of Police of the Metropolis* [2007] UKHL 13

[23] To comply with the requirements of Article 2, ECHR, an investigation must look at both "by what means" and "in what circumstances" the death occurred. Previously investigations in England were required, under domestic law, primarily to comply only with the former rather than the latter. The House of Lords described the domestic investigation requirements to that point as being insufficient to provide a meaningful conclusion as to whether the conduct of State agents might reasonably have prevented a death. While the case turned on the application of Article 2, it is interesting to note that the House of Lords also made reference to the "satisfaction" of Mrs Hurst's "understandable desire for detailed findings to be made upon the circumstances leading to her son's death" which suggests the court was cognisant of the interaction between investigation requirements under Article 2 and the right to a remedy under Article 13. *R (on the application of Hurst) v Commissioner of Police of the Metropolis* [2007] UKHL 13. The citation is from the Opinion by Lord Brown, at para 34.

taken subsequent to the entry into force of the Human rights Act).[24] The ECtHR is currently considering this case.[25] The decision of the ECtHR will be interesting to note in respect of the remedies required for breaches of Article 2 (and Article 3 where case law on investigation requirements has developed in parallel). In an earlier UK case the ECtHR clearly viewed convention rights on remedies under articles 2, 3 and 13 to be applicable to events that happened prior to the entry into force of the Human Rights Act and considered that an arguable claim could be made under the Human Rights Act for the domestic application of those principles.[26] The House of Lords in *Hurst* did not consider the views of the ECtHR in the earlier case.

The purpose of this paper, however, is not to assess the extent to which domestic law at various periods complied with international law. Consequently, irrespective of whether a victim of a pre 2000 violation was or would have been able in fact to rely upon the ECHR, and/or seek a *"convention compliant"* remedy in a national court, international obligations relevant to the abuse of children in care continued to exist during this period. In addition to the ECHR, which came into force on 3 September 1953, several relevant treaties created obligations for the United Kingdom during this period relevant to the work of the proposed Forum. Regardless of whether there has been any transformation of these treaties into UK law through statute, actions or omissions that can be attributed to the State may have violated those obligations, and *under international law* remedies are due to the affected individuals. Those remedies may remain due today if they have not yet been made available (see below on dealing with time frame challenges).[27]

During this period the United Nations also further developed its understanding of the rights of the child, firstly in its 1959 Declaration on the

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[24] In so finding the House of Lords upheld its previous judgement on the same issue in *In re McKerr*, [2004] 1 W.L.R. 807.

[25] *Christine Hurst v UK*, European Court of Human Rights, Application no. 42577/07, statement of facts and questions to the parties, 19 November 2009.

[26] *E and others v UK*, Application No. 33218/96, Judgement of 26 November 2002, para 115, in relation to action against abuses which occurred in the 1960s and 1970s the Court stated, *"If taking action at the present time, the applicants might, at least on arguable grounds, have a claim to a duty of care under domestic law, reinforced by the ability under the Human Rights Act to rely directly on the provisions of the Convention."*

[27] Other State parties to the Convention also have the right to refer any alleged breach to the court (Article 33).

Rights of the Child. The Declaration, which is not a legally binding standard, can be considered to reflect the developing international consensus on child rights. It includes a reference to forms of abuse, *"Principle 9: The child shall be protected against all forms of neglect, cruelty and exploitation…"* and also contains innovations not seen much outside UDHR on the responsibilities of individuals and private institutions.[28] The UN General Assembly also adopted a Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1975.[29]

The International Covenant on Civil and Political Rights (ICCPR, 1966) an international treaty binding on the UK since ratification in 1976, includes several rights relevant to this review including the right to an effective remedy, the right to dignified conditions of detention, the right to a fair trial and fair hearing and the right to freedom from torture and ill-treatment. Obligations in respect of the last of these were further spelt out in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984) which the UK ratified in 1988.

In 1991 the UK ratified the UN Convention on the Rights of the Child (CRC), which includes very far reaching provisions relevant to this review. Among other relevant provisions, the CRC provides that the best interests of the child shall be a primary consideration in all decisions which affect the child, that States have positive duties to ensure the protection of children, and to ensure that all institutions responsible for the care of children conform with health and national safety standards as well as on the suitability of staff and supervision in such institutions;[30] it provides explicitly for the protection of

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[28] The Declaration states "The General Assembly … calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures progressively".

[29] Adopted by UN General Assembly resolution 3452 of 9 December 1975.

[30] Article 3:

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions … the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

the child from, *"all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child";*[31] for special protection for children who cannot in their own best interests be permitted to remain in the care of their families;[32] and protection of the child from sexual exploitation and abuse.[33]

According to the UN Human Rights Committee (in 1994), the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment is a norm of customary international law.[34] Customary international law therefore plays a role during this period as source to fill any treaty gaps, reinforce the new treaty norms, or assist in interpreting them, particularly in relation to whether acts and omissions of individuals and private institutions may be attributable to the State (see Part B). In addition, customary law can be directly relied upon by victims in national courts without national implementing legislation.[35]

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3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

[31] Article 19

"1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

[32] Article 20.

[33] Article 34.

[34] UN Human Rights Committee, General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant : . 04/11/94. UN Doc. CCPR/C/21/Rev.1/Add.6, para. 8. A much wider range of authorities have found that the prohibition of torture is a peremptory norm of customary international law. See for example *Prosecutor v Furundzija*, 10 December 1998 of the International Criminal Tribunal for the former Yugoslavia; *R v Bow Street Magistrate, ex parte Pinochet* (No.3) [2000] 1 AC 147; and *Attorney General v Zaoui*, [2005] NZSC 38 at [51].

[35] The general UK approach to international law is, on the whole, that treaties require national legislation in order for their provisions to be enforceable in domestic courts while customary international law automatically forms part of domestic law.

Judgments of the ECtHR are not legally binding on all States, only to those who are parties to an individual case or complaint. These decisions can constitute a subsidiary source of international law, and over the years they have acquired significant weight as such. General Comments of the UN Human Rights Committee and other UN treaty bodies such as the Committee Against Torture and the Committee on the Rights of the Child, and views of those treaty bodies which consider individual communications concerning alleged violations of the treaties, are not legally binding, even on the States involved in the particular situation,[36] but they are often treated as a final legal determination of the matter including by States themselves. All such decisions and findings are authoritative interpretations of binding international obligations and as such an important guide to the meaning and scope of treaties and customary norms.

During this period the UN Human Rights Committee (the committee of independent experts which monitors States' performance under the ICCPR) adopted two General Comments on Article 7 of the ICCPR (the prohibition of torture and ill-treatment), the first in 1982 and the second which replaced it in 1992.

Finally, the United Nations produced several standard-setting documents that, although again not legally binding, provide benchmarks of an adequate State response to crime, abuse of power, gross violations of human rights and the rights of juveniles deprived of their liberty.[37]

3. Post 2000

Although no major new treaties were ratified by the United Kingdom on

[36] The UK is not a party to the 1966 Optional Protocol to the ICCPR allowing individual complaints to the Human Rights Committee.

[37] Including Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN General Assembly resolution 55/89 Annex of 4 December 2000); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN General Assembly resolution 43/173 of 9 December 1988);

Rules for the Protection of Juveniles Deprived of their Liberty (UN General Assembly resolution 45/113 of 14 December 1990).

subject matter relevant to the Forum between 2000 and 2009[38], the case law of the ECtHR has ruled in recent years on the existence of both a positive obligation to prevent violations and a procedural obligation to carry out an effective investigation under article 3. It has also made key rulings including in several cases involving the United Kingdom, on the issue of effective investigations and effective remedies generally.

Various UN treaty bodies have also issued further authoritative interpretations of UN human rights law relevant to the forum, including the UN Committee against Torture which adopted a General Comment[39] in 2007 including, among other things, a clear pronouncement on States due diligence obligations. The UN Committee on the Rights of the Child also adopted a General Comment in 2006 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment under the CRC.[40]

In addition, the international human rights law applicable to the manner in which the forum is designed and implemented will be the law in force at the time the Forum is operating, covering the rights of all those whose rights could be affected. It will thus include more recently ratified treaties, such as the Convention on the Rights of Persons with Disabilities (CRPD), to which the UK has been a party since June 2009, to the extent that they are relevant to the process of design and implementation of the forum. The CRPD includes extensive provisions on the participation rights of persons

[38] The UK accepted the Optional Protocol to the UN Torture Convention creating a Sub commission to inspect detention facilities (into force for UK 22.6.2006) and the Convention for Elimination of Discrimination Against Women allowing individual or group communications to a Committee which can pronounce views and recommendations (into force for UK 17.3.2005), which help bolster the future protection of detained and female children, but do not apply to historic abuse. On 8 June 2009 the UK ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) which includes various provisions relevant to the forum, however the Convention does not have retrospective effect and so is most relevant to the process rights in developing and delivering the forum in respect of people with physical and mental disabilities. On 7 August 2009 the UK ratified the Optional Protocol to the CRPD which will allow individuals and groups of individuals who believe that their rights have been violated and they have not been able to access an effective remedy in the UK to communicate their concerns to the UN Committee on the Rights of Persons with Disabilities.

[39] CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, GENERAL COMMENT No. 2, Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2.

[40] General Comment Nº 8 (2006) : . 02/03/2007. UN Doc. CRC/C/GC/8. (General Comments).

with (physical and mental) disabilities;[41] the right to an effective remedy and effective access to justice for persons with disabilities;[42] and the right to protection from *"all forms of exploitation, violence and abuse, including gender-based aspects"*, including a duty to effectively monitor all facilities designed to serve people with disabilities.[43]

Details of specific provisions and customary international law are referred to in Parts B and C in relation to the particular topics covered. Until the specific facts or incidents of abuse are known, it cannot be determined whether the legal thresholds of some of the treaties and standard-setting documents mentioned below will be met, for example torture or gross violations, however they are included here as being potentially applicable.

41 Throughout (as discussed below) but including articles 3, 21, 29.

42 Article 13.

43 Article 16.

PART B CORE ISSUES

1. CHARACTERISATION OF CONDUCT

The Scottish Office guidance of 1998 divides the types of abuse into physical injury, sexual abuse, non-organic failure to thrive, emotional abuse and physical neglect.[44]

In international human rights law these forms of abuse may be understood as violations of physical and mental integrity rights: particularly the right to freedom from torture and other forms of cruel, inhuman or degrading treatment or punishment (ill-treatment), and the right to privacy, protection of the home and family life. In order to qualify as prohibited ill-treatment under international human rights law conduct must rise above a threshold of physical and mental suffering. However, determining whether that threshold has been reached depends on all the circumstances of the case, including the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, religion and state of health of the victim.[45] The vulnerable position of a child victim is an aggravating factor and may be a determinative factor assessing whether conduct rises above a minimum threshold of severity to be considered cruel, inhuman or degrading.[46] Other aggravating factors include the particular vulnerability of persons in institutional settings, the nature of power relations between perpetrators and victims in that setting,[47] additional obstacles to seeking and securing protection that child victims may have faced in the

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[44] Only the acts or omissions mentioned in this Guidance are used as a parameter, not its requirements on effect, knowledge or intention.

[45] *Ireland v United Kingdom* (1978) ECHR (Series A) No 25, at 162.

[46] The European Court of Human Rights expressed concern in the Costello-Roberts v the United Kingdom case, Application no. 13134/87, decision of 25 March 1993 that the applicant was only seven years old when he was "slippered", but in all the circumstances of the case did not find that the minimum threshold of severity was reached at that time. In reaching its decision the Court nevertheless recognised that, *"The assessment of this minimum level of severity depends on all the circumstances of the case. Factors such as the nature and context of the punishment, the manner and method of its execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim must all be taken into account."*

[47] E.g. being treated "as an object in the power of the authorities" constitutes an "assault" on one of the main purposes of Article 3, to protect, "a person's dignity and physical integrity". Tyrer v UK (1978), para. 33.

institutional setting (including the high standing and trust that institutions and perpetrators may have held in the eyes of the public and the State), and the premeditated and / or systematic nature of the abuse and its often lengthy duration.

Other relevant conduct may have accompanied the abuse, designed to ensure that the victims were not in a position to seek help or communicate what was happening to them to individuals or institutions that might have intervened. Human rights law may additionally prohibit such interference with children's ability to seek help. However the UN Human Rights Committee considers that it is not sufficient that treatment be capable of producing an adverse physical or mental effect; it must be proven that this has occurred in a specific case.[48]

In terms of the differentiation of conduct as torture, inhuman or degrading treatment or punishment, the UN human rights bodies consider that *"distinctions depend on the nature, purpose and severity of the treatment applied"*[49] and that *"in practice, the definitional threshold between cruel, inhuman or degrading treatment or punishment and torture is often not clear."*[50] The European human rights mechanisms have fluctuated somewhat between an approach which emphasised the purpose (the European Commission of Human Rights in the *Greek case* of 1969) and one which emphasises the threshold of pain and suffering (the ECtHR in *Ireland v United Kingdom* of 1978)[51] before establishing a view which includes elements of both purpose and severity as determinative (*Selmouni v France* of 1999[52] and *İlhan v Turkey*[53] of 2000).

In the *Greek case* of 1969 the European Commission found that ill-treatment exists on a continuum, and torture has a particular purpose. Thus, *"all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least*

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48 *Vuolanne v Finland*, HRC Communication No. 265/1987, 7 April 1989, §9.2.

49 UN Human Rights Committee, General Comment No. 20, *Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment,* (1992), para. 4 in UN Doc. HRI/GEN/1/Rev.7.

50 UN Committee against Torture, General Comment No. 2, *Implementation of article 2 by States Parties*, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (23 November 2007), para. 3.

51 *Ireland v United Kingdom* (1978) ECHR (Series A) No 25

52 *Selmouni v France*, no. 25803/94, ECHR 1999-V, judgement of 28 July 1999.

53 *İlhan v Turkey*, no. 22277/93, ECHR 2000-VII, judgement of 27 June 2000.

such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable… Torture… has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience."[54]

In *Ireland v United Kingdom* in 1978 the ECtHR drew a distinction between torture and other forms of ill-treatment given the *"special stigma"* which attaches to torture. It found that the decisive element was not in fact the purpose but the suffering of *"particular intensity and cruelty"* which the act caused.[55]

More recent cases have sought to balance the purposive and severity of suffering approaches. As the ECtHR stated in 2000, *"in addition to the severity of the treatment, there is a purposive element as recognised in the United Nations Convention against Torture… which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating."*[56]

a. Degrading[57] treatment or punishment[58]

This type of treatment or punishment is characterised by *having the purpose or effect*[59] *of gross humiliation or debasement.* In determining whether treatment is degrading, the ECtHR has regard to whether its object is to humiliate and debase and whether it adversely affected the applicant's personality. [60] However the Court generally views purpose as *"a factor"*, the absence of which does not rule out a violation of Article 3.[61] Degrading treatment must be of sufficient severity; involving some form of gross

54 *The Greek Case,* nos. 3321/67, 3322/67, 3323/67 and 3344/67, 1969 Yearbook of the European Convention on Human Rights, No. 12.

55 *Ireland v UK*, no. 5310/71, ECHR (Series A) No. 25, judgement of 18 January 1978, para. 167.

56 *İlhan v Turkey*, no. 22277/93, ECHR 2000-VII, judgement of 27 June 2000, para. 85.

57 Oxford English Dictionary: Causing a loss of self-respect, humiliating.

58 ECHR art 3; ICCPR art 7; CAT art 16, CRC art 37.

59 A violation may be found even where the treatment of punishment did not have a specific purpose of humiliation or debasement but nonetheless caused that result.

60 Peers v Greece, Judgement of 19 April 2001, 33 EHHRR 51, para. 68.

61 Ibid, para. 74.

humiliation[62] or debasement;[63] interfering with the dignity of the person;[64] but it is not necessary that the purpose of the treatment was to humiliate or debase the victim.[65] Whether the conduct reaches this level is determined by reference to the nature and context of the treatment, its manner and method and circumstances of the particular case. Degrading treatment may *"arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them."*[66] The degree of humiliation or debasement has a subjective element.[67]

The most detailed definitions of this form of ill-treatment have come from the ECtHR.[68] Since the ECHR came into force in 1953, the UK has been bound by its article 3 prohibiting degrading treatment or punishment. The Court has found instances of degrading treatment and punishment in the context of strip searching, corporal punishment, forms of official punishment and restraint, and detention and prison conditions. Many of its cases have related to physical abuse, but the prohibition is not limited to physical treatment. In a small number of more recent cases the Court has clarified that sexual abuse,[69] and serious and prolonged neglect,[70] even

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62 *The Greek Case,* (1969), op cit.

63 *Campbell and Cosans v United Kingdom* (1982) ECHR (Series A) No 48 at 28.

64 *East African Asians v United Kingdom* (3 EHRR 76) 15 December 1973.

65 *V v United Kingdom* (1999) ECHR (Series A) No 9 at 71. Although the absence of intent is relevant to the award of compensation – see *Price v UK* (2001).

66 *Ireland v UK*, para 167.

67 *Campbell and Cosans v United Kingdom* (1982) ECHR (Series A) No 48 para. 28. *"the 'treatment' itself will not be 'degrading' unless the person has undergone – either in the eyes of others or in his own eyes – humiliation or debasement attaining a minimum level of severity."* (emphasis added). See also *Yankov v Bulgaria*, no. 39084/97, ECHR 2003-XII, judgement of 11 December 2003, para 117, *"Even if it was not intended to humiliate, the removal of the applicant's hair without specific justification was in itself arbitrary and punitive and therefore likely to appear to him to be aimed at debasing and/ or subduing him."*

68 The ICCPR, article 7, prohibits degrading treatment but does not define it; General Comment 20 extends it to mental suffering and specifically corporal punishment. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does not define cruel, inhuman or degrading treatment or punishment. In more recent time the UN Committee on the Rights of the Child has issued a 15 page authoritative interpretation of the prohibition of ill-treatment in the CRC, Committee on the Rights of the Child, *General Comment No. 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)*, UN Doc. CRC/C/GC/8, June 2006. The provisions of the latter are described below as they clarify the standard required by the CRC to which the UK has been party since 1991.

69 *E and others v UK*, 2002 (the case also involved physical abuse including adults standing on children's bare feet while wearing heavy shoes and forcing children to strip to the waist and beat each other with metal chains).

70 *Z and others v UK*, 2001. The type of severe parental neglect is described below.

where they take place in the home, may also amount to inhuman and degrading treatment. The test applied by the Court focuses on specific nature and circumstances of each case; even if the severity of corporal punishment does not render it inhuman, the *circumstances* may.[71]

ECtHR case-law would tend to indicate that, with reference to the Scottish Office Guidance definition of child abuse:

- *physical injury and sexual abuse*[72] as described would ordinarily fall into the category of degrading treatment. The possible exception would be corporal punishment prior to 1972[73] although the circumstances in which it was carried out could bring it within the definition of degrading.
- *Emotional abuse*, (failing to provide for basic emotional needs), if it had a purpose to cause humiliation and debasement, could be defined as degrading. There is no requirement that in addition it caused long-lasting damage.
- *Physical neglect* as described could certainly meet the threshold of degrading without the need to show endangerment. Non-organic failure to thrive would most likely be evidence of the effects of neglect not a human rights violation in itself.

In 1969 degrading treatment or punishment was interpreted by the European commission of human rights (the commission) as consisting of *treatment or punishment which grossly humiliated a person or drives him to act against his will or conscience*.[74]

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[71] Including its sexual nature: here a teenage girl caned on the hand in 1981 by a male teacher in the presence of another male teacher 9471/81 X v UK, 1985.

[72] Although sexual abuse is clearly a violation of human rights, international human rights law referring to sexual abuse has generally been very limited. One exception is Article 19 of the CRC which specifically refers to sexual abuse under prohibited violence against children, and the Committee on the Rights of the child frequently considers child sexual abuse as cruel, inhuman or degrading treatment (see e.g. *Concluding Observations of the Committee on the Rights of the Child: Fiji*. 24/06/98, UN Doc. CRC/C/15/Add.98, para. 37. The European Court of Human Rights has considered sexual abuse in the context of Article 3 in at least one case – *E and others v UK* (2002), discussed below.

[73] The date of the punishment in *Tyrer.*

[74] *The Greek Case*, 3321-3/ 67, and 3344/ 67, 11 YBK of the ECHR (Rep.) November 5, 1969 (1969) p.186.

In 1978 the Court found the UK responsible for degrading treatment or punishment, for conduct between 1971 and 1974 including food and sleep deprivation and standing in stress positions. It described the acts as *such as to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance.*[75]

In April the same year, in a finding against the UK[76]on corporal punishment[77] by birching in 1972 (*Tyrer*), the Court stressed that the practice was *institutionalised violence, that the victim was under the power of the authorities and, in such a situation, his physical integrity and personal dignity were attacked*. Aggravating factors bringing the punishment to the level of grossly humiliating (as compared to the humiliation any convicted person might feel upon being punished) included *the removal of the victim's clothes*[78]*, the infliction of the punishment by strangers, the official context of the procedure and the mental anguish of the victim worrying in advance of the punishment.* It is not necessary to show that the treatment caused severe or long-lasting effects.[79]

V v UK 1999 pointed out that the humiliation related to the *treatment or punishment being public* might be a relevant factor but equally a level of *private humiliation* of a victim may sufficient to violate the convention.

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75 *Ireland v United Kingdom* (A/ 25) (1979- 80) 2 E.H.R.R. 25, ECHR.

76 *Tyrer v United Kingdom* (A/ 26) (1979- 80) 2 E.H.R.R. 1, ECHR.

77 It was abolished in Scotland in 1986. In the case of *Townend* 1987, resolved before the European commission by friendly settlement, the commission accepted that the new provisions in the Education (no2) Act 1986 contained an appropriate standard of protection from corporal punishment. Conduct post-1986 complying with that Act would therefore on the face of it not violate the ECHR though two subsequent cases of corporal punishment in the United Kingdom were found to constitute inhuman treatment (see below).

78 As the series of cases on strip searching since 2001 illustrates, the *removal of clothing* where there is no acceptable necessity justification may also in itself humiliate and debase to a level that would be contrary to article 3. *Iwanczuk v Poland* (25196/94)(2004) 38 E.H.R.R. 8 ECHR*, Wieser v Austria* (229303)(2007) 45 E.H.R.R. 44 ECHR, *Valasinas v Lithuania (44558/98)* 12 B.H.R.C. 266 ECHR, *Frerot v France* June 12th 2007 ECHR*, Van der Ven v The Netherlands (50901/99)(2004)* 38 E.H.R.R. 46 ECHR.

79 In 1972 in the Isle of Man, the victim who was 15 years old was hit with a birch in the presence of his father and a doctor, as punishment for the crime of assault. He was made to take down his trousers and underpants and bend over a table. He was held by two policemen, whilst a third administered the punishment, pieces of the birch breaking at the first stroke. The birching raised, but did not cut the applicant's skin causing pain for about a week and a half. *Judicial* corporal punishment of adults and juveniles had been abolished in England, Wales and Scotland in 1948 and in Northern Ireland in 1968.

Measures used to control the behaviour of children in residential care or in young offenders institutions are not exempt: *restraint*, including fastening to a bed, for a lengthy periods of time, even where medical reasons provided as justification[80] has amounted to degrading treatment.

One-off *threats of violence* may not amount to degrading treatment[81] (no viol for threat), although it should be borne in mind that this was a single incident.

The ECtHR, in a series of judgements, has progressively condemned corporal punishment of children, first in the penal system, then in schools, including private schools, and most recently in the home.[82] Considering corporal punishment and other forms of cruel or degrading punishment under the CRC, the UN Committee on the Rights of the Child issued an authoritative interpretation in 2006.[83] In its General Comment the Committee clarified that Article 19 of the CRC[84] requires that children be protected from all forms of violence and that States should *"enact or repeal, as a matter of urgency, their legislation in order to prohibit all forms of violence, however light, within the family and in schools, including as a form of discipline, as required by the provisions of the Convention ..."*. The Committee rejected any justification for violence or humiliation as forms of punishment and provided detailed and expansive definitions of corporal or physical punishment of children[85]- that is the *"the deliberate and punitive*

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80 *Herczegalvy v Austria* (A/242)(1993) 15 E.H.R.R. 437 ECHR.

81 *Campbell & Cosans v UK* (A/48)(1982) 4 E.H.R.R. 293 ECHR.

82 see in particular *Tyrer v. UK*, 1978; *Campbell and Cosans v. UK*, 1982; *Costello-Roberts v. UK*, 1993; *A v. UK*, 1998.

83 Committee on the Rights of the Child, *General Comment No. 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)*, UN Doc. CRC/C/GC/8, June 2006.

84 Article 19 requires States to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child". As the Committee stated, "there is no ambiguity".

85 General Comment No. 8, para 11, "The Committee defines "corporal" or "physical" punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices)."

use of force to cause some degree of pain, discomfort or humiliation."[86] This it considered was *"invariably degrading"* and also considered that other non-physical forms of punishment were also *"cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child."*[87]

UN[88] and other regional human rights bodies have considered that the use of seclusion, particularly for people with mental disabilities, may amount to ill-treatment.[89]

In terms of physical neglect, the cases on prison conditions since the mid to late 1990s provide a useful analogy. Similarities exist in relation to control of most or all aspects of life and conditions within an institution and the lack of freedom to complain or to leave. *A lack of food, water, toilet facilities, overcrowding, opened toilets, pestilence leading to illness, severe temperatures and inadequate sleeping and sanitary facilities have all been found to violate the probation on degrading treatment.*[90] The lack of resources and economic assistance is not a justification.[91] Over the last two decades there have been findings that in a prison setting, lack of medical assistance has also been found to constitute degrading treatment,[92] that unjustified delays in ensuring access to medical treatment when requested may violate article 3,[93] and the behaviour of the prisoner is no justification for delaying treatment.[94] The failure to ensure access to an independent

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[86] This is as distinct from non-punitive and necessary force (or reasonable restraint) to protect the child or another person. See General Comment No. 8, paras 14 and 15.

[87] General Comment No. 8, para 11.

[88] The UN Human Rights Committee specifically mentions "prolonged solitary confinement" as a practice that may amount to a violation of Article 7 of the ICCPR, General Comment 20, 1992, para 6.

[89] *The Case of Victor Rosario Congo,* Inter-American Commission on Human Rights Report 29/99, Case 11,427, Ecuador, adopted in Sess. 1424, OEA/Ser/L.V/II.) Doc. 26, March 9, 1999, para. 54.

[90] *Fedetov v Russia* (5140/02)(2007) 44 E.H.R.R. 26 ECHR, *Dougoz v Greece* (40907/98)(2002) 34 E.H.R.R. 61, *Peers v Greece* (28524/95)(2001) 33 E.H.R.R. 51, Kalashnikov v Russia (47095/99)(2003) 36 E.H.R.R. 34 ECHR.

[91] *Poltoratskiy v Ukraine* (38812/97)(2004) 39 E.H.R.R. 43 ECHR.

[92] *McGlinchy v UK* (50390/99) 37 E.H.R.R. 41.

[93] *Hutardo v Switzerland* (1994).

[94] *Iorgov v Bulgaria* (40653/98)(2005) 40 E.H.R.R. 7 ECHR. The treatment was only classified as such in the 1990s perhaps reflecting the prevailing support for rigid treatment of convicted adult prisoners, but this is inapplicable to the situation of children in care whether for their own protection or as a result of offending. It is therefore likely that such treatment inside a children's residential key institution would have fallen foul of the prohibition of degrading treatment from the earliest days of the Convention.

medical assessment can be aggravated where an individual is suffering additionally from a mental disorder.[95] Likewise the failure to detain a person with disabilities in appropriate conditions such that she *"is dangerously cold, risk developing bed sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention."*[96]

In terms specifically of physical neglect and emotional abuse of children, in *Z v UK*[97] it was uncontested that long-standing physical and emotional neglect over a period of four and a half years amounted to inhuman and degrading treatment. Specific conduct in that case included children being locked out in an unsanitary garden for long and repeated periods, living in a state of neglect with filthy bedrooms including soiled and broken beds, no lighting, no toys, and being deprived of affection.

In his interim report to the UN General Assembly of 2000, Sir Nigel Rodley, then UN Special Rapporteur on Torture considered that neglect in residential care may amount to cruel and inhuman treatment, particularly among younger children.[98] He also considered that children in many residential institutions without judicial oversight of the placement decision. His view is that *"indeterminate confinement, particularly in institutions that severely restrict their freedom of movement, can in itself constitute cruel or inhuman treatment."*[99]

Other forms of treatment may also violate article 3. These include intimate searches, which must be justified by reasons of security and should be conducted in a manner which preserves a detainee's human dignity as much as possible. Thus abusive remarks during the search[100] or the

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95 *Khudobin v Russia* (2006).

96 *Price v UK* (2001).

97 *Z v UK*, (29392/952001), judgement of 10 May 2001.

98 Annual Report of the UN Special Rapporteur on Torture, 11 August 2000, UN Doc. A/55/290, para 11, "foster care systems and residential institutions caring for children who become wards of the State after being orphaned or removed from parental care for their own protection are in some cases alleged to permit inhuman forms of discipline or extreme forms of neglect. Particularly in the case of extremely young children, such abuses can amount to cruel and inhuman treatment."

99 Ibid, para 12.

100 *Iwanczuk v Poland* (2001).

presence of a prison officer of the opposite sex[101] may amount to a violation of Article 3.

With regard specifically to punishment or disciplinary procedures of children deprived of their liberty, principle 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty (1990) outlines a non-exhaustive list of forms of punishment considered to constitute cruel, inhuman or degrading treatment. It states:

> *"All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose."*

In respect of the use of restraints and force, principle 64 of the same Rules states:

> *"Instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time. By order of the director of the administration, such instruments might be resorted to in order to prevent the juvenile from inflicting self-injury, injuries to others or serious destruction of property. In such instances, the director should at once consult medical and other relevant personnel and report to the higher administrative authority."*

While these principles and other UN guidelines on treatment of persons deprived of their liberty are not in themselves binding, as a prominent group of jurists has pointed out, *"breach of these standards may constitute a breach of the general prohibition relating to torture under international law or lead to breaches of CAT or Article 7 and/or Article 10(1) of the*

[101] *Valasinas v Lithuania* (2001).

ICCPR."[102] Interpreting the CRC on the same issue, the Committee clarifies, *"there is a clear distinction between the use of force motivated by the need to protect a child or others and the use of force to punish. The principle of the minimum necessary use of force for the shortest necessary period of time must always apply."*[103]

b. Cruel or Inhuman[104] treatment or punishment

Inhuman treatment[105] covers acts which

- cause severe mental and physical suffering (both are not required[106]).
- are carried out deliberately to have that effect

By 1969, the European Commission on Human Rights had determined that inhuman treatment is that which has *a purpose to break or eliminate a persons will*, especially when it is premeditated act.[107]

No distinction need be made between inhuman[108] and cruel treatment as human rights violations.[109]

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[102] Advisory Council of Jurists, Asia-Pacific Forum of National Human Rights Institutions, *Reference on Torture*, Ulaanbaatar, December 2005, p 30. http://www.asiapacificforum.net/acj/references/acj-references-torture/downloads/reference-on-torture/acj-torture-report.pdf

[103] Committee on the Rights of the Child, *General Comment No. 8*, para. 15.

[104] OED: lacking positive human qualities, cruel or barbaric.

[105] The ECHR does not refer to cruel treatment as a distinct conduct.

[106] This is logical given that torture itself need not involve physical attack. See further below.

[107] *The Greek Case,* (1969), supra.

[108] There is an accepted practice of cross-referencing sources between international humanitarian law and human rights law as regarding cruel and inhuman treatment as an aid to interpretation. No distinction is made in the case law of the ICTY as between "cruel" and "inhuman" treatment, Jelisic (T.Ch. 14.12.99). *Naletilic and Martinovic* (T. Ch) 31.3.03, paragraph 246 *"Materially the elements of these offences are the same" …"the degree of physical or mental suffering required to prove either one of those offences is lower than the one required for torture, though at the same level as the one required to prove a charge of wilfully causing great suffering or serious injury to body or health."*

[109] Cruel treatment in Control Council Law 10 was interpreted to include medical experimentation (*Medical Case*, 2 CCL No 10 Trials 171 at 183) and in 1961 acts *"causing serious physical and mental harm" Eichmann* (1961) 36 ILR at 239. The International Law Commission 1996 Draft Code refers to inhumane acts as *"those which severely damage physical or mental integrity, health or human dignity."* Likewise at the ICTY *Blaskic*: *"an intentional act or omission ..... deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity"* (T. Ch.) 3.3.2000, 154–55 and Rome Statute Art.7(k). By 1998 *Forced nudity* was held to be an inhumane act *Akayesu* ICTR (T.Ch.) 2.9.9.8 and forcing a person to witness an atrocity *Kupreskic* (Trial Chamber) 14th January 2000, paragraph 562 – 66, 819 – 22, 830 – 32. The harm does not need to be long lasting

While most of the cases deal with physical mistreatment such as blows by hand, foot, or implements[110], mental harm such as anguish and distress can also qualify as inhuman.[111] For children, following the Court's general approach to vulnerable victims, the severity and intensity required in relation to physical mistreatment is reduced but some injurious consequences were still required in the cases of the 1990s such as significant bruising[112] and a *significant effect on physical or mental health* is generally required[113] (although this is the general rule which should be balanced with the importance of context and factors related to the individual including age, relative power relations, physical and mental health etc).

The ICCPR in article 7 prohibits cruel, inhuman or degrading treatment or punishment and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) requires States to prevent it.[114] Neither provides definitions however. The UN Human Rights Committee in its General Comments (guidance to States) in 1982[115] specifically stated that *"Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim"* and that the prohibition extended to chastisement or disciplining of children, and to individuals in educational and medical institutions, as well as arrested or imprisoned persons.

An unpredictable range of forms of conduct is likely to be raised in the forum, many of which may amount to cruel, inhuman or degrading treatment, if not torture, although they may not yet have been explicitly considered by international human rights bodies. The Shaw Review, for example refers to instances where children were told that their parents

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Krnojelac (T.Ch.) 15.3.02, paragraph 131.

110 *Ireland v UK* A/25 (1979-80) 2 E.H.R.R. 25 ECHR, *Tomasi v France* (A/241-A)(1993) 15 E.H.R.R. 1 ECHR, *Ribitschv Austria* (A/336(1996) 21 E.H.R.R. 573 ECHR.

111 *Mentes v Turkey* 23186/94.

112 *A v UK* (caning repeatedly) (35373/97) (2003) 36 E.H.R.R., *Y v UK* (Settlement not judgment) (Rep.) October 9, 1991, Series A, No. 247.

113 *Aerts v Belgium* (2000) 29 E.H.R.R. 50, Ebbinge v *The Netherlands* (47240/99)(Dec.) March 14 2000 ECHR.

114 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 16 (criminalisation and jurisdiction articles 1-9 only apply to torture).

115 No. 7 16th session.

were dead when this was not the case. Human rights bodies have considered that the position of relatives of disappeared persons, in an analogous position, amounts to ill-treatment.[116]

For those children who were deprived of their liberty, Article 10 of the International Covenant on Civil and Political Rights (ICCPR) provides *"all person deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."* The UN Human Rights Committee views this as a guarantee that general conditions of detention must be dignified and humane, and considers individual ill-treatment of a specific detainee primarily under Article 7 (although there appear to be some exceptions such as the denial of access to medical treatment to a specific detainee which is often considered under Article 10). The Human Rights Committee has issued two General Comments (authoritative interpretations) on Article 10, the first in 1982 and the second in 1992. In the first of these the Committee clarified that the right to humane treatment which accords with human dignity applies to *"all institutions where persons are lawfully held against their will, not only in prisons but also, for example, hospitals, detention camps or correctional institutions"* and that the ultimate responsibility for ensuring this principle is observed lies with the State.[117] The latter General Comment, which replaced the former, reiterated and reinforced this principle, and specified a duty to protect vulnerable people in detention, clarified that the protections of Article 10 should compliment those of Article 7 (the prohibition of torture and ill-treatment) so that, *"not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons."*[118] The General Comment also points to the positive obligation inherent in Article 10(1). This has been developed further in views of the Human Rights

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[116] *Brudnicka and Others v Poland* No 54723/00, paragraphs 26 and *Nolkenbockhoff v Germany*, Judgement of 25 August 1987, Series A No 123, paragraph 33, both related to breaches of Articles 6(1); *Cakici v Turkey*, judgment of the ECHR, 8 July 1999.

[117] UN Human Rights Committee, *General Comment No. 9, Humane Treatment of Persons Deprived of their Liberty (Article 10)*, 30/7/82 (1982), para. 1.

[118] UN Human Rights Committee, General Comment No. 21, *Replaces General Comment No. 9 concerning Humane Treatment of Persons Deprived of their Liberty (Article 10)*, 10/4/92 (1992), para. 3.

Committee in relation to individual communications,[119] and in the UN Rules on the Protection of Juveniles Deprived of their Liberty.[120]

The UN Principles on Children Deprived of their Liberty[121] (1990) also contain detailed principles on for example the physical environment and accommodation of this group of children.

c. Attacks on physical and mental integrity & the right to private and family life

Article 8 of the ECHR protects the right to respect for private and family life, home and correspondence.[122] Its central purpose is protection against *"arbitrary or unlawful interference with* [an individual's] *privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation."*[123] However its protection is now understood to much wider and includes personal autonomy, and physical and mental integrity. Some of the conduct categorised as child abuse under the Scottish Office Guidance or accompanying it would be prohibited, certainly physical attacks such as rape,[124]with a serious potential effect of mental harm. They

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119 *"The Committee has found violations of Article 10(1) arising from, inter alia, overcrowding, a lack of natural light and ventilation, inadequate or inappropriate food, a shortage of mattresses, no integral sanitation, unhygienic conditions, inadequate medical services (including psychiatric treatment), and a lack of recreation or educational facilities."* (Association for the Prevention of Torture and Centre for Justice and International Law, *Torture in International Law, a guide to jurisprudence*, Geneva/Washington D.C., 2008 (hereinafter APT and CEJIL), citing *Mika Miha v Equatorial Guinea*, HRC Communication No. 414/1990, 8 July 1994; *Griffin v Spain*, HRC Communication No. 493/1992, 4 April 1995; *Yasseen and Thomas v Guyana*, HRC Communication No. 676/1996, 30 March 1998; *M'Boissona v the Central African Republic*, HRC Communication No. 428/1990, 7 April 1994; *Freemantle v Jamaica* (2000); *Sextus v Trinidad and Tobago*, HRC Communication No. 818/1998, 16 July 2001; *Lantsova v the Russian Federation*, HRC Communication No. 763/1997, 26 March 2002; *Madafferi v Australia*, HRC Communication No. 1011/2001, 26 July 2004.)

120 See for example principles 31-37 on physical environment and accommodation and 49-55 on medical care.

121 As Geraldine Van Beuren has pointed out, "UN Rules for the Protection of Juveniles Deprived of their Liberty, however, are not only applicable to juvenile justice institutions but importantly apply to deprivations of liberty on the basis of the children's welfare and health." UN Rules for the treatment of juveniles deprived of their liberty, Defence for Children International, http://child-abuse.com/childhouse/childrens_rights/dci_pr25.html

122 Also included in Article 17, ICCPR and in Articles 22 and 23, CRPD.

123 UN Human Rights Committee, *General Comment no. 16, The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, 8 April 1988, para. 1.

124 *X and Y v The Netherlands* (8978/80)(1986 8EHRR235).

may also amount to cruel, inhuman or degrading treatment,[125] or even torture.[126]

Since Article 8 protections relate also to the right to identity, to develop relationships with other people and the outside world, acts which prevented children from maintaining contact, for example, with extended family or friends may fall into this category as may attempts to interfere with a child's communication to other staff, medical visitors or third persons. A core element of the right is private correspondence, and arbitrary restrictions on the right to correspond with the outside world violate this right.[127]

A range of types of conduct can already be identified as likely to be brought up during the forum which is likely to conflict with Article 8 and related rights .These include:

1. being told that surviving relatives are dead: in cases of disappearance human rights bodies have found that being told your relative is dead and kept in a prolonged anguish and stress associated with periods of uncertainty as to their fate may amount to ill-treatment.[128]

2. withholding contact, including destroying letters, from parents and other family members (recorded in Shaw). Specific Standards on

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[125] Mental health is a crucial part of moral integrity protected by Article 8, *Bensaid v UK*, February 6, 2001, ECHR 2001, i, paragraph 47.

[126] Inter-American Commission of Human Rights, Case 10.970, Report No. 5/96, Raque Martín de Mejía (Peru), 1 March 1996; *Aydin v Turkey, no. 23178/94, Rep. 1997-VI, ECHR, judgement of 25 September 1997.* In the latter case, for example the ECtHR considered *"The rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence... against this background the Court is satisfied that the accumulation of acts of physical and mental violence… especially the cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention."*

[127] General Comment 10 (19th session, 1983) and General Comment 16 (32nd session 1988).

[128] See, e.g. UN Human Rights Committee, *Sarma v Sri Lanka*, Communication No. 950/2000: Sri Lanka. 31/07/2003. CCPR/C/78/D/950/2000 at 9.5. Quinteros Almeida v Uruguay, HRC Communication No. 107/1981, 21 July 1983, para. 14 where the Committee noted *"the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7."*,

"contact with the wider community" are included in the UN Principles on Children Deprived of their Liberty in principles 59-62. The CRC, article 37 (c) also provides that, *"every child deprived of liberty … shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances"*.

3. Denial of identity: having true identity, date of birth etc withheld is recorded in the Shaw Review.[129] Both the CRC and the ICCPR protect the right to identity/ and right to recognition as a person. See for example articles 7 and 8, CRC, which include the right to registration at birth, to a name, nationality, (as far as possible) to know and be cared for by his or her parents, to protection for his or her identity and to a speedy remedy where elements of the child's identity are illegally deprived.

4. Separation of siblings in care: this may amount to an article 8 concern where it is not shown to be reasonably justifiable. The Shaw Review[130] includes a particularly severe example in the testimony of a survivor who was unaware, until much later in life, of the existence of a twin who was also placed in care.

5. placing children who were *"young offenders ordered by a court"* together with children *"in need of care and protection"*: the Shaw Review[131] finds there is no doubt that children from such different backgrounds *"were, in practice, placed together"*. The UN Committee on the Rights of the Child has repeatedly expressed concern about such placements.[132]

6. Forced emigration/exile directly from child care: An unknown number of children were sent to Australia, New Zealand, Canada, Rhodesia (as it then was) and elsewhere. Estimates suggest that around 150,000 children from the UK as a whole were forcibly emigrated over a number of decades. The Shaw Review found that

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129 p 136

130 p 136.

131 P 44.

132 Peter Newell and Rachel Hodgkin, Implementation Handbook for the Convention on the Rights of the Child, fully revised third edition, 2007, UNICEF, New York, p 285.

this practice continued up until 1967 and *"those sent to Australia suffered physical, mental and sexual abuse"*.[133] The CRC specifically considers the separation of children from their parents and family through a variety of means in Article 9. For example, Article 9(4) provides that, *"Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned."* There is also a complex question for due diligence below as apparently there was little UK State interest in checking the conditions of children sent to Australia until the 60s and the practice had begun before the turn of the century). The practice also has some elements in common with enforced disappearances.[134] In *Kurt v Turkey*[135] the ECHR held that the mother of a disappeared person was herself a victim of inhuman and degrading treatment because she had endured years of inaction on the part of the State authorities and years of knowing nothing of her son's fate. However, in *Cakici v Turkey*[136] the ECHR held that Kurt did not establish any general principle that a family member of a 'disappeared person' is thereby a victim of ill-treatment (see section

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133 From Shaw, p 26, "The exact numbers of children sent from Scottish residential institutions isn't known, however 7,000 child emigrants were sent by Quarrier's, 50 from Aberlour, 200 from Whinwell Children's Home in Stirling and an unknown number from Scottish local authority establishments (Abrams, 1998)." References for abuse in Australia include Australian Senate Legal and Constitutional References Committee 2001 as well as House of Commons Health Committee 1997-8.

134 Although it is doubtful whether facts will emerge consistent with the definition of enforced disappearances as included in the new international convention (which is not yet in force). Article 2 of the Convention against Enforced Disappearances states, *"For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."*

135 *Kurt v Turkey*, judgment of the ECHR, 25 May 1998.

136 *Cakici v Turkey*, judgment of the ECHR, 8 July 1999.

on victims below).

If during the period examined by the Forum, records, including medical records were not maintained regarding the children and their welfare, according to statutory duties of the institutions and individuals providing care, or where children or adults were unable to access that information regarding the circumstances of their entry into residential care and their treatment while in care, those individuals may have been victims of a violation of Article 8 if access to his or her personal information is obstructed. In a case involving the UK from 1990, for example, a person in the care of the local authority for most of his childhood requested his files, arguing the information was the only record of his early years. The State refused and there was no independent procedure following a refusal or information or the holder of information could not be found. The Commission ruled that people cannot be obstructed from obtaining information about themselves without a specific justification from the authorities. The Court declined to make a finding that a right of access to personal data and information is part of Article 8, but concluded that the individual had a vital interest in the information and that the State had not properly balanced the issue of access. [137]

In respect of young people deprived of their liberty, the UN Rules on Juveniles Deprived of their Liberty state in principle 19 that:

> *"All reports, including legal records, medical records and records of disciplinary proceedings, and all other documents relating to the form, content and details of treatment, should be placed in a confidential individual file, which should be kept up to date, accessible only to authorized persons and classified in such a way as to be easily understood. Where possible, every juvenile should have the right to contest any fact or opinion contained in his or her file so as to permit rectification of inaccurate, unfounded or unfair statements. In order to exercise this right, there should be procedures that allow an appropriate third party to have access to and to consult the file on request. Upon release, the records of juveniles shall be sealed, and, at an appropriate time, expunged."*

[137] *Gaskin v United Kingdom* (10454/83)(1990, 12 E.H.R.R. 36, ECHR).

As well as the childhood survivors themselves, in situations where the parents of a child victim were alive and attempted to obtain information regarding the situation of the child, their Article 8 rights may also be relevant,[138] including as to the original decision to take a child into care. Parents and other family members rights in the procedure of removal of children would also be an issue under Articles 8 and 6 (right to a fair hearing) of the ECHR, where lack of procedural safeguards is alleged.

Likewise decisions to publicise the names of persons alleged to have perpetrated abuse must not be arbitrary or they will engage this right. In this respect the UN Set of Principles to combat impunity includes these guidelines for truth commissions and equivalent bodies: *"Before a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees:*

(a) The commission must try to corroborate information implicating individuals before they are named publicly;

(b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission's file."[139]

The right to respect for private and family life, home and correspondence is also protected in Articles 17 and 19 ICCPR.[140] It is not an absolute right. Any limitation must justify the tests of legality, necessity and proportionality – including that a restriction is provided for by law, is necessary in pursuit of a legitimate aim (as provided in Article 8), and is the least restriction necessary to achieve that aim.

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[138] States parties to the ECHR must provide sufficient procedural protection of parents interest in situations of child care, a principle established by cases against the UK in the 1980s. e.g. *W v United Kingdom* (9749/82) 1988, 10 E.H.R.R. 29, ECHR). Survivors may recount attempts by their family to obtain information and the State obligation to provide procedural protection and to ensure that parents were in a position to obtain accessed information on the care measures affecting their children is a relevant issue, see *P, C and S v UK* (2002) 35EHRR 31 *TP and KM v UK* (2002) 34 EHRR2 and *KA v Finland* (27751/95) [2003] 1FLR696.

[139] UN Doc. E/CN.4/2005/102/Add.1, Principle 9.

[140] Article 16 of the CRC contains a similar provision specific to children.

d. Torture & the Right to Life

Particularly severe treatment, for the purposes of punishment or intimidation, may reach this level in the context of child abuse. Since the 1960s, conduct amounting to torture contrary to Article 3 of the ECHR and subsequently Article 2 of the UNCAT[141] includes non-physical acts *inflicting mental suffering through creating a state of anguish and stress.*[142] In 1978 the Court defined torture as *deliberate inhuman treatment causing very serious and cruel suffering*. The UNCAT introduces a specific but similar definition.[143] While the UNCAT takes the view that the distinction between torture and other ill-treatment in UNCAT is often not clear,[144] the UN Special Rapporteur takes the view that *"the decisive criteria for distinguishing torture from [cruel, inhuman or degrading treatment] may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted."*[145]

Examples of the kind of conduct that has been found to amount to torture include[146] applying electric shocks to a half-naked and wet person, beating him, putting a hood over his head and burning him with lit cigarettes;[147] holding a person's head in water until the point of drowning;[148] rape[149] (or

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141 In terms definitions of torture prior to the 1984 UNCAT the prohibition of torture and even torture's status as a crime under international law may have pre-dated the Convention if a suitable argument is made on the basis of customary international law. On coming into force in 1976, the ICCPR prohibited torture and again provides no definition in the treaty itself. Its oversight body refers to the prior developed case law of the ECHR.

142 *The Greek Case*, (1969), supra.

143 Severe mental or physical pain or suffering for specific purposes, the most relevant of which here would be would be punishment. The common element of the purposes required by UNCAT has been described as *"some connection with the interests or policies of the State and its organs."* Burgers and Danelius, The United Nations Convention against Torture, Martinus Nijhoff, Dordrecht, 1988, p. 119.

144 CAT, General Comment No. 2, *"Implementation of article 2 by States Parties"*, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (23 November 2007), para. 3.

145 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. E/CN.4/2006/6 (23 December 2005), para. 39.

146 For further examples see, e.g. Advisory Council of Jurists, Asia-Pacific Forum of National Human Rights Institutions, *Reference on Torture*, Ulaanbaatar, December 2005, p 75-76.

147 Inter-American Commission of Human Rights, Case 10.574, Report No. 5/94, Lovato Rivera (El Salvador), 1 February 1994.

148 Inter-American Commission of Human Rights, Case 9274, Resolution No. 11/84, Roslik (Uruguay), 3 October 1984.

149 Inter-American Commission of Human Rights, Case 10.970, Report No. 5/96, Raque Martín de Mejía (Peru), 1 March 1996.

threat of rape).[150]

It is also possible that survivors may recount to the Forum instances of death of other children while in care, or subsequent death, for example through illness or suicide, alleged to be due to abuse. Issues of potential responsibility of the State are dealt with below, however, in terms of conduct, physical assault, or even failure to provide medical assistance leading to death, may fall within this category. Likewise the failure to protect the right to life where the State knew or ought to have known of an immediate threat to life, whether from other individuals or through suicide, and failed to take reasonable measures to avoid that risk.[151] Use of force by persons who could be considered agents of the State, for example, to restrain a person causing death, whether intentionally or accidentally, may potentially be covered.[152] Deaths caused through illness and suicide or physical attacks even by entirely *private* individuals could fall under the positive obligation to protect.

In a recent case before the ECtHR Slovakia admitted violating the positive obligation to protect life in Article 2. Despite having received allegations of repeated and serious violence against children by their father, and that he had a shotgun and threatened to use it to kill himself and the children, they had failed to act upon these allegations. He carried out his threats and the children were killed.[153]

e. Other relevant rights

Since 1991, the UK has been a party to the UN Convention on the Rights of the Child (CRC), which includes many provisions relevant to the forum in addition to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment. Article 19 of the CRC, explicitly provides for the right of the child to protection from *"all forms of physical or mental violence, injury or abuse, neglect or negligent treatment,*

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150 *Abad v Spain*, UN Committee against Torture, Communication No. 59/1996: Spain. 14/05/98. CAT/C/20/D/59/1996 at [8.3].

151 *Osman v UK* (1998) and *Keenan v UK* (27229/95)(2001) 33 E.C.H.R.R.38.

152 See for example Commission Report 10044/82 (December) July 10, 1984, 39D.R. also *Makaratzis v Greece* (50385/99)(2005) 41EHRR49, ECHR.

153 *Kontrova v Slovakia*, Application No. 7510/04, Judgment of 24 September 2007.

maltreatment or exploitation, including sexual abuse" whoever has care of the child. The Committee has stated bluntly that *"there is no ambiguity: 'all forms of physical or mental violence' does not leave room for any level of legalized violence against children."*[154]

Interpreting mental violence, the UN Committee on the Rights of the Child has considered, *"humiliation, harassment, verbal abuse, the effects of isolation and other practices that cause or may result in psychological harm"* to be prohibited.[155] Negligent treatment suggests a duty of due diligence to prevent accidents to children.[156]

Article 25 of the CRC also contains a right of a child in care to *"a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement"*.

Article 7 of the ECHR provides that *"no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."*[157] Its purposes have been described by the ECtHR as to prevent arbitrary prosecution, conviction or punishment[158] through:

- prohibiting the retrospective application of criminal law;
- providing that only the law can define a crime and prescribe a penalty;
- providing that criminal law must not be extensively construed to the detriment of an accused person (e.g. by analogy).[159]
- Ensuring that the criminal law is accessible and foreseeable.

The ECtHR itself has considered the definition of prohibited conduct at the time in determining whether Article 7 is engaged. In a case involving Hungary, for example, the ECtHR has found that Article 7 was violated where an individual was found guilt of crimes against humanity for acts

154 Committee on the Rights of the Child, General Comment No. 8, para. 18.

155 UNICEF Implementation Handbook, p 256.

156 Ibid, p 257.

157 Article 7 of the ECHR is a near word for word repetition of Article 11(2) of the Universal Declaration of Human Rights.

158 *C.R. v. the United Kingdom*, 22 November 1995

159 *Kokkinakis v Greece*, Judgment of 25 May 1993, Ser. A. no. 260-A, p 22, para 52.

committed in 1956. This followed an assessment by the ECtHR that the relevant conduct was not considered a crime against humanity at that time.

Consequently, any criminal proceedings as part of a remedy for historic child abuse should be on the basis of criminal law at the time of the act or omission in question.

In interpreting this article the case of *C.R. v UK* may be helpful. The applicant alleged violation of Article 7 following his conviction for marital rape, when, at the time of the conduct non-consensual sex between spouses was not thought to fall within the definition of rape in the UK. In determining that Article 7 had not been breached the ECtHR found that:

> *"The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 32 above). What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom."*[160]

[160] *C.R. v. the United Kingdom*, 22 November 1995

2. ATTRIBUTION & RESPONSIBILITIES

a. State responsibility for actions of State agents, public authorities and private persons

Under International Law, States can be liable for actions or omissions which are (a) attributable to the State and (b) which violate the State's international obligations.[161] States can be held responsible in three main ways (1) by causing the harm (2) by failing in certain circumstances to take measures to prevent the harm and, (3) by failing to take appropriate measure after the fact. All branches and levels of the State, and other public authorities (such as public care providers and State run places of detention) can engage State responsibility.[162]

A large part of the conduct which the Forum will deal with is likely to have taken place in private care homes and institutions. Actions or omissions of private persons or bodies can lead to the State being responsible for the harm that they cause, if they can be equated to organs of the State, for example, where there is a complete dependency. It may also occur if they are acting on behalf of the State, for example if they are empowered by local law to carry out certain activities. If the private person or body was acting on the instructions of, or under the control of, the State any harm that they cause may be attributed to the State itself.[163] An action can still be termed a violation of international law even if it was perfectly legal in national law. Likewise, international law can determine that a person or body was acting on behalf of or on instructions of the State, even if under national law this would not be the case.

Crucially, the State can be responsible for the acts of individuals or bodies even if they were acting out-with the powers they were given by national

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[161] The international law of State responsibility referred to here is customary, to a large extent reflected in the ILC 2001 Draft Articles, see especially here Articles 4 – 11.

[162] UN Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 4, *"All branches of government (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."*

[163] Articles 5, 7 and 8 ILC Draft Articles.

law, [164] or even directly contrary to the instructions they had been given by the State.[165]

Human rights law will generally attribute an act or omission to a State if it is an act or omission of an agent of a State, or of a person acting with the consent or acquiescence of a public official.[166] When a State fails to react, this can also be treated as acquiescence i.e., it will be treated as a violation of the right itself (for example, freedom from torture) and not simply as failure to provide an effective remedy.[167] The UN Committee against Torture has clarified the general principles on due diligence to protect individuals from torture and ill-treatment in its General Comment 2, which states:

> *"The Convention imposes obligations on States parties and not on individuals. States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law. Accordingly, each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools,* ***institutions that engage in the care of children****, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene*

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164 Article 7 ILC draft Articles also *Youmans Claim* US v Mexico (1926) 4RIAA110.

165 *Ireland v UK* (1978) 2 E.H.R.R.25, judgement of 18 January 1978, Series A, number 25; *Timurtas v Turkey*, Application number 23531/94, judgment of 13 June 2000. *Ertek v Turkey*, Application number 20764/92, judgement of 9 May 2000. See also Velasquez Rodriguez, Judgment of July 29th 1988, Inter-Am, Ct.H.R. (Ser C.) No.4 (1998) paragraph 169 – 172 and UN Human Rights Committee communication number 23531/94 (Sri Lanka) CCPR/C/78/D/950/2000 views dated 31 July 2003 referring to this case law from the European Court of Human Rights and the InterAmercian Court as well as Article 7 of the ILC draft Articles. The Council of Europe have also pointed out that responsibility may be engaged where a State's agents are acting *ultra vires* or contrary to instructions (see Terry Davis, United Kingdom member of Parliament and Secretary General Council of Europe letter of 21 November 2005 to the Ministers of Foreign Affairs of all member States.

166 See for example *European Court, Nilsen and Johnson v Norway* (2000) 30 HERR878, and a series of Turkish cases including *Kilic* (2001) 33 E.H.R.R.1357, *Akkoc* (2002) 34 E.H.R.R.41 and *Kaya,* Eur.Ct.Hr 2000 – iii 149. The UNCAT includes more detailed expression of attribution "*inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".*

167 See for example Comment 2 of the Committee v Torture CAT/C/GC/2 24 January 2008, paragraph 17 relating in particular to the responsibility of the State for privately run detention centres and their obligation to monitor and take all effective measures to prevent torture and ill treatment.

encourages and enhances the danger of privately inflicted harm. The Convention does not, however, limit the international responsibility that States or individuals can incur for perpetrating torture and ill-treatment under international customary law and other treaties."[168]

b. State responsibility for failure to prevent and protect, including from acts of private persons

In some situations, it is enough to show that the actions of the State caused the harm, in others it is necessary to show that the State had intent or was negligent, for example, that there was a lack of due diligence[169] to prevent human rights abuses or to take action to investigate or punish them afterwards.

Several specific rights include positive obligations to protect. Of those most directly relevant to the Forum, the right to life, the freedom from torture, cruel, inhuman or degrading treatment or punishment, and the right to private and family life have all been interpreted as containing duties of the State to protect individuals not only from the actions of their own officials and institutions but from acts of private persons. Survivors may recount experiences where the State has failed in its duty to protect them whilst in residential care, for example neglect, including failure to supply medical treatment to prevent severe pain and suffering or to take general measures and precautions – consistent with the totality of rights in the Convention - to diminish opportunities for self-harm.[170]

The State has a positive obligation to take *"preventive operational measures to protect an individual whose life is at risk from the criminal act*[171] *of another individual"*[172] and will be liable if it *knew or ought to have*

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168 UN Committee against Torture, General Comment No. 2, *Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, Para 15 (emphasis added).

169 The standard applied by international (including human rights) law.

170 *Keenan v UK* (27229/95)(2001) 33 E.C.H.R.R.38*, Pantea v Romania*, June 3, 2003, ECHR2003-vi, paragraphs 188 – 196, failure to monitor mental illness or prevent attacks from other detainees. See also *McGlinchey v UK* (50390/99)(2003) 37 E.H.R.R. 41.

171 Suicide while in custody where there has been a failure to monitor and treat mental health problems and to respond adequately may violate the positive obligation to protect *Keenan v UK* (27229/95)(2001) 33 E.C.H.R.R.38 – in this case the State was found to have responded adequately.

172 *Osman v UK*, judgement of 28 October 1988, reports 1988 – viii, page 3159, paragraph 115.

known at the time that there was a *real and immediate risk* to the life of a person, including from the criminal acts of a third party and they failed to take the measures that were within their powers which, judged reasonably might have been expected to avoid that risk. [173]

In relation to ill-treatment under article 3 of the ECHR, together with the obligation under Article 1 to secure to everyone within the jurisdiction the rights and freedoms in the Convention, this includes a duty to take measures[174] designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including from private individuals (such as staff of non-State residential care facilities).[175] Such measures include a duty to ensure effective deterrence

[173] *HLR v France* 1997 ECHR 29.7.97 re art, 3 para 40: the risk must be real, and includes risks from private groups or individuals.

[174] Article 7 of the ICCPR also includes protection obligations, as the UN Human Rights Committee stated in General Comment No. 20 of 1992 (para. 2), *"It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."*

[175] see *A. v. the United Kingdom*, judgment of 23 September 1998, Reports of Judgments and Decisions 1998 VI, p. 2699, § 22. The case involved a child caned by his stepfather. The stepfather was prosecuted but acquitted on the basis that the treatment was "reasonable chastisement". The ECtHR found that the UK had failed in its positive obligation to protect A from ill-treatment. As two prominent human rights NGOs have stated, *"While this is a significant decision, it should not be interpreted too widely. A State will not be responsible for all acts of ill-treatment committed in the private sphere; State responsibility still has to be engaged in some way."* (Association for the Prevention of Torture and Centre for Justice and International Law, *Torture in International Law, a guide to jurisprudence*, Geneva/Washington D.C., 2008, p 64). The principle of State obligation to protect individuals from ill-treatment by private actors has been reaffirmed in various cases including *E and others v United Kingdom*, Application No. 33218/96, Judgement of 26 November 2002 and *D.P. & J.C. v. THE UNITED KINGDOM*, Application no. 38719/97, Judgement of 10 October 2002. See also *Assenov v Bulgaria* (24760/94)(1999) 28 E.H.R.R. 652, and also Őneryildiz v Turkey, no. 48939/99. While the Court has only considered this positive duty under Article 3 since the late 90s, it has applied it to historic conduct and referred to a positive duty implicit in article 2 since the mid 1990s *McCann v United Kingdom* (A/324) (1996) 21 E.H.R.R.97. One may argue it was implicit in Article 3 itself and within the article 1 general duty to since the coming into force of the Convention as the Court has applied it, since the 1990s to conduct from the 1960s and 1970s. This was certainly the approach taken by the Inter-American system since 1988. *"174. The State has a legal duty to take reasonable steps to prevent human rights violations … 176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention". Velasquez-Rodriguez v Honduras* Judgment of July 29th 1988, Inter-Am, Ct.H.R. (Ser C.) No.4 (1998)

against ill-treatment,[176] and effective (legal[177] and operational) protection,[178] in particular, of children and other vulnerable persons[179] and to take reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.[180] Concrete steps must be taken to protect a child from abuse and neglect even in a parental home where local authorities knew or ought to have know of a risk of ill-treatment.[181] The ECtHR has found that States are responsible for ill-treatment from the moment at which they knew or ought to have known of ill-treatment[182] but not before. Thus where there was insufficient evidence to suggest that the authorities knew or ought to have known of abuse, no violation of the duty to protect is found[183] (although a failure of the duty to prevent may still be shown if the State had not discharged its due diligence obligations to take reasonable steps to prevent ill-treatment). Knowledge of *"sporadic"* violent incidents will not be considered *"as revealing a clear pattern of victimisation or abuse."*[184] Considering liability for failure to intervene where abuse is taking place, the Court has acknowledged *"the difficult and sensitive decisions facing social services and the important and countervailing principle of respecting and preserving family life."*[185]For the authorities to take the *"draconian"* step of removing a child from the family

176 *A v UK* (1999) 27 E.H.R.R.611.

177 In *A v UK* the Court expressed concern at the lack of adequate protection from ill-treatment provided by the law in England due to the defence, under English law, to a charge of assault on a child that the treatment in question amounted to "reasonable chastisement". In *M.C. V Bulgaria* (2003) the ECtHR found a violation of article 3 where the domestic legal prohibition of rape was inadequate due to a disproportionate emphasis on need for violence. The definition of the offence in domestic law effectively required proof of physical resistance. The ECtHR referred to developing State practice on rape definitions as broader than in the past and found that the Bulgarian definition was inadequate as it did not protect individuals from non-consensual sexual acts.

178 *Z v UK* (29392/952001), judgement of 10 May 2001.

179 The particular vulnerability of children being relevant not only to determining whether conduct reaches the threshold of ill-treatment but also to the form and requirement of special measures of protection (as noted by Baroness Hale of Richmond in *E (a child), Re (Northern Ireland)* [2008] UKHL 66 (12 November 2008), para. 9.

180 *A v UK* (1999), *Z v UK* (2001), *E v UK* (2002), *D.P. and J.C. v UK*, 2002.

181 *Z v UK* (29392/952001), judgement of 10 May 2001: failure by local authority to act, including to remove, children suffering serious ill-treatment including physical and psychological injury, emotional abuse, possible sexual abuse and serious neglect of four children over a period of years from a person earlier having served a sentence for chid abuse; (33218/96)(2003) 36 E.H.R.R. 31, 2003.

182 *E and others v UK* (2002).

183 *D.P. and J.C. v UK*, 2002, para 112.

184 Ibid.

185 Ibid, para 113.

environment requires *"convincing reasons"*.[186]

Two leading cases where a breach of the duty of protection were found by the ECtHR are *Z v UK*[187] and *E v UK.*[188] In *Z*, the authorities had failed to protect children from prolonged abuse and neglect about which they were well aware following repeated visits. In *E*, they had failed to monitor the situation after a step-father had been convicted of sexual abuse, and so it was held that they should have found out that he was abusing the children and done something to protect them.[189]

The test for a failure to discharge the positive obligation under Article 3 of the ECHR is not a "but for" test[190] – i.e. if it were not for State inaction there would have been no abuse. Rather the State must take *reasonably available measures* which could have had a real prospect of altering the outcome or mitigating the harm.[191] Thus, for example, the ECHR has found that the UK breached Article 3 in a Scottish case where the *"pattern of lack of investigation, communication and co-operation by the relevant authorities disclosed in this case must be regarded as having had a significant influence on the course of events and that proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered."*[192] The overall due diligence standard is the measure by which State behaviour is judged[193] and ignorance cannot be justified where it occurs through negligence or failure, particularly where statutory duties existed to visit, monitor, and check the health of children in care. As the UN Committee against Torture has clarified:

> *"where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials*

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186 Ibid.

187 *Z v UK* (29392/952001), judgement of 10 May 2001.

188 *E and others v UK* (2002).

189 Summaries adopted from opinion of Baroness Hale of Richmond in *E (a child), Re (Northern Ireland)* [2008] UKHL 66 (12 November 2008), para 7.

190 In obiter, the House of Lords (Baroness Hale) has expressed some concern with the rejection of the "but for test". Ibid, para. 14.

191 *E v UK*, (33218/96) 36 E.H.R.R. 31 at para 99.

192 Ibid, para 100.

193 Imported from the general international law of State responsibility into human rights law.

or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts."[194]

Similar obligations exist under the ICCPR[195] including the duty of public authorities to ensure protection including from persons acting outside or without any official authority.[196] Article 24 guarantees to every child *"the right to such measures of protection as are required by his status as a minor on the part of his family, society and the State"*. These measures are intended to ensure children enjoy the other rights protected by the Covenant.[197] The Committee against Torture has developed this to require positive *effective* measures to prevent torture and ill-treatment.[198]

Positive obligations also arise under Article 8 in the ECHR to ensure regular adequate supervisory control of private mental health clinics[199] and protect children from corporal punishment[200] and since 1991 the UN Convention on the Rights of the Child imposes general positive duties on the UK regarding child wellbeing.[201]

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194 UN CAT, General Comment 2, para 18.

195 ICCPR as interpreted by the UN Human Rights Committee to include similar positive obligations to *"ensure an effective protection through some machinery of control."* General Comments 7 and 20, with particular protection for those in vulnerable situations including persons arrested or imprisoned but also pupils and patients in educational and medical institutions.

196 General Comment 7 *ibid.*

197 Such as protections from cruel, inhuman or degrading treatment, deprivation of liberty in the case of juvenile offenders, protection of privacy, family home and correspondence and expression. General Comment 17 (35th session, 1989).

198 UN CAT , General Comment 2, para 4, "*"States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented."*

199 *Stock v Germany* (61603/00)(2006) 46 EHRR6.

200 The Commission points out in the case of *Costello Roberts v UK* that punishment may infringe the right to respect for private life, and the voluntary sending of the child to the school by parents was not consent to this treatment. The Court later agreed.

201 Article 3(2) and 3(3) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures; … ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their

The CRC states explicitly in Article 19, that States must *"take all appropriate …measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child"*. The UN Committee on the Rights of the Child has clarified that this includes a duty to *"enact or repeal, as a matter of urgency, their legislation in order to prohibit all forms of violence, however light, within the family and in schools, including as a form of discipline, as required by the provisions of the Convention ..."*[202] and to take all appropriate measures to prevent and eliminate institutional violence against adolescents.[203] Article 34 reiterates the duty of the State to protect the child from all forms of sexual abuse. In particular the State shall take all forms of national, bilateral and multilateral measures to prevent *"the inducement or coercion of a child to engage in any unlawful sexual activity"*.

States are of course only required to take *measures within their power*.[204] In relation to due diligence required by the State to prevent a violation, as well as *Osman v UK*[205] and *Bensaid v UK*[206], the United Nations Committee Against Torture points to a duty to take every *reasonable step* to prevent a real and immediate threat, and to carry out the *means reasonably available to them* to take effective steps to bring the violation to an end.[207]

There are situations where the provision of country-wide preventative systems is necessary irrespective of knowledge of individuals' cases, such as a criminal justice system capable of punishing all forms of rape and sexual abuse.[208] The lack of an adequate response such as investigation and punishment can also be characterised as a breach of the obligation to

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staff, as well as competent supervision.

202 Committee on the Rights of the Child, day of general discussion on violence against children within the family and in schools, Report on the twenty-eighth session, September/October 2001, CRC/C/111, paras. 701-745.

203 CRC General Comment No. 4, para 23

204 Citing *Velasquez Rodriguez* July 29th 1988, Inter-Am, Ct.H.R. (Ser C.) No.4 (1998).

205 Judgment of 28 October 1988, reports 1988 – viii, page 3159, paragraph 115.

206 *Bensaid v UK*, February 6, 2001, ECHR 2001, i, paragraph 47.

207 Communication No 161/2000, Dzemajl et Al, State party Yugoslavia, views dated 21 November 2002, paragraphs 9.2.

208 *M.C. v Bulgaria* 39272/98, 2003.

prevent subsequent violations.

c. Private institutions and individuals

Human rights are the rights and freedoms to which we are all entitled as a human being. They have traditionally been seen as associated with obligations of States. However, even in 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights as a common standard of achievement for *"every individual and every organ of society"* which should strive to *"promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance"*. Subsequent international instruments reiterated references to individual responsibilities, particularly in the field of the rights of the child.[209] The CRC, for example, recognises *"the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child"*[210] and that *"Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child."*[211]

Nevertheless, the human rights responsibilities of private actors remained an underdeveloped area of international human rights law for many decades. More recently work of UN human rights mechanisms, particularly the Special Representative of the Secretary General on Business and Human Rights (SRSG), Professor John Ruggie, has begun to clarify the area. The SRSG has developed a framework of respect, protect and remedy duties of business.[212]

In the UK, the UK Parliament Joint Committee on Human Rights has been examining business responsibilities for human rights since 2006, particularly the extent to which private actors performing a public function,

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209 In adopting the UN Declaration on the Rights of the Child in 1959, the UN General Assembly, *"call[ed] upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures progressively".*

210 Article 3(2), CRC; see also Article 3(2), 14(2), 27(2).

211 Article 18 (1).

212 See http://www2.ohchr.org/english/issues/globalization/business/index.htm

will be subject to the duty under the Human Rights Act 1998 to act in a Convention compatible way.[213] Most recently it published a report of its inquiry in 2009/10 which concluded, among other things, that there was a need for further legislation to clarify the duties of private actors which undertake public functions under the Human Rights Act 1998 (section 6). While the UK Parliament had intended, through section 6, to ensure that private actors should be considered public authorities to the extent that they carry out public functions, a succession of judicial decisions have cast doubt on the extent to which this is currently the case. In the *YL v Birmingham City Council* case, for example, the House of Lords considered the implications on the right to privacy and protection of home and family life of a decision by a private care home to evict an elderly resident following a dispute with her relatives.[214] The House of Lords developed a set of non-exhaustive criteria for determining when a private body should be considered a public authority under the HRA. Subsequent changes to the legislative framework in the social care sector have clarified that private actors delivering public services (in Scotland as well as in England and Wales)[215] in that area should be considered public authorities for the purposes of section 6 of the HRA. There does, however, remain uncertainty in other areas.

The HRA does not provide for the application of Convention rights between private individuals. Nevertheless, the courts remain under a duty to interpret and apply the law in a manner which is compatible with Convention rights, including the law as it applies to disputes between

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213 See Joint Committee on Human Rights, Ninth Report of Session 2006-07, *Meaning of Public Authority under the Human Rights Act,* HL Paper 77/HC 410; Seventh Report of Session 2007-08, *Meaning of Public Authority under the Human Rights Act,* HL Paper 39/HC 382.

214 *YL v Birmingham City Council* [2007] UKHL 27. In this case Lord Bingham (at paras 6-12) provided a list of factors which may assist in determining whether a body is to be considered a public authority for the purposes of the Human Rights Act. These included, but were not limited to: the nature of the function in question, the role and responsibility of the State in relation to the subject matter, the nature and extent of the public interest in the function, any statutory power or duty in relation to the function, the extent to which the State regulates the performance of the function, whether the State is by one means or another willing to pay, the extent of the risk that improper performance of the function might violate an individual's Convention right.

215 Section 145 of the Health and Social Care Act 2008 of the UK Parliament, which defines private providers of residential care facilities as public authorities for the purposes of the Human Rights Act, extends to Scotland as a result of a Legislative Consent Motion passed by the Scottish Parliament to consent to the UK Parliament legislating over this area which lies within its devolved power.

private parties.[216]

International human rights law occasionally requires the State to create individual responsibility. The only conduct in this category which is of possible relevance here is torture.[217] Individual liability for torture (and the duty to prosecute) extends in international human rights law not only to those who directly participate but to others who are complicit. [218] Note that even where an individual has been acquitted in a criminal trial, the State may still be liable in international law for the conduct itself.[219] As discussed below, criminal investigation of individuals is sometimes required as part of a remedy for State violations of human rights or of a procedural duty.

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[216] [citation from JCHR report of 2009/2010] Section 6. See for example, *Campbell v Mirror Group Newspapers* [2004] UKHL 22 at para 17, where Lord Nichol explained *"The values embodied in Articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority"*.

[217] Article 4 of the UNCAT demands that States ensure that any form of participation in torture as well as attempt to commit torture are made illegal and the obligation under Article 5 to prosecute any such act occurring within UK territory. These *obligations* did not exist for the UK in international law prior to its ratification on 8 December 1988. This is not to say that the torture was not a freestanding crime under customary international law before then, such that the UK had a legitimate basis to exert its jurisdiction over acts of torture before that date. Torture as a war crime or crime against humanity can probably be considered to have been prohibited by customary international law since the late 1940s. It is not clear whether abuse in foreign countries by UK officials will be part of the Forum's subject matter, in which case despite the Pinochet decision, good arguments can be made that custom provided a basis for the optional exercise of enforcement jurisdiction.

[218] UN Committee Against Torture, General Comment no. 2, Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007), para. 8. Cherie Booth Q.C. and Dan Squires consider that this may extend to those in hierarchical structures in institutions, Cherie Booth Q.C. and Dan Squires, *The Negligence Liability of Public Authorities*, OUP, 2005, para. 7.68.

[219] For example *Ribitschv Austria* (A/336(1996) 21 E.H.R.R. 573 ECHR*, Avsar v Turkey* (25657/94)(2003) 37 E.H.R.R. 53 ECHR.

3. OBLIGATIONS OF RESPONSE

The European human rights mechanisms have considered remedies for ill-treatment since the 1960s.[220]

a. investigation and prosecution

The obligation to investigate is both an element of a victim's right to an effective remedy as well as being a separate procedural duty of the State.[221] There is a general obligation in international human rights law on the State to investigate allegations of human rights violations promptly, thoroughly and effectively through independent and impartial bodies. This does not necessarily mean through prosecutorial bodies or the courts, but may be through administrative mechanisms.[222] In some circumstances, however, more specific investigation requirements exist. Under the European Convention on Human Rights, different investigation requirements exist in relation to individual abuses dependent on the Article of the ECHR engaged, and in some cases the nature of the conduct and the profile of the alleged perpetrators.

In relation to torture and serious ill treatment, since the late 1990s the ECtHR requires an official investigation *when an arguable claim of torture or serious ill treatment by agents of the state*[223] *is made*.[224] Unlike the requirement for an investigation under Article 2 (the right to life), in

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[220] The precise nature and scope of that investigation has been defined in detail by the Court particularly since the 1990's. The European Commission on Human Rights comments in its proposals on "the Greek case" 3321-3/67 and 3347/67, 11YBK of the ECHR (Report) November 5, 1969, *"compensation should be awarded in cases where it has been established by the Commission that torture or ill treatment had been inflicted", "investigations should be undertaken in the cases ..... in which it has not yet been established whether or not torture or ill treatment has been inflicted", Silver v United Kingdom* (A/161) (1983) 5EHRR 347, see also at paragraph 113; *"where an individual has an arguable claim that he is the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority which has the power both to decide his claim and if appropriate, to give redress".*

[221] for example under articles 2, 3 and 8 of the ECHR, and articles 7 and 10 of ICCPR, article 2(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[222] UN Human Rights Committee, General Comment no 31, para. 15.

[223] *Assenov 1998; İlhan v Turkey*, no. 22277/93, ECHR 2000-VII, judgement of 27 June 2000..

[224] This is of particular importance since child abuse claims may be made many years later, given the possible obstruction or non existence of formal complaint mechanisms for children in institutional settings and the obstacles to communication generally which may have discouraged or prevented disclosure of information to the State authorities.

relation to Article 3 a distinction appears to be drawn in the investigation requirements dependent on the gravity of the abuse and the profile of the alleged perpetrator. In the *Assenov* case the ECtHR found that *"where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1…requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible."*[225] Case law in relation to Article 2 suggests that investigation, prosecution where possible, disciplinary sanctions and availability of civil remedies would be required to fulfil the obligation.[226]

The procedural obligation would ordinarily be satisfied by a *criminal* investigation.[227] Thus the absence of a criminal investigation for such serious violations by State agents may also mean that the remedy as a whole was ineffective,[228] but not always.[229]

In theory, a non-criminal remedy is sufficient but in practice it is unlikely

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[225] Assenov, para. 102.

[226] *Banks v UK*, 21387/05 (Decision) February 6th, 2007. Since 1998 the Inter-American Court has applied a rigorous standard: *"174. The State has a legal duty to take reasonable steps to … use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation….177. In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation..." Velasquez-Rodriguez v Honduras* Judgment of July 29th 1988, Inter-Am, Ct.H.R. (Ser C.) No.4 (1998).

[227] *Assenov v Bulgaria*, citing *McCann v United Kingdom* (A/324) (1996) 21EHRR97; and *İlhan v Turkey*, no. 22277/93, ECHR 2000-VII, judgement of 27 June 2000, para 103, *"no effective criminal investigation can be considered to have been conducted in accordance with Article 13. The Court finds therefore that no effective remedy has been provided in respect of [the applicant's] injuries and thereby access to any other available remedies, including a claim for compensation, has also been denied."*

[228] And so breaches art 13.

[229] No violation of art 13 was found where the criminal investigation was ineffective but a civil proceeding was ongoing. *McKerr v UK McKerr v United Kingdom,* application number 28883/95, judgement of 4 May 2001 citing *Aksoy v Turkey* 18 Dec 1996 Reports 1996-IV para 95, *Aydin v Turkey* 25 Sept 1997 Report 1997-VI para 103.

that a non-judicial body will be able to satisfy the requirements of an effective investigation, particularly in relation to the punishment of those responsible where sufficient evidence is found.[230] Non-judicial commissions set up by the State, or civil proceedings that the victim raises himself, may not always be sufficient even if they result in a full investigation.[231]

According to guidance from the ECtHR since the mid 1990's which was based on earlier United Nations standards,[232] for such an investigation to be effective it must be:

- Prompt: The investigation must be carried out within a reasonable timescale.[233]
- Carried out at the initiative of the State. [234]
- Independent: the persons who are responsible for the investigation and to carry it out must be independent from the institutions and persons implicated.[235] This means not only hierarchical but also practical independence.[236]
- Capable of leading to a determination of the identity of those responsible and to punishment of those persons. As mentioned above, the standard for the State in this regard is "due diligence" i.e. they must take reasonable steps available to them to secure

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[230] E.g. General Comment 7 ICCPR *"complaints about ill treatment must be investigated effectively by competent authorities. Those found guilty must be found responsible, and the alleged victims must themselves have effective remedies at their disposal including the right to obtain compensation".*

[231] *"While civil proceedings would provide a judicial fact finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of an award of damages, it is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification of any alleged perpetrator. As such it cannot be taken into account in the assessments of the State's compliance with its procedural obligations under Article 2 of the Convention." McShane v UK*, 43290/98 [2002] ECHR 465 para 125, *Jordan v UK* at para 141.

[232] Including the UN Principles on the Effective Prevention and Investigation of Extra Legal, Arbitrary and Summary Executions (ECOSOC Resolution 1989/65).

[233] In the case of *Halimi-Nedzibi v Austria* the Committee against Torture stated that a delay of 15 months before initiating an investigation of allegations of torture was unreasonably long. Communication No. 8/1991: Austria. 30/11/93. UN Doc. CAT/C/11/D/8/1991, para. 13.5.

[234] The onus is on the authorities to begin the investigation, and cannot be left to the initiative of a victim or family member to lodge a complaint: *Shanaghan v UK*, unreported, Application No. 37715/97 judgment of 4th May 2001, para 88.

[235] APT and CEJIL cite *Barbu Anghelescu v Romania*, no. 46430/99, judgement of 5 October 2004, para. 66.

[236] APT and CEJIL cite *Kelly and Others v UK*, no. 30054/96, ECHR 2001-III, judgement of 4 May 2001, para. 114.

evidence concerning the incident and determine any pattern of practice which may have brought about the violation.

- Open to public scrutiny: There should be a sufficient element of public scrutiny of the investigation or its results so as to secure accountability in practice as well as in theory. The victim or next of kin must be involved in the procedure to the extent necessary to safeguard his or his legitimate interests.[237]
- Accessible to the victim: *"the complainant must have effective access to the investigatory procedure"*.[238]

The UN Principles on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[239] add some requirements[240] which would have to be balanced in the context of a Forum of this sort.

The duty to investigate allegations of ill-treatment now extends to ill-treatment by private actors.[241] Serious (criminal) ill-treatment by private actors should now be pursued through similar effective official investigations capable of identifying and punishing perpetrators.[242] In another case the ECtHR found a violation of Article 3 where applicants could not appeal against a decision of prosecuting authorities not to pursue prosecutions in respect of a serious assault between neighbours.[243] However the Court does not, yet, apply this duty consistently. As one commentator has stated, *"This extension of Assenov* [applying the duty of

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[237] These requirements originated in the procedural obligation under the Right to Life in Article 2 of the ECHR but are now applied to Article 3 investigations (originating Article 2 Case Law, *McCann v United Kingdom* (A/324) (1996) 21 E.H.R.R.97, *Jordan v United Kingdom* (2003) 37EHRR52, *Gulec v Turkey*, judgement of 27 July 1998, *Reports* 1988 – iv paragraphs 81-82, *McKerr v United Kingdom,* application number 28883/95, judgement of 4 May 2001, paragraph 113, *Kaya v Turkey* reports of judgements and decision 1988-I page 324, paragraph 87.

[238] APT and CEJIL citing *Aksoy v Turkey* (1996), para 98; *İlhan v Turkey* (2000), para 92.

[239] General Assembly Resolution 55/89 Annex, 4 December 2000.

[240] For example, all the findings being made public, all alleged victims of ill treatment having access to any hearing to be carried out by the investigative body and a report describing in detail all the specific events that were found to have occurred and the names of the witnesses who testified. See further part D.

[241] APT and CEJIL cite M.C. v Bulgaria, *op. cit*., §151; *Members of the Gldani Congregation of Jehovah's Witnesses v Georgia*, *op. cit*., §97; *Šečić v Croatia*, no. 40116/02, judgement of 31 May 2007.

[242] *M.C. v Bulgaria*, Judgement of 4 December 2003, para 151.

[243] *Macovei v Romania*, Application no. 5048/02, Judgment of 21 June 2007.

effective investigation to arguable claims of serious ill-treatment by private individuals] *is a further enhancement of the procedural protection given to individuals under Article 3. The perpetrators of serious ill-treatment should be sought by effective investigations whether they be State agents or private individuals. More generally, it is to be hoped that the Court becomes as consistently vigorous in the application of this obligation as it has been in respect of the corresponding duty under Article 2."*[244] Others have stated more definitively that, *"as in the case of Article 2, the procedural obligation in Article 3 to investigate extends to allegations of ill-treatment by private persons as with as [sic] state officials."*[245]

In another two cases a more limited approach to the investigatory requirements in relation to serious ill-treatment by private individuals has been suggested. In cases related to the failure of the State to protect children from abuse from their parents or guardians, the ECtHR has found that the investigatory requirement may be satisfied by an *"independent investigation mechanism"*:

> *"The Court has previously held that where a right with as fundamental an importance as the right to life or the prohibition against torture, inhuman and degrading treatment is at stake, Article 13 requires, 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, including effective access for the complainant to the investigation procedure (see Kaya v. Turkey, judgment of 19 February 1998, Reports 1998-I, pp. 330-31, § 107). These cases, however, concerned alleged killings or infliction of treatment contrary to Article 3 involving potential criminal responsibility on the part of security force officials. Where alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 may not always require that the authorities undertake the responsibility for investigating the allegations. There should, however, be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the*

[244] Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights*, second ed. OUP, 2007, p 158.
[245] Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, second ed. OUP, 2009, p 110.

breach of their rights under the Convention. Furthermore, in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies."[246]

The ECtHR has dismissed the suggestion that there can be no investigation of the extent to which individual children suffered ill-treatment, beyond that found in criminal prosecution (which it had been argued would be tantamount to a finding of guilt on serious criminal offences in proceedings to which the alleged perpetrator was not a party). Dismissing this suggestion the ECtHR found that, *"criminal law liability is distinct from international responsibility under the Convention."*[247]

There is also an obligation under Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to undertake proactive (*ex oficio*) investigations and regular inspections which *"do not necessarily lead to a full criminal investigation or even prosecution, but perhaps to a disciplinary sanction or only to a better knowledge about the risks of torture [and ill-treatment] and how such risks can be more effectively prevented."*[248]

According to the UN CAT, the investigation and prosecution duties do not require a formal complaint, rather *"it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated, as prescribed by this provision of the Convention."*[249] According to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, States parties have an obligation to undertake prompt and impartial investigation where there are reasonable grounds to believe that torture or ill-treatment has occurred[250] and for an individual to

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[246] *E and others v UK*, 2002, para 110; *Z and others v UK*, Judgement of 10 May 2001, para 109.

[247] *E and others v UK*, para 91.

[248] Nowak and McArthur, p 415, para 5.

[249] *Dhaou Belgacem Thabti v. Tunisia* (187/2001), UN CAT, UN Doc. A/59/44(14 November 2003) 167 (CAT/C/31/D/187/2001) at para 10.6.

[250] Article 12.

complain of torture or ill-treatment and to have that complaint promptly and impartially examined by the relevant authorities.[251] A leading commentator (and current UN Special Rapporteur on torture) takes the view that the State duty is to *"undertake prompt, impartial and effective investigations into allegations of ill treatment and torture reported to the authorities, and where findings so warrant, to prosecute and punish the perpetrators, as considered appropriate."*[252] The requirement to investigate may be triggered as a result of information from a wide range of sources, including from national or international non-governmental organisations or national human rights institutions.[253]

According to the UN Human Rights Committee, where investigations *"reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7)".*[254] Decisions not to prosecute at all after an adequate investigation (e.g. for lack of evidence) are assessed in the light of the remedy as a whole including reparations.

If the domestic law is unable or obstructs effective domestic investigation and prosecution this can render a remedy ineffective, even where a civil action is available.[255]

b) The right to an effective remedy

The obligation of a State to provide redress where it has violated international law is a longstanding rule of customary international law which includes a general right to reparation for breach of an international

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[251] Article 13.

[252] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture, a commentary*, OUP, 2008, p 418, para. 17.

[253] Ibid, p 432, para 53, citing concluding observations and view of the UN CAT.

[254] UN Human Rights Committee, General Comment no. 31, *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant : . 26/05/2004.* UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 para 18.

[255] *X and Y v Netherlands*, which involved a physical attack of a young female in a vulnerable position in detention, (8978/80)(1986 8EHRR235). *MC v Bulgaria* (39272/98) (2005) 40EHRR 20.

wrong.[256] Reparation must, as far as possible, redress all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[257] According to the UN Special Rapporteur on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, "*reparation should respond to the needs and wishes of the victims. It shall be proportionate to the gravity of the violations and the resulting harm and shall include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition*".[258]

Specific measures of redress include financial compensation[259] or in situations where financial compensation is inappropriate, apology and

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[256] Advisory Council of Jurists, Asia-Pacific Forum of National Human Rights Institutions, *Reference on Torture*, Ulaanbaatar, December 2005, p 38, citing *Factory at Chorzow* case (*op cit*) at 47: *"The essential principle contained in the actual notion of an illegal act…is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law"*. ACJ also cites the International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits 1986 ICJ Report, 14, 114 (June 27); *Corfu Channel Case; (United Kingdom v Albania)*; *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, I.C.J. Reports 1949, p. 184. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State." (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 (ILC draft Articles on State Responsibility)).

[257] *Factory at Chorzow*, PCIJ (Permanent Court of International Justice), Ser A, No 17 (1928). Also in the European human rights system, the ECtHR has stated, *"A judgment in which it finds a breach imposes on the respondent State a legal obligation under [Article 46 of the ECHR] to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach." Assanidze v Georgia*, no. 71503/01, ECHR 2004-II, judgement of 8 April 2004, para. 198.

[258] UN Special Rapporteur on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, *'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms'*, UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-fifth session, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993 at 56.

[259] *Factory at Chorzow*, PCIJ (Permanent Court of International Justice), Ser A, No 17 (1928). The duty to provide this redress to individuals rather than the States of which they are Nationals began with the advent of the protection of individual rights under International Human Rights Law. See also Inter-American Court of Human Rights, *Aloeboetoe et al. Case, Reparations* (Art. 63(1) American Convention on Human Rights) Judgment of September 10, 1993, Inter-Am.Ct.H.R. (Ser. C) No. 15 (1994).

acknowledgement should be given.[260]

The right to an effective remedy is included in both the ECHR (Article 13) and the ICCPR (Article 2(3)).[261] According to the ECtHR, Article 13 of the ECHR requires:

> *"(a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress;*
> *(b) the authority referred to in Article 13 (art. 13) may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective;* [262]
> *(c) although no single remedy may itself entirely satisfy the requirements of Article 13 (art. 13), the aggregate of remedies provided for under domestic law may do so"* [263]

The right to an effective remedy is not an absolute right but can be limited where such limitation is provided for by law, pursues a legitimate aim and is a proportionate means of achieving that aim. In such circumstances the ECtHR has found that Article 13 requires *"a remedy that is as effective as can be, having regard to the restricted scope for recourse inherent* [in the particular context]".[264] The remedy must be effective in practice as

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[260] *The I'm Alone case (Canada v United States)* 3 R.I.A.A. 1609, 1933, *Rainbow Warrior Arbitration* (New Zealand v France) 82 I.L.R.499.

[261] The UN Human Rights Committee considers that *"Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."* General Comment No. 31, para. 16.

[262] In determining whether non-judicial bodies provide effective remedies the ECtHR has carefully examined their powers, procedures and independence. See Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart, 2004, pp 206-207. For an overview of the ECtHR's consideration of the gaps in Scottish remedies for victims of historic child abuse see *E and others v UK*.

[263] *Silver v. UK*, judgment 25 March 1983, para 113.

[264] *Klass and Others v. Germany* (A/28) (1979-80) September 6, 1978. The case involved surveillance of the applicant in connection with a criminal investigation.

well as in law,[265] having regard to adequacy, accessibility and promptness.[266] From the time the ECHR came into force in 1953, an *effective remedy* for the violation of a human right, as guaranteed by article 13 would comprise at least financial compensation and probably measures of satisfaction such as apology and acknowledgement. In relation to violations of Article 8 (Right to Private and Family Life), the remedy must be *capable of deciding the claim*, i.e. what happened, who is responsible and what redress the victim will receive, financial and non financial. It does not have to be a criminal remedy or a judicial body but the court has found that non-judicial bodies may have problems meeting independent requirements.[267]

Full reparation may include[268] restitution (restoring the victim to their original situation for example through ensuring their enjoyment of human rights); compensation (for any economically assessable damage, for example for physical or mental harm, lost opportunities including employment, education and social benefits, material damages and loss of earnings including earning potential, moral damage and any costs for legal or expert assistance and medical, psychological and social services); rehabilitation (including medical and psychological care as well as legal and social services); and satisfaction (including for example ensuring that continuing violations stop, verifying the facts and where appropriate, publicly disclosing the truth, official apologies and judicial or administrative sanctions against persons responsible, commemorations and tributes to the victims).

An effective remedy[269] is due not only where the State itself violated the

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[265] *İlhan v Turkey*, no. 22277/93, ECHR 2000-VII, judgement of 27 June 2000.

[266] *Paulino Tomás v. Portugal* (2003)

[267] *Z v UK* supra, *Klass v Germany* (A/28) (1979-80) September 6, 1978, Series A number 28, *Chahal v United Kingdom* (22414/93) (1997) 23 E.H.R.R. 413.

[268] 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, Adopted and proclaimed by UN General Assembly resolution 60/147 of 16 December 2005.

[269] ECHR article 13, ICCPR article 2(3), CAT Article 14, CRPD article 16(4) and CRC Article 39, the last of which includes additional elements, not explicit in Article 2(3) of ICCPR or Article 13 ECHR. Article 39, CRC: *"States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."*

person's right but also where the State failed to protect them from the acts of others.

The *1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*[270] covers any victim of crime[271] not only of human rights violations[272] and sets out reparations measures as restitution, compensation and assistance (including medical, psychological and social assistance.) The type and standard of assistance and role of public services as set out by the Council of Europe, is an excellent benchmark.[273]

Two additional sets of principles, the *"Van Boven"* and the *"Impunity"* (or "Joinet-Orentlicher") Principles,[274] applying to victims of gross violations of international human rights law have requirements on investigation mirroring those developed by the ECtHR.

The UN Basic 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 (the *Van Boven Principles*), developed over decades and adopted by the UN General Assembly in 2005, include detailed provisions on remedies for victims of violations of human rights which *"constitute an affront to human dignity"*. They are also reflected in the work of the International Law Commission to codify the Responsibility of States for Internationally Wrongful Acts.[275] According to

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[270] UN General Assembly Resolution 40/34 of 29 November 1985.

[271] It would be counterproductive to only assist those who are victims of conduct which was criminal at the time of the commission. A useful reference point for different mechanisms to achieve restitution and similar "restorative" elements of reparation are found in the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

[272] For example, childhood survivors who suffered ill treatment which would have been outlawed by the Children and Young Persons Act 1937 might not reach the threshold of torture, cruel or inhuman or degrading treatment or punishment under the ECHR, or physical or mental harm under Article 8 of the same. The Declaration also applies to people who have been victims of human rights abuse in countries where the type of abuse is not criminalised in the national law.

[273] Recommendation on Assistance to Crime Victims, Council of Europe recommendation (2006) 8,14th June 2006 including easily accessible medical care, material support, psychological health services, social care, counselling, explanations of all decisions made in their cases, confidentiality, special help for sexual abuse victims, standards of good practice and access to information about available services.

[274] Originally appearing in UN ECOSOC Resolution No 1235(xlii) 6 June 1967 and Resolution 1503(xlviii) 27 May 1970.

[275] See International Law Commission, Responsibility of States for Internationally Wrongful Acts, 2001 (Draft Articles of State Responsibility), Article 31 (duty to make full reparation for the injury – including material and moral damage - caused by an internationally wrongful act); Article 34 (forms of

those principles, the right to an effective remedy for gross violations of international human rights law includes the victim's right to:

(a) **Equal and effective access to justice** (equal access to judicial remedies, and other remedies which are available. This includes duties on the State to ensure information about available remedies is accessible to victims; minimize inconvenience to victims and protect their privacy and safety; provide proper assistance to victims seeking access to justice and make available the legal and other means to ensure victims can exercise their right to a remedy. States should also ensure means for group reparations as appropriate.);

(b) **Adequate, effective and prompt reparation for harm suffered** (Reparation should be proportional to the gravity of the violations and the harm suffered. Reparation is defined as restitution[276], compensation,[277] rehabilitation[278] and satisfaction.[279] The State should provide reparations for violations it is responsible for. Where a person, legal person or other entity is found liable it should provide reparations to the victim or compensation to the State if it has already provided reparation. States should endeavour to establish national programmes of reparations liable parties are unable or unwilling to meet their obligations. There should be effective mechanisms to enforce reparations decisions);

(c) **Access to relevant information concerning violations and reparation mechanisms**. (*"States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international*

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reparation); Article 35 (restitution); Article 36 (compensation); Article 37 (satisfaction). NB. The Draft Articles of State Responsibility relate to international responsibility (i.e. responsibility to other States). http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

[276] Restoring the victim to their original situation for example through ensuring their enjoyment of human rights.

[277] For any economically assessable damage, for example for physical or mental harm, lost opportunities including employment, education and social benefits, material damages and loss of earnings including earning potential, moral damage and any costs for legal or expert assistance and medical, psychological and social services.

[278] Including medical and psychological care as well as legal and social services.

[279] Including for example ensuring that continuing violations stop, verifying the facts and where appropriate, publicly disclosing the truth, official apologies and judicial or administrative sanctions against persons responsible, commemorations and tributes to the victims.

humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, 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.")[280]

In 1992, the UN Human Rights Committee revisited the question of obligations of remedy and response to torture and ill-treatment in General Comment 20, which replaced General Comment No. 7:

"The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with…Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."[281]

In a Scottish case involving historic child abuse from 2002 the ECtHR considered that Article 13 requires the existence of a remedy which is effective in practice as well as in law.[282] The Court relied on settled case law from the mid 1990s to the effect that:

"Where alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 may not always require that the authorities undertake the responsibility for investigating the

280 Van Boven Principles, X, para. 24.

281 UN Human Rights Committee, General Comment No. 20, para. 14 and 15.

282 *E and others v UK*, 2002

allegations. There should however be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress."[283]

In the case in question, a number of the applicants had received a sum (£25,000) of non-pecuniary damages from the Criminal Injuries Compensation Authority. Nevertheless, the Court made it clear that, *"the Board cannot be regarded as providing a mechanism for determining the liability of the social services for any negligence towards the children."* The Court pointed out that compensation had not taken into account pecuniary loss resulting from the abuse. Additionally it found that an investigation by the Ombudsman would not have provided satisfaction as it could not make *"binding determinations"*, only non-binding recommendations. In general, the Court takes the view that actions in the domestic courts for damages may provide an effective remedy in cases of alleged unlawfulness or negligence by public authorities.[284] Nevertheless, the Court found that, the House of Lords decision in the case of *X. and Others*[285] *"gave the impression that the highest judicial authority had ruled out the possibility of suing local authorities in the exercise of their child protection functions on grounds of public policy."* The Court found, in these circumstances that Article 13 had been violated as the applicants did not have at their disposal the means of obtaining a determination of their allegations that the local authority failed

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283 *E and others v UK*, 2002, para 110.

284 Ibid, citing *Hugh Jordan v. the United Kingdom*, no. 24746/94, (Sect. 3), judgment of 4 May 2001, §§ 162-163, extracts published in an annex to *McKerr v. the United Kingdom*, ECHR 2001-III.

285 *X (Minors) v Bedfordshire CC* [1995] UKHL 9 (29 June 1995). Subsequent cases have clarified that local authorities can in some circumstances be held to owe a duty of care to avoid negligence which may permit abuse to occur or continue: in *Barrett v. the London Borough of Enfield* ([1999] 3 WLR 79). The House of Lords found that *X and Others v. Bedfordshire County Council* did not prevent a claim of negligence being brought against a local authority by a child formerly in its care. That case concerned the claims of the plaintiff, who had been in care from the age of ten months to seventeen years, that the local authority had negligently failed to safeguard his welfare causing him deep-seated psychiatric problems. Nevertheless the *X and others* decision was referred to positively by the House of Lords as recently as February 2009 in the Scottish case of *Mitchell (AP) and another (Original Respondents and Cross-appellants) v Glasgow City Council (Original Appellant and Cross-respondents) (Scotland)* [2009] UKHL 11 (18 February 2009).

to protect them from inhuman and degrading treatment.[286]

Similarly, in *Z v UK*, the ECtHR found no violation of Article 6 (1) where local authorities were not found liable by domestic courts for a failure to protect children from violations of Article 3 (following a careful balance by the courts of public policy rationale for excluding local authorities from such liability).[287] Nevertheless, the very fact that Article 6 applies to such situations requires consideration of whether the right is effectively realised in practice, including through the operation of legal aid schemes to ensure individuals whose article 6 rights are engaged in this way are enabled in practice to realise that right. It is notable that the ECtHR placed a great deal of emphasis in *Z* on the fact that legal aid was provided to the applicant to pursue his case to the House of Lords.[288]

In *Z*, the ECtHR did, however find that this left the applicants without a right to an effective remedy for the violation of their right under Article 3. The duty to provide that remedy lay with the State. The practical consequence of this is that it may be reasonable, under the Convention, to limit the civil liability a particular public authority has to victims of ill-treatment, but that does not undermine the duty of the State under Article 3 and Article 13, and to ensure an effective remedy where it fails.[289]

The ECtHR then considered the range of remedies which was said to be available to the applicants: the Criminal Injuries Compensation Board, the Local Government Ombudsman and remedies under the Children Act 1989. It found that each was inadequate – the CICB could only consider harm

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[286] *E and others v UK*, 2002, para 116.

[287] *"The right* [to a fair hearing on the determination of a civil right including access to an independent tribunal to determine the right] *is not absolute, however. It may be subject to legitimate restrictions such as statutory limitation periods… Where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and, in particular, whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. If the restriction is compatible with these principles, no violation of Article 6 will arise." Z v UK*, (2001), para. 93, citing diverse authority.

[288] Ibid, para. 95. That having been said, there is no requirement under the Convention to support access to the Courts where there is no reasonable prospect of a successful outcome. *"if as a matter of law, there was no basis for the claim, the hearing of evidence would have been an expensive and time-consuming process which would not have provided the applicants with any remedy at its conclusion."* (para. 97).

[289] Ibid, paras. 102-103.

related to criminal conduct (not neglect as in this case), and the recommendations of the ombudsman were not legally enforceable. The ECtHR found that Article 13 was violated as the applicants *"did not have available to them an appropriate means of obtaining a determination of their allegations that the local authority failed to protect them from inhuman and degrading treatment and the possibility of obtaining an enforceable award of compensation for the damage suffered thereby."*[290] The ECtHR stopped short of declaring that access to a court would always be a required element of the right to a remedy where alleged violations of article 3 were concerned it did argue in favour of access to court. *"The Court does not consider it appropriate in this case to make any findings as to whether only court proceedings could have furnished effective redress, though judicial remedies indeed furnish strong guarantees of independence, access for the victim and family, and enforceability of awards in compliance with the requirements of Article 13."*[291]

The 1984 UNCAT contains provisions on effective remedies for torture which were not at that time explicitly extended to other forms of ill-treatment which did not amount to torture.[292] However the Committee against Torture has subsequently clarified that victims of ill-treatment have the right to redress and compensation.[293]

In practice, the UN Committee against Torture now takes the view that the broad range of effective remedies should be available today, where they have not been in the past, for survivors of historic child abuse. In its recent review of New Zealand, for example, the Committee received information on hundreds of unresolved claims of abuse[294] by staff, carers and other

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290 Ibid, para 111.

291 Ibid, para. 110, citing *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, p. 30, § 67.

292 Article 14 of CAT which provides for a broader range of remedies for torture, was not included within the range of articles explicitly to apply to acts of ill-treatment which did not amount to torture. Article 14 provides, *"1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."*

293 *"The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision." Dzemajl and Others v Yugoslavia* (2002). This was later clarified in General Comment No. 2 (below).

294 *"physical, sexual and psychological abuse, solitary confinement, threats of, and the witnessing of, physical and sexual abuse and neglect of education"*

residents in institutions or children's homes run by the State from the 1950s onwards.[295] The Committee against Torture responded, in its concluding observations:

> *"The Committee is concerned that allegations of cruel, inhuman or degrading treatment , inflicted by persons acting in an official capacity against children in State institutions, and against patients in psychiatric hospitals have not been investigated, perpetrators not prosecuted, and victims not accorded redress, including adequate compensation and rehabilitation. (arts.12, 14 and 16)*
>
> *The State party should take appropriate measures to ensure that allegations of cruel, inhuman or degrading treatment in the "historic cases" are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation."*[296]

It thus seems clear from both ECtHR case law and from the practice of the UN Committee against Torture, that the right to an effective remedy for victims of historic abuse requires at least a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention, prosecution of perpetrators where appropriate, effective compensation and rehabilitation.

Finally, human rights remedies focus on individual harm.[297] If the number of survivors is manageable, a country with the level of economic development of Scotland should be capable of providing individualised responses.[298] The due diligence standard for a State such as Scotland

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[295] Sonja Cooper, COMMITTEE AGAINST TORTURE: Forty-second session - 27 April – 15 May 2009, Information for the consideration of the Fifth Periodic Report of the Government of New Zealand, http://www2.ohchr.org/english/bodies/cat/cats42.htm, the abuse is described as *"serious, often systematic, torture and/or cruel, inhuman, or degrading treatment or punishment, inflicted by, at the instigation of, or with the acquiescence or consent of, persons acting in an official capacity. "*

[296] UN Committee against Torture, *Concluding Observations, New Zealand*, UN Doc. CAT/C/NZL/CO/5, 14 May 2009.

[297] Issues of collective harm and remedies have been dealt with in relation to destruction of collective property and mass killing e.g. *Plan de Sanchez Guatemala*, Int. Am. Ct. H.R., 19.11. 2004. Series C No. 116.

[298] This is not a post conflict or post repression situation facing endemic State criminality or deliberate State policies that violate human rights, or a peace process where trade offs are suggested. Although the paradigm of "truth and reconciliation commissions" is clearly ill-fitting, some of the technical aspects are transferable, see in Section C.

responding to the quantity and type of violations that may be revealed by the Forum's work would require a suitable remedy for each victim.[299]

Based on the principles of proportionality (dependent on the gravity of the violation and the individual circumstances) and participation of the victim (to consider his or her needs and wishes), the Van Boven principles appear to represent a comprehensive approach to effective remedies. These principles, together with the specific requirements of ECHR Articles 3 and 13, and the UNCAT, would require, in addition to investigation and prosecution in the circumstances outlined above:

- Equal and effective access to justice: including information on remedies available and support to exercise those remedies – current remedies in the Scottish context (including for example in relation to compensation and access to the courts) appear unduly limited in relation to the range of victims whose rights may be considered in a forum considering historic abuse.
- Reparation: including restitution of rights (where such restitution for ancillary violations may be possible – e.g. in relation to rights to education, the highest attainable standard of physical and mental health, an adequate standard of living); adequate compensation; rehabilitation; satisfaction (including public disclosure of the truth, apology, sanctions for those responsible, commemorations).

Remedy and positive obligation to protect a wider population come together where the law requires investigation capable of showing if the violations to one individual resulted from a policy, system, laws, or practices that are still being applied to other individuals with similar effects. If so, UK human rights compliance would mean action to bring reforming those laws, practices and policies.

c. Dealing with time frame challenges

The coming into force of different treaties and the development of the case law of the ECtHR means that definitions of childhood abuse in human

[299] Subject to the qualifier that the victim cannot always choose to exclude a criminal justice response due to the State's obligation to protect others from alleged perpetrators.

rights terms (and the actions that international law requires from the State in response) are moving targets.

In the *Hurst* decision[300] the UK House of Lords took the view that the type of remedy a victim is entitled to under domestic law (the Human Rights Act 1998) depends on the date the violation occurred (whether it was before or after 2 October 2000). This case is currently pending before the ECtHR.

Following the approach of the House of Lords would mean that older survivors would be assured fewer remedies than younger survivors. Such a difference in treatment in the realisation of the right to an effective remedy would of course have to be based on reasonable and objectively justifiable grounds, in order to avoid being discriminatory. It is unlikely that such a difference in treatment would be so justifiable.

The UN Committee against Torture on the other hand, now clearly takes the view that the full range of remedies should be available to survivors of historic abuse – applying today's interpretation of remedies under UNCAT (that the full range should extend to victims of ill-treatment as well as torture) to historic conduct.[301] In doing so the UN Committee has made no obvious distinction between duties to remedy ill-treatment which took place before or after ratification of the UNCAT. The ECtHR seems to take a similar view, specifically suggesting that the Human Rights Act 1998 in the UK might, at least on arguable grounds, be used to require ECHR remedies today for historic child abuse cases.[302] The ECtHR has already clearly held

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300 *R (on the application of Hurst) v Commissioner of Police of the Metropolis* [2007] UKHL 13. The case concerned the application of the positive duty to investigate under Article 2 of the ECHR to determine whether the State had failed in its positive obligation to protect the right to life. It was found by the House of Lords that this duty only existed subsequent to 2 October 2000, the date at which the Human Rights Act 1998 entered into force. It was therefore not enforceable in relation to a death on 25 May 2000.

301 As noted above, in considering historic abuse since the 1950s in New Zealand the Committee recommended, "*The State party should take appropriate measures to ensure that allegations of cruel, inhuman or degrading treatment in the "historic cases" are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation.*" UN Committee against Torture, *Concluding Observations, New Zealand*, UN Doc. CAT/C/NZL/CO/5, 14 May 2009.

302 *E and others v UK*, 2002, para 115, in relation to action against abuses which occurred in the 1960s and 1970s the Court stated, *"If taking action at the present time, the applicants might, at least on arguable grounds, have a claim to a duty of care under domestic law, reinforced by the ability under the Human Rights Act to rely directly on the provisions of the Convention."*

the State liable under international law for a failure to protect, under Article 3, in respect of historic conduct.[303]

In the case of *E and others v UK*, the ECtHR recognised that the State is under an obligation to provide remedies for abuse which may have occurred many decades before a remedy is sought. In that case the ECtHR took evidence on the state of social work practice in Scotland at the time at which abuse occurred (1960s and 1970s) to determine whether the conduct of the social services could be considered faulty. It thus considered conduct in relation to the standards applicable at the time. In respect of the State's procedural liability to ensure effective remedies, however, the ECtHR considered those available at the time the case was considered (2002).[304]

However the ECtHR does not consider that States are required under the ECHR to remedy abuses which took place prior to ratification of the ECHR (the UK ratified the ECHR on 8 March 1951, the Convention entered into force on 3 September 1953).[305]

Leading commentators support the view that human rights treaties may have an "independent requirement that a remedy be provided even for violations that took place prior to entry into force of a Convention."[306]

Consequently the approach proposed in this paper is the following:

(1) Characterisation of the conduct in human rights terms must conform to the definition applicable at the date on which it occurred, since it would be legally unacceptable to hold a State liable under international law for conduct that did not amount to a violation of international law at the time

[303] Ibid. the UK was found in violation of Article 3 in combination with Article 1, for a failure to protect the applicants from ill-treatment which occurred in the 1960s and 1970s from the moment at which the authorities knew or ought to have known of the ill-treatment.

[304] Ibid.

[305] *Kopecký v Slovakia*, Application No. 44912/98, Judgement of 28 September 2004, para. 38. *"the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to their ratification of the Convention."*

[306] Dinah Shelton, *Remedies in international human rights law*, 2nd ed. 2005, OUP. Citing various cases before the Inter-American Commission on Human Rights. Professor Shelton has recently been appointed to the Inter-American Commission on Human Rights.

it occurred. Where criminal liability of non-State actors is at issue this should be on the basis of domestic criminal law at the time the act was carried out.

(2) In cases where the victim has tried to obtain a remedy, actions by the State in response should be judged only by the standards at the time those actions happened. Likewise, a State cannot be held liable under international law for failing to provide an effective remedy unless it knew or ought to have known that a human rights violation had even occurred.[307]

(3) However in cases where, despite the fact that it knew, or ought to have known of an alleged violation, there has been no effective remedy, or where the State is today notified of an alleged violation, the obligation of the State must be to provide a remedy now and which conforms to current international law.

d. Statutes of limitation and time-bar

International law obligations (such as the obligation to provide a remedy or to investigate) are not extinguished by national laws.

Criminal liability: As mentioned above, obstruction of criminal *investigation* may render a remedy ineffective.[308] The ECtHR has found that *"when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible"*.[309] However statutes of limitation are not *per se* contrary to the ECHR. As the ECtHR has clarified,

> *"Limitation may be defined as the statutory right of an offender not to be prosecuted or tried after the lapse of a certain period of time since the offence was committed. Limitation periods, which are a*

[307] Except in those situations where under international law the State had violated its positive obligation to protect the victim from that violation.

[308] *X and Y v Netherlands, supra*: physical attack on a young detained female, *MC v Bulgaria* (39272/98) (2005) 40EHRR 20.

[309] See also *Okkali v Turkey*, 17.10.2006 ECHR, citing *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004; compare *Laurence Dujardin v. France*, no. 16734/90, Commission decision of 2 September 1991, Decisions and Reports, 72, pp. 236-240.

common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time."[310]

There is an interaction between limitations and Article 7 of the ECHR (above) and in one case the ECtHR has found that a modification of the law on limitations to extend the period of liability did not violate Article 7.[311] There is also increasing recognition that international crimes and gross human rights violations, including torture, should be imprescriptible,[312] and the UN CAT recommends repealing statutes of limitation for torture. However the law in this area is evolving.[313]

Civil liability: Statutes of limitation should not be *"unduly restrictive"*.[314] Even where a court is unable to consider the merits of a claim of ill-treatment (due for example to the passage of time) it may nevertheless consider violations of procedural obligations of prevention, protection and investigation.[315]

In relation to the *reparations* element, if a suitable alternative reparations programme is created, the absence of civil recourse due to time-bar is not fatal.[316] In *Z and others v UK*, the ECtHR explicitly included statutes of limitation under the range of limitations to the exercise of the Article 6

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310 *Coëme and Others v. Belgium,* para 146.

311 Ibid.

312 The International Criminal Tribunal for the Former Yugoslavia considered that *"torture may not be covered by a statute of limitations." Prosecutor v Furundžija*, judgment of Trial Chamber II of ICTY, Case No. IT-95-17/1-T, 10 December 1998, para 156. The Human Rights Committee has also considered that torture and other *"gross violations of civil and political rights"* should be prosecutable for *"as long as necessary to bring the perpetrators to justice"* (see e.g. concluding observations on Argentina, UN Doc. CCPR/CO/70/ARG, para. 9.

313 See Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102, 18 February 2005, paras 47-48.

314 Van Boven, Principles, IV, para. 7.

315 See for example *Martinez Sala and Others v Spain* ECHR no. 58438/00, Judgement of 2 November 2004.

316 Van Boven Principle 17. A specific mention is made in the Van Boven (Pr. 6&7) and Impunity Principles (Pr. 23) of statutes of limitations being inapplicable to "gross" violations. In relation to limitations on civil claims, the principles require that these not be *"unduly restrictive"*.

right to determination of a civil right (including determining whether a local authority breached Article 3 rights by failing to protect children from abuse), however it found that such limitations would have to pass tests of legality, necessity and proportionality. Even where it was considered legitimate and proportionate to exclude liability from a particular public authority, the residual duty to ensure an effective remedy remained on the State.[317]

In another case the European Commission on Human Rights found a violation of the right to access to a court for the determination of a civil right (combined with the prohibition on discrimination) in relation to a "time-bar" on civil claims by victims of historic childhood sexual abuse. In the case in question the applicants were four people who had suffered serious psychological problems since adolescence which they had not realised, until the limitation period had passed for civil claims, were related to childhood sexual abuse (in at least one of the cases the abuse was alleged to have occurred while in foster care, and to have been perpetrated by the foster father and foster brother).[318] While the Commission agreed that limitation of civil claims pursued a legitimate aim (finality and legal certainty), it found that its inflexible application in these cases was unreasonable and disproportionate when compared with the victims of unintentional injury. When the case went before the ECtHR, however, no violation of the Convention was found. The ECtHR found that the right of access to a court in Article 6(1) is not absolute and can be subject to reasonable limitations (as noted in respect of *Z and others v UK* above). It noted that limitation periods in personal injury cases are a common feature of domestic legal systems and that they serve *"several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time."*[319] It found that a criminal conviction could be brought at any time, and if

[317] *Z v UK*, (2001).

[318] *Stubbings and others v United Kingdom* (Application No. 22083/93), paras 56 and 67-68, and *D. S. v. the United Kingdom* (Application No. 22095/93), Judgment of the ECtHR, 24 September 1996, paras 44 and 55-56.

[319] Ibid. Para. 51.

successful a compensation award could be made.[320] Finally, the ECtHR found that, at that time (1996), no common position existed on limitation periods across Council of Europe States. However the ECtHR did recognise that,

> *"There has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions applying in member States of the Council of Europe may have to be amended to make special provision for this group of claimants in the near future.*
>
> *However, since the very essence of the applicants' right of access was not impaired and the restrictions in question pursued a legitimate aim and were proportionate, it is not for the Court to substitute its own view for that of the State authorities as to what would be the most appropriate policy in this regard."*[321]

Article 1 of Protocol 1 of the European Convention on Human Rights protects the right to peaceful enjoyment of possessions of both natural and legal persons (thus extending that right to institutions) and provides that *"no one shall be deprived of his* [sic] *possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."* According to the ECtHR, this right extends to either *"'existing possessions' or assets, including claims, in respect of which the applicant can argue that he or she has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right."*[322] The ECtHR has found that claims in tort law (delict in Scotland) are "assets" for the purposes of Article 1, Protocol 1 and *"in particular that the established case-law of the national courts would continue to be applied in respect of damage which had already occurred."*[323]

It has been suggested by the Scottish Law Commission that *"in light of the case law on the Convention, there is a real possibility that the retrospective*

[320] ibid, para. 52.
[321] Ibid, para 56.
[322] *Kopecký v Slovakia*, Application No. 44912/98, Judgement of 28 September 2004, para. 35.
[323] Ibid, para 48, citing *Pressos Compania Naviera S.A. and Others v Belgium*, Judgement of 20 November 1995, Series A no. 332.

imposition of liability on a person upon whom no liability currently existed for events which occurred in the past would contravene Article 1 of the First Protocol to the Convention…the imposition of such liability could require the payment of compensation out of his assets and thus the depletion of his 'possessions'."[324] The case law of the ECtHR does not explicitly exclude the possibility that a legitimate expectation of an exclusion of liability (for example on the part of institutions or insurance companies) from a delictual claim would qualify as an asset for the purposes of Article 1, Protocol 1. However such a finding would certainly be difficult to reconcile with the ECtHRs established principles.[325] Indeed a recent Scottish judicial review found that an exclusion of liability was not an asset for the purposes of Article 1, Protocol 1.[326]

In any event this right is qualified and can be limited where *"a fair balance* [is] *struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights…"* [327]

[324] Scottish Law Commission, Report on Personal Injury Actions: limitation and prescribed claims, December 2007, Scot Law Com No 207, p 54.

[325] Ibid, paras 49 and 50, *"in a line of cases the Court has found that the applicants did not have a 'legitimate expectation' where it could not be said that they had a currently enforceable claim that was sufficiently established." "similarly, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts."*

[326] *OPINION OF LORD EMSLIE in the petition of AXA GENERAL INSURANCE LIMITED and OTHERS for Judicial Review of the Damages (Asbestos-related Conditions) (Scotland) Act 2009* [2010] CSOH 2, http://www.scotcourts.gov.uk/opinions/2010CSOH02.html.

[327] *Sporrong and Lönnroth v Sweden*, Application no. 7151/75; 7152/75, Judgement of 23 September 1982. para. 69.

4. THE FORUM AS AN ELEMENT OF THE RIGHT TO AN EFFECTIVE REMEDY

a. Generally

The Forum is likely to receive accounts of conduct similar to the human rights abuses mentioned above, and of State failure to respond. If the Forum itself is deemed to be a State body[328] or if it, or survivors put the State on notice the obligation to investigate and, if a violation is shown, to provide reparations is triggered.

Unless the Forum or some other mechanism carries out at least a preliminary investigation,[329] it will not be possible to identify with any certainty which survivors are entitled to a remedy under international human rights law.[330] The State may therefore simply decide beforehand to assume all survivors are entitled to a maximum level human rights remedy and design investigative and reparation mechanisms accordingly. Or it may decide to provide all survivors with only selected aspects of a remedy which are more straightforward to supply (*rehabilitation*, such as therapy, counselling, education, training; some measures of *satisfaction,* such official declaration, apology and acknowledgement, commemoration) leaving the criminal courts to provide *investigation* and the civil courts *compensation.*[331] This would not, however, comply with all elements of survivors' right to an effective remedy, particularly where other remedies are not genuinely effective, as has been found by the ECtHR.[332]

The Forum could however play an important role in providing the first

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328 See the section on attribution as an illustration. Scots administrative law would not be determinative of the position in international law.

329 Or at least validates in a basic way the credibility of survivors and reliability of their accounts.

330 Nor whether violations occurred that require an "effective investigation."

331 And both to provide *access to justice* and disclosure of facts as *satisfaction* (within the framework of UN Victims Declaration and Van Boven Principles).

332 *E and others v UK* (concerning Scottish remedies as at 2002) and *Z v UK* (concerning equivalent English remedies). It may not also comply fully with the positive obligations on the State to support victims to make use of available remedies for example the obligations on effective access to justice Article 13(1) of the UN Convention on the Rights of Persons with Disabilities including through procedural and age appropriate accommodations.

overall element of an effective remedy identified by van Boven: *"equal and effective access to justice"*. It could do this by investigating the extent to which existing remedies are genuinely effective and point to barriers to survivors' ability to effectively realise their right to a remedy such as, for example, the fact that administrative compensation mechanisms available relate only to criminal injuries whereas some forms of ill-treatment may not have been expressly criminalised, that they are limited to events after 1964 and thus exclude older survivors, and that elements in their design and functioning may act in practice to exclude survivors of historic child abuse. In respect of actions in the civil courts, it may be that the Forum identifies elements in the legal aid scheme as well as the manner of operation of laws related to limitations requiring review. In measures of satisfaction, real or perceived obstacles to institutions issuing effective apologies may be key. The Forum may likewise determine that existing procedures are incapable of providing an effective remedy as defined in section 3 (for example through time-bar, lack of subject matter jurisdiction, or requiring the victim to initiate the proceedings).

Throughout consultation the Scottish Government has termed the Forum the *Acknowledgement and Accountability* Forum, aimed at *"ensuring that some survivors receive practical help to assist them to recover",*[333] and providing an opportunity for survivors to *"tell their story, be believed and have the pain that was caused fully acknowledged".*

No definition of "Accountability" exists in international human rights law, the closest approximation being the absence of impunity for gross human rights violations, which is broadly in line with the procedural requirement for investigation of cruel, inhuman or degrading treatment or punishment[334]: *bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – in which they are subject to an enquiry that might lead to their being accused, arrested, tried and if found guilty sentenced to appropriate penalties and to making reparations to their victims*.[335]

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[333] Consultation Communication dated 10 October 2008.

[334] Investigation capable of leading to determining the identity of those responsible and to their punishment.

[335] Set of Principles for the Protection and Promotion of Human Rights through action to Combat Impunity E/CN.4/Sub.2/1997/20/Rev.1.

Clearly, the recounting of survivors' experiences and acknowledgement of their suffering would not constitute holding persons (or even institutions) to account.[336]

The Set of principles for the protection and promotion of human rights through action to combat impunity developed by two UN independent experts are guiding principles for States establishing truth commissions and commissions of inquiry.[337] They are not legal standards in the strict sense but draw on *"international law as reflected in jurisprudence of international courts, human rights treaty bodies and national courts as well as in other aspects of State practice."*[338] Drawing on lessons from recent experiences of designing administrative programmes of reparation around the world the Independent Expert notes among other things:

- *"A reparations programme should also operate in coordination with other justice measures. When a reparations programme functions in the absence of other justice measures, the benefits it distributes risk being seen as constituting the currency with which the State tries to buy the silence or acquiescence of victims and their families. Thus it is important to ensure that reparations efforts cohere with other justice initiatives, including criminal prosecutions, truth-telling, and institutional reform;*
- *If two of the critical aims of a reparations programme are to provide recognition to victims (not just in their status as victims, but also in their status as citizens and bearers of equal human rights) and to promote their trust in State institutions, it is essential to involve victims in the process of designing and implementing the programme."*[339]

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[336] Even informal definitions are unlikely to exclude any corrective measures against the individual or institutions responsible. The South African "model", mentioned by the Scottish Government in its proposal, would almost certainly violate current international criminal and human rights law. It departs from all prior models, and has been largely rejected. While the nature and scale of the conduct to be dealt with by the Forum is of a different order, the principle is the same: international law requires responses by the State to include criminal investigation for certain serious violations.

[337] See the revised principles in Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102, 18 February 2005, and its Addendum UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

[338] UN Doc. E/CN.4/2005/102, para 5.

[339] UN Doc. E/CN.4/2005/102, para 59.

The Independent Expert endorses the view of the UN Secretary General who found *"we must…eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations."*[340]

b. Investigation and Inquiry

The duty to investigate is often described as a victim's right to know. This would not be satisfied by a victim simply recounting his own experience, which he already knows, but will require further steps. If no attempt has been made by the State through other means to find additional information about the harm and how it occurred, it cannot treat its acceptance of a survivor account as an investigation (as defined above).

The Scottish Government points out correctly that the criminal justice system *"is about prosecution in the public interest and is not directly aimed at redress for individuals"*[341] but human rights law takes an individual focus. If the Forum mandate does not include inquiry into individual incidents or human rights abuses to provide the survivor with information, then for those survivors seeking further information but not prosecutions, a non-judicial commission of inquiry can perform the function.

Of course there is no duty on a victim of human rights violations to report those violations to the authorities. Non-State bodies can receive such accounts of survivors confidentially with no follow-up required by them.[342] This does not, however, detract from the State's duty to investigate (or at least establish a mechanism to determine any State liability in the breach of a Convention right) as discussed above.

As indicated by the global goals in the Consultation Document, the Forum could play a significant role in promoting reform, not necessarily as part of a remedy due to individuals but of the State's general obligation to prevent

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340 UN Doc. S/2004/616, page 1. The Secretary General was concerned with transitional justice programmes, but the Independent Expert found his view applicable in other situations of administrative reparations programmes.

341 Consultation Document.

342 Unless it indicates ongoing abuse/real and immediate risk.

future violations. Information from survivors could be crucial in determining the nature and scope of the abuse, patterns, policies and perpetrator profiles linking different incidents of abuse. A Forum with a more proactive approach to gathering and analysing information can widen the pool of persons who can cooperate to include former care workers, family members, witnesses generally, specialists, and may benefit from State support in terms of ordering the production of records and other documents.[343] Victims may wish the results of this type of inquiry to be made public, on which topic see Part C.

c. Reparations

The Consultation Document includes redress mechanisms as an example for respondents to consider. The elements of reparation should depend on the needs and wishes of the survivor, and the principle of proportionality, dependent on the gravity of the violation and the circumstances of the individual.[344] Participation in a discussion Forum should not be a prerequisite for a survivor to obtain reparation in any of its forms. If the Forum's mandate does include redress, it does not necessarily require a full and detailed testimony: simplified forms of application and validation are satisfactory.[345] That said, the information should be sufficient to allow an analysis of the compensation due to *each* individual as would be required by international human rights law.[346]

i) satisfaction

Public record of the truth: A Forum as a historical or oral history exercise alone would not satisfy the reparation component of a remedy either. Disclosure of the truth is part of satisfaction but does not mean a general truth, or truth about systemic abuse, but truth for a victim about the circumstances of the violations they suffered. Likewise it should not be presumed that the mere act of recalling one's experience is a form of

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343 An interesting comparison might be the proposal released in January 2009 by the "Bradley-Eames" Commission in Northern Ireland, which recommended an internal thematic investigative unit, parallel to a unit investigating individual crimes.

344 (Special Rapporteur on restitution). See above under right to an effective remedy.

345 In the Chilean reparations program presumptions of certain levels of ill treatment applied if persons can demonstrate they were held in a certain institution at a certain period of time.

346 Rather than payment of a set amount to every victim, e.g. 2009 Bradley-Eames Commission in Northern Ireland to pay every victim of any type of violence a set amount.

reparations because it has positive psychological effect.

Acknowledgement is also a component of satisfaction. Again, a victim and State can agree together that an acknowledgement of suffering will satisfy his claim to a human right to a remedy. But ordinarily, acknowledgement comes *after* an information-gathering exercise and requires acceptance of the known facts, circumstances and harm that the victim suffered.

Apology: An official apology is also often an element of satisfaction. Even general public acknowledgement and apology may carry legal implications for the State if it amounts to an admission (at least de facto) of responsibility for harm. The experience before the European Commission and Court and the Inter-American Commission and Court of Human Rights is that compensation may be agreed to by the State without liability in terms of admitting the substantive violation (the ill treatment itself) but admitting responsibility for the lack of an adequate remedy. It would mean confronting survivors with a kind of partial acceptance of the truth of their statement, but a formal apology by the State for a lack of response is indeed valuable in itself. It may also affect individuals, as survivors may understandably wish to cite the acknowledgement for example in future proceedings against the State or individuals as evidence of the truth of their experience. This may be the case even if the proceedings of the Forum are entirely behind closed doors and even if it does not produce a report, if publicly linked to specific institutions.[347]

Much research on the elements of meaningful apologies suggests the following as crucial:[348]

> *"• An acknowledgement of the wrong done. This is the naming of the offence. Whether or not it was intentional, an apology must correctly describe the offending action or behaviour. The description must be specific in order to demonstrate an understanding of the offence. It must also acknowledge the resulting impact on the aggrieved.*

[347] The Kauffman report on the Nova Scotia redress programme provides many lessons on the importance of taking the rights of everyone fully into account in the design and delivery of redress mechanisms.

[348] See e.g. Scottish Public Services Ombudsman, Advice Leaflet 2, *Guidance on Apology*, www.spso.org.uk

• Accepting responsibility for the offence and the harm done. This includes identifying who was responsible for the offence.

• A clear explanation as to why the offence happened. This should show that the offence was not intentional or personal. Although most people will want or need an explanation, it should be recognised that this is not always the case. Also, if there is no valid explanation, then one should not be offered. The offender may wish to say that there is no excuse for the offending behaviour.

• Expressing sincere regret. This demonstrates that the offender recognises the suffering of the aggrieved and is remorseful. It can be difficult to communicate sincere regret in writing. The nature of the harm done and needs of the aggrieved will determine whether the expression of regret should be made in person as well as being reinforced in writing.

• An assurance that the offence will not be repeated. This may include a statement of the steps that have or will be taken to address the complaint and, wherever possible, to prevent a reoccurrence of the harm.

• Actual and real reparations (or redress). This is making amends."[349]

Concerns around civil liability of organisations associated with apologies have arisen around the world, including in contexts of institutions wishing to apologise for historic abuse of children. In this context an increasing number of jurisdictions have enacted so-called apology laws to overcome this (see Annex 1).

ii) Compensation

Adequate compensation is a core element of reparation, particularly where restitution of rights is not possible. Van Boven considers that 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, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs*

[349] Ibid.

required for legal or expert assistance, medicine and medical services, and psychological and social services."[350]

In cases of torture and ill-treatment the consequences of the violation may extend far beyond immediate economic loss. For example, in the case disappearance and torture by the Chilean dictatorship, the Inter-American Court of Human Rights awarded the following to the families of victims: a pension not less than the average for Chilean families; expedited procedures to declare a presumption of the victim's death; special attention from the State with regard to health, education and housing, assistance with debts, and exemption from obligatory military service for sons of victims. [351]

The ECtHR, which has generally taken a more conservative approach to compensation, has recognised in the case of violations of article 3 duties to protect children from ill-treatment that "*a precise calculation of the sums necessary to make complete reparation (restitutio in integrum) in respect of the pecuniary losses suffered by applicants may be prevented by the inherently uncertain character of the damage flowing from the violation ... An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved the more uncertain the link becomes between the breach and the damage. The question to be decided in such cases is the level of just satisfaction, in respect of both past and future pecuniary loss, which it is necessary to award to each applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable."*[352]

Compensation does not of course have to be linked to prosecution or legal procedures,[353] so entirely separate mechanism can be created to receive, adjudicate and respond to claims for reparation, including as an alternative to formal civil actions, and still be human rights compliant as part of an

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350 *Van Boven Principles*, IX, para. 20.

351 *Gary Hermosilla et. Al*., case no. 10.843, Inter-American Court of Human Rights 1988, at 171, para. 57.

352 *Z and others v UK*, application 29392/95, 2001, para. 120.

353 See for example article 2(2), ECHR on Compensation of Victims of Violent Crimes (harm in this case covering serious bodily injury or impairment of health directly attributable to an intentional crime of violence).

effective remedy. [354]Indeed there are significant advantages in not using the forum as a means of gathering information that 'qualifies' survivors for reparations, be they financial or access to social services and other assistance. Nevertheless, such remedies as are available must be effective and genuinely accessible to survivors of historic ill-treatment, whether or not such ill-treatment was criminalised at the time, where the State failed to discharge its obligation to protect individuals from ill-treatment.

[354] *Ex gratia* or discretionary payments (including by the Criminal Injuries compensation bodies do not amount to exhaustion of remedies for the purpose of admissibility of a case to the European Court however. *Reilly v UK,* 53731/00, (Dec.) June 26, 2003; also 14545/89 (Dec.) October 9, 1990, 66 D.R. re ministerial discretion to award compensation.

PART C IMPLEMENTATION ISSUES

1. Definition of Victim

Five different categories of definition are relevant here:

1. Definitions of victim in human rights law, which, if satisfied, will entitle the individual to a remedy.
2. Definitions of victims that appear in non-binding international human rights standards.
3. Definition of victims of crime that appear in non-binding international standards.
4. Definitions of victims of crime in domestic rules and legislation.
5. A definition of victim (or survivor) that the proposed Forum might adopt to determine who may participate and/or access assistance provided by the Forum or other State or private bodies.

Definitions in all five categories are not necessarily all the same, nor should they be as each has a discreet purpose.

1. Starting with the human rights law definitions, clearly not all individuals that may wish to provide accounts of abuse to the Forum will be victims of conduct that can be classified as a violation of international human rights law. The ECtHR classifies victims as *"the person directly affected by the act or omission which is in issue."*[355] It is not necessary that there be any injury;[356] it is enough that the person is directly affected.[357] Neither does the person have to show prejudice.[358] The scope of victims who wish to access the forum may not be limited to survivors of child abuse (ill-treatment as described above) but may also include former staff in institutions, for example

[355] *De Wilde, Ooms and Versyp v Belgium*, Judgement of 10 March 1972, Series A No 14, page 11 paragraphs 23 – 24.
[356] *Marckx v Belgium*, Judgement of 13 June 2979, Series A No 31.
[357] *Amuur v France*, Judgement of 25 June 1996, Reports of Judgements and decisions 1996 iii, paragraph 36.
[358] Ibid.

where their right to a fair hearing, privacy, due process rights were violated. The Kaufman Report in Nova Scotia, for example, considers cases where individuals committed suicide following damage to their reputation associated with the findings of a redress mechanism which fell short of international fair hearing and privacy standards.[359] In some circumstances, there may be indirect victims who can claim a remedy, for example close relatives.[360] In *Cakici v Turkey*[361] however, the ECtHR clarified the limited circumstances in which a relative may be considered a victim for the purposes of Convention rights:

> *"Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the essence of such a violation does not so much lie in the fact of the 'disappearance' of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct."* [362]

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[359] Kaufman, F, *Searching for Justice: an independent review of Nova Scotia's response to reports of institutional abuse.* Volume 1, 2002, Province of Nova Scotia.

[360] This is generally in relation to family members of deceased or disappeared victims, but has been extended to the widow of deceased person whose death was not caused by a violation of human rights itself but whose reputation or presumption of innocence had been violated during their life. *Brudnicka and Others v Poland* No 54723/00, paragraphs 26 and *Nolkenbockhoff v Germany*, Judgement of 25 August 1987, Series A No 123, paragraph 33, both related to breaches of Articles 6(1).

[361] *Cakici v Turkey*, judgment of the ECHR, 8 July 1999.

[362] Ibid, at 98. The ECtHR has indicated that claims could be made from family members in relation to article 3 abuse also (not only disappearance under article 2) see *Berktay v Turkey*(2001); *Sultan and others v Turkey* (2006); *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2006).

A leading commentator on the UN CAT, now UN Special Rapporteur on torture, Manfred Nowak, considers that *"not only should mechanisms to obtain redress, compensation and rehabilitation exist, they should also be accessible to all victims (and dependants of victims) of acts of torture or abuse, including sexual violence, perpetrated by [State] officials."* The UN Committee against Torture has found a duty to inform victims and their families of their right to pursue compensation and to make procedures transparent.[363] The Committee has also criticised States for failing to give standing to victims' dependants in redress mechanisms.[364]

2. In relation to international standards on victims of human rights abuse, the basic definition is contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[365] ("UN Victims' Declaration"). In Principle 18 victims are described as *"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 do not yet constitute violations of national criminal law but of internationally recognised norms relating to human rights".* This appears to be limited to those human rights abuses that will become criminalised under national law at some point rather than victims of violations of any human right whatsoever.

3. In relation to international standards which define victims of crime, again the UN Declaration contains a specific definition *"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".* The parts in square brackets were omitted when the

363 Consideration of State report of Switzerland, UN Doc. CAT/C/CR/34/CHE, para 5(f).

364 Communication on Namibia, UN Doc. A/52/44, para 240.

365 29 November 1985.

European Union drafted a framework decision on the standing of victims in criminal proceedings[366] and the recommendation of Committee of Ministers on assistance to crime victims in 2006.

4. Definitions under national law and procedure may vary across the legal jurisdictions within the United Kingdom.

5. Those approaching the forum may fall within one, more or none of these definitions depending on the conduct from which they suffered. It may be that the Forum itself wishes to adopt a definition which builds on the ECHR definition, applied to the specific circumstances of Scotland and the mandate of the forum. For example *"a person directly affected by any of the following acts or omissions, or another person with sufficient degree of proximity"*, followed by a listing of the forms of ill-treatment to which the forum is directed, as well as associated abuses, for example to extend to due process and privacy rights of former staff.

As to whether the Forum must go further in terms of categorising victims using these definitions, this very much depends on whether the Forum functions as an inquiry or a redress mechanism. From the point of view of the State, at the very least, persons who on the face of it are victims of violations of human rights should be identified and informed of their rights to claim reparation. If there is no issue of a current risk to the public from the perpetrator, the survivor can then make the choice whether or not to pursue the remedy.

In terms of the treatment of survivors through the *process*, given the varying definitions of victim and that the different facts will be not known until after their testimony, the Forum would be advised to adopt the minimum guidance in the UN Victims Declaration.[367]

- victims should be treated with compassion and respect for their dignity
- they should be informed of their rights and of the scope of the judicial and administrative processes open to them

366 2001/220/JHA, 15 March 2001, Article 1(a).

367 Principles 4, 5 and 6.

- their views and concerns and should be heard at appropriate stages of the process where their personal interests are affected
- they should be given proper assistance
- their privacy and where necessary their safety, as well as that of their families and witnesses, should be protected, and unnecessary delay must be avoided.

Victim participation in the processes of the Forum, including their access to information it possesses, must be balanced with the rights of others, as discussed below.

2. Privacy

Taking the wider right to private and family life as a starting point rather than privacy, survivors might supply information on alleged abusers or other victims or witnesses who would be severely affected if such information is made public. Survivors may claim rights of access to personal information gathered by the Forum.[368] The Forum may seek survivors' medical or personal records from private or State bodies, with the consent of the survivor. Confidentiality and information security is clearly necessary.

One challenge however, which has been faced by Commissions of Inquiry and Truth Commissions globally, is the balance between documenting abuses, and promoting change. International human rights obligations do not require *blanket* confidentiality. Some of the information provided to the Forum[369] may be open source, already in the public domain or obtainable from States agencies under freedom of information requests. It may have no impact on rights of the information provider or third parties such as other survivors, witnesses and their families, current and former

[368] National data protection laws may also apply.

[369] If the Forum is designed in such a way as to proactively gather information, it might encourage persons other than survivors to give useful information, as suggested above, including medical staff and so on, the rights to privacy of those persons are obviously in play, as it is for the survivors themselves. This may extend to ex-perpetrators themselves to come forward and give information confidentially, and to have their privacy respected, subject to the caution that if their information indicates an ongoing human rights violation or serious risk thereof, it will be passed to the authorities.

staff and management of the relevant institutions, or can be redacted accordingly. Some survivors or other information providers may want to go on the record.[370] The Forum may therefore be able to gather a public archive of information useful not only to survivors but to researchers, policy makers and care providers, and reserve confidential material.

Commissions publicising information capable of linking individuals to misconduct can prompt defamation claims[371] based on interference with private life. Even if there are no public conclusions in relation to individual human rights violations or criminal activity, conclusions relating to institutions can also lead to challenges based on the effects on those who worked on them.[372]

3. Protection of Mental and Physical Health

The State has the obligation to protect the physical and mental health of those participating in (or cooperating with) the Forum as well as third parties affected by its work, including through taking steps to ensure that the mental health[373] of those who engage with the forum is protected and protection from attacks on life, physical or mental integrity[374] by private individuals. Survivors or witnesses may risk threats, intimidation or even attacks by former abusers for instance, particularly if there is a lack of proper outreach by the Forum explaining its non-criminal function and its confidentiality procedures. Alleged perpetrators or those with similar names may risk intrusion by the media, suspension from employment or

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370 The UN Commission of Inquiry on Darfur offered complete confidentiality to those who sought it; others chose to attach their identity to statements provided to the Commission investigators and subsequently passed to the International Criminal Court.

371 As was the case in South Africa when survivors named perpetrators publicly as part of the TRC hearings.

372 As pointed out by the Kauffman Review of the Canadian enquiry into child abuse in Nova Scotia in the mid 90's.

373 The right to the highest attainable standard of physical and mental health is guaranteed in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). To comply with that right, the State must take immediate steps to respect, protect and fulfil (achieve progressively the full realisation of) the right to health. See UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health : . 11/08/2000.* UN Doc. E/C.12/2000/4.

374 Articles 2, 3 and 8 of the ECHR and ICCPR art 7, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 16.

even physical attacks from the public, if the Forum's stored information is not properly protected and reports redacted.

Equally, the Forum may incur State responsibility for directly violating participants' rights through poor treatment. Even if it is a voluntarily decision to participate, the circumstances and the vulnerability of the survivors and families requires particular care.

This extends to staff, particularly those who will receive or transcribe months of harrowing testimony. In serious crime investigations and truth commissions around the world this has had significant effects on their mental health.

4. Due process and access to justice

The first consideration here is whether the activities or outcomes of the Forum would amount to a determination of the civil rights and obligations of any individual or any criminal charge against him.[375] This seems to be explicitly excluded from the Forum's work and this is made very clear in the documentation from the Scottish Government. There are other circumstances in which the work of the Forum may have implications related to these guarantees.

Some people who have been accused of abuse as workers may wish to use the forum where they believe that their rights to a fair hearing or to respect for private life were violated when they were accused of abuse. The House of Lords was recently presented with a case related to four care workers who were provisionally listed as unsuitable to work with vulnerable adults, pending a full determination. The effect of listing being to deprive the care workers of their employment and, as the House of Lords found, in effect to prevent at least some of them from getting any other such employment.

The first question which the House of Lords considered was whether the

[375] This is equally relevant in relation to Article 6 of the ECHR and Article 14 of the International Covenant and Civil and Political Rights.

situations concerned a civil right at all. This it found uncontroversial, as the ECtHR has found since 1981 that civil rights include the right to practise one's profession.[376] *"The right to remain in the employment one currently holds must be a civil right, as too must the right to engage in a wide variety of jobs in the care sector even if one does not currently have one."*[377]

Finding that the opportunity for a judicial hearing came only after a lengthy administrative process during most of which the care worker is provisionally on the list, the House of Lords found that Article 6 rights of fair hearing were breached. The provisional listing was considered to be a *"determination of his civil rights"* under the meaning of Article 6(1) as the impact on at least some of those affected will be to limit his/her right to continue in employment or to seek similar employment from another employer. It was also a determination (despite being only provisional) due to the serious impact it would have on those rights for some (others, at least in theory, will be free to find other employment for the same employer). For the House of Lords, the process of provisional listing breached Article 6 as it did not allow a fair hearing at the outset, when a possibly irreparable harm may be visited on the accused person through provisional listing. This cannot be remedied by a later fair hearing in a tribunal exercising full jurisdiction.

Thus a process of listing a care worker as unsuitable to work with children or vulnerable adults must start with an opportunity for the care worker to be heard, to tell their side of the experience.

For the House of Lords in some cases the provisional listing will also have such a serious impact on their personal relationships as to breach Article 8.[378] *"The ban is also likely to have an effect in practice going beyond its effect in law. Even though the lists are not made public, the fact is likely to get about and the stigma will be considerable."* [379] While there will be cases where such a limitation on Article 8 rights will be justified, *"the low*

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376 *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1; *Bakker v Austria* (2004) 39 EHRR 548.

377 *R (on the application of Wright and others) (Appellants) v Secretary of State for Health and another (Respondents)*, [2009] UKHL 3, para. 19.

378 Ibid, Para. 36.

379 Ibid, Para. 36.

threshold for provisional listing adds to the risk of arbitrary and unjustified interferences and thus contributes to the overall unfairness of the scheme."[380]

Such cases should seen in the context of the need to ensure that the low threshold required to trigger investigation into allegations of child abuse or neglect (as envisaged, e.g. in Article 19 CRC) whilst still respecting the rights of those persons who may be accused of ill-treatment (respecting absolute rights such as the right to a fair hearing and the legality, necessity and proportionality of any limitation of qualified rights such as the right to respect for private life). As the ECtHR has found, Article 8 does not, and cannot, place on child welfare authorities an obligation to thoroughly investigate the basis for a complaint before opening an investigation. *"If it were to be a prerequisite that all such reports, even those that appear credible on their face, should be verified in advance, it would risk delaying such investigations, deflecting attention and resources away from the real problems and reducing their effectiveness and hampering efforts in instances where it was paramount to establish urgently and without delay whether a child was living under conditions that may harm his or her health or development. In this connection, the Court cannot but note the emphasis placed on effectiveness in Article 19 of the UN Convention on the Rights of the Child".*[381]

Even if the Forum were to publish a report concluding that criminal activity or negligence occurred in certain institutions over certain periods of time, this would not be a determination of the individual rights of the victim, criminal responsibility of the perpetrator, or the obligations in delict of the perpetrator, institution or State. Likewise, if the Forum made public findings regarding the violation of human rights, even in relation to specific victims, while that may amount to a determination of the victims' rights as victim of a crime or human rights abuse, this by its nature is a conclusion regarding standing, not a determination of the rights or obligations of potential perpetrator or responsible institution. In other words, the Article 6 rights of a survivor or family member may be triggered by such a conclusion, but not those of an alleged perpetrator or third party.

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380 Ibid, Para. 37.

381 *K.T. v Norway*, 2008

If the Forum were to be created as a redress mechanism in which awards[382] are based on findings of fault, or where the Forum publicises the fact base in a way capable of identifying individuals alleged to have been negligent or acted unlawfully, it may risk being classified as a body with a deliberative function in relation to the civil obligations of those individuals and institutions. On that basis, procedures allowing the right of reply and participation of those alleged to be responsible, would be necessary, or at the very least, a validation procedure which was rigorous enough to achieve the over arching requirements of Article 6, fairness to each party and a reasonable opportunity to present his case, not to be placed at a substantial disadvantage *viz* the other party. [383] If the Forum will have such a wide mandate as to include deliberations about civil rights and obligations, its processes and procedures must allow for such fairness.

From the victim's point of view, participation in those parts of the procedure *in which their personal interests are affected*[384] would clearly require balancing such a right of participation with the rights of others (for example, access to documents such as anonymous statements may be impossible since it may affect the safety of the information provider or other third parties).[385]

5. Relationship to criminal and civil actions

The Forum may be dealing with actual circumstances which are also the

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382 Reparation plans can also be considered as relating to civil rights and obligations. A Foundation created after the Second World War to pay compensation for forced labour, was characterised as such, *Wos v Poland* June 8, 2006, ECHR, see also *C.B. v UK*, 35512/04 (Dec.) August 25, 2005 relating to the Criminal Injuries Compensation Scheme. One for the major criticisms of the Nova Scotia Redress Mechanism was precisely the conclusion regarding eligibility for redress without suitable validation procedure. Whether in addition to the rights to private and family life, an individual right to a fair hearing is affected, would depend on all of the circumstances including whether proceedings had been or were to be initiated.

383 See *R (on the application of Wright and others) (Appellants) v Secretary of State for Health and another (Respondents)*, [2009] UKHL 3, above.

384 See UN Declaration of Basic Principles of Justice for Victims of Crime & Abuse of Power, 1985 article 6(b); Recommendation on the Position of the Victim in the Framework of Criminal law and Procedure Council of Europe, 28th June 1985 article 9.

385 On the issue of the right to a fair hearing generally, and the restrictions on the public nature of procedures, see General Comment 13 (21st Session, 1984), paragraph 6 ICCPR.

subject of ongoing civil or criminal proceedings. Information may come into its possession which a victim wishes to use later to bring civil, criminal or disciplinary proceedings. [386] Information may come into their possession that indicates a crime is currently being committed or there is a high risk of a crime being committed. The Forum may make public findings, even if not naming individual persons responsible, including facts, time period and location, indicate that employees had a duty of care towards residents, or that negligence or criminal conduct occurred.

The risk is that each case will take on a trajectory of its own irrespective of the victim's specific wishes.

On the whole, commissions of inquiry into the large-scale human rights abuse have been precursors to prosecutions and reparations claims rather than running alongside.[387] Truth commissions have tended to operate in situations where few, if any, legal proceedings are ongoing.[388] In rare examples[389] criminal proceedings and truth seeking are designed to run concurrently.

Where truth commissions have run concurrently with legal proceedings, often the information gathered, even when open source, has been completely ring fenced and unavailable to victims, perpetrators or the public.[390] This can have an unintended counterproductive effect. If no suitable channels are created for information providers who *do* wish to co-operate with victims or victims groups, valuable opportunities may be

386 These may be classified as determining civil rights and obligations, even where a sizeable punitive fine is imposed, the Court has not regarded these as criminal for the purpose of Article 6. *Irving Brown v UK* 38644/97(December) November 24, 1988.

387 For example, the Chilean and Argentine Commissions, which focussed on individual incidents and locations of abuse with a view to criminal prosecutions and reparations claims. In the Peruvian example, a unit within the Truth Commission was tasked with identifying suitable cases to be passed to the public prosecutor, maintaining the confidentiality of those who had provided the information. This does tend to blur the lines between the truth seeking body and the criminal authorities however and was not without its difficulties, particularly the criteria applied for case selection and the level of rigour applied to source the valuation. This heritage can be seen in today's UN sponsored commissions of inquiry for example the UN Commission into the events of Darfur.

388 For example, the Guatemalan Commission for Historical Clarification, the Peruvian Truth and Reconciliation Commission.

389 Such as Sierra Leone and East Timor.

390 The Guatemalan Commission for Historical Clarification for example.

lost.[391]

The relationship of the Forum may be one of complete separation but non-interference with the criminal and civil proceedings, but this is not recommended from comparative international experience.[392] It may include an extra element: facilitating victims' access to those remedies. This facilitation may take a minimum form of identification of barriers faced by survivors to accessing justice and other remedies effectively, as well as advice and direction to the appropriate authorities or to non governmental groups where survivors can receive advice about how to raise a civil claim or start a criminal action and as mentioned, it can include leaving the option open for information providers[393] to assist if they feel they can.

For a body such as the proposed Forum, a suitable design option may be providing confidentiality to those supplying statements or documents subject to one proviso, that if the information indicates an ongoing human rights abuse or real risk of such abuse, the Forum must inform the relevant authorities.[394] A higher bar on investigations, prosecutions or other forms of disciplinary procedure would include additional criteria dependent on the nature and gravity of the conduct, as outlined above. All information providers may be cautioned on this aspect.

The rights of the accused to a fair trial are not triggered until that person is charged, therefore, if the Forum were to pass information to the criminal authorities for the purposes of investigation, then during that investigation phase, the right to fair trail would not arise.

If the Forum's mandate were to permit it to pass information to survivors who request it to raise proceedings[395], the fair hearing rights of defendants

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[391] Various problems were experienced for example in the Sierra Leone model where accused persons who had received suitable legal advice wanted to contribute to the Truth Commission's work but were prohibited from doing so by the Court.

[392] See report of UN Independent Expert to update the Set of principles on impunity, para 59.

[393] This is somewhat similar to the new Canadian Indian residential schools model which does allow the information provider to decide whether or not the information can be used or at least subject to privacy and safety issues, rather than adopting a blanket confidentiality policy, as was done with the Irish Inquiry.

[394] Akin to the methodology used by the Irish Commission to Inquire into Child Abuse. In some national legal systems a duty exists to investigate when notified of any crime, no matter how old.

[395] This would likely reduce the number of people including other survivors willing to participate.

would not be raised until the commencement of the action. Finally, if the Forum were to pass information to a survivor or itself initiate disciplinary procedures, the right of the individual to a fair hearing arises at the commencement of those proceedings. In all cases, the bodies required to respect the rights to fair trial and fair hearing would be the relevant criminal, civil or disciplinary authorities rather than the Forum itself. There is no obligation in international human rights law for such a non judicial commission to provide exculpatory information.

Given the unique opportunity that the Forum provides for a wealth of information from many survivors and possibly from third parties such as staff and medical personnel, the potential of the Forum to catalyse further remedies and preventive reforms can be increased. Information providers including survivors will have to give their names and contact details to the Forum in any event, at least in order to allow for verification. The Forum can ask them whether, if the victims wish to continue to try to seek remedy whether through criminal, civil courts or disciplinary procedures, they like to be notified in case they decide to come forward and offer information. This leaves the decision in the hands of the information provider, protects their identity and security, but does not close the door to assisting future efforts by survivors to obtain more information or remedies.

Open source information should be put in the public domain, redacted as necessary, and so can be referred to by other survivors, researchers or policy-makers.

In relation to non-interference, if it is decided that the Forum will make findings regarding facts, any facts overlapping with current civil or criminal proceedings should be excluded from the report. They may be published further down the line in an updated report, for example once the court proceedings have finalised.[396] It is advisable that prosecution authorities provide the Forum with a list of the parties to civil actions[397] and criminal

[396] This was one of the recommendations of Kauffman following the problematic Nova Scotia exercise, that if there are ongoing criminal proceedings, the body should wait before making any conclusions in relation to the same facts and/or perpetrators. The same should apply also in civil proceedings, and arguably where disciplinary proceedings may be ongoing in relation to the institution or individual alleged to be responsible.

[397] If the identities are in the public domain and if not, request the consent of the parties to provide their identities to the Forum.

accused. This information may be cross referenced first with the names of survivors coming forward to make statements in the first place, in order that the survivor may be given legal advice as to the possible implications and again with the content of the statements.

The survivor may wish to give the Forum documents they have already lodged in court to give a richer picture of their case. Their solicitor should be able to advise them whether this is possible in the national legal system in relation to documents obtained from third parties or from the defence. The survivor can of course provide the same documentation that was in his or her possession to the Forum as they have already supplied to their solicitor. [398]

[398] The survivor's solicitor may also wish to be satisfied of the security arrangements made by the Forum in relation to visits by the survivor and the holding of their statement, that the defence would not be able to request a copy of the statement, that the final report of the Commission would not prejudice the outcome of the proceedings or that participating in the Forum may have adverse mental health effects given existing pressure of the criminal proceedings.

PART D IMPLICATIONS FOR DESIGN AND OPERATIONS

The specific objectives created for the Forum, will determine its activities and therefore the structures, processes and systems it will need. These include the following Protocols and policies.

1. PROTOCOLS

- *Communications (with survivors, families, witnesses, experts, for example); this has a security aspect but also covers outreach, liaison and courtesy in general.*
- *Statement taking (including caution of information providers in relation to use of information indicating current or real risk of human rights violations.)*
- *Medical/personal record consent.*
- *Source evaluation.*
- *Security[399]: Information, Location, Personal (in relation to information, various user access levels can be designed, and measures should include not only a physical storage of information but communication, electronically[400] and telephonically.)*
- *Confidentiality: excluding open-sources, otherwise opt-in*
- *Pre-statement psychological screening; liaison throughout the process.*
- *Classifications (for the chosen conduct definitions, definition of victim, whether a human rights definition or a Forum own definition, attribution – where conclusions are made regarding responsibility of the State of private institutions).*
- *Judicial liaison (cross referencing ongoing proceedings, information*

[399] Basic safeguards should be employed in particular to protect the life, limb and mental health of participants and to avoid exposing witnesses to danger or exposing those individuals or institutions that are alleged to be responsible to violations of due process and privacy. Not least, such exposure can jeopardise future civil, criminal or disciplinary proceedings against those same individuals and bodies and so actually obstruct the victim's access to justice.

[400] For electronic communications and remote storage of information, many organisations use the PGP System for example.

provision where necessary-ongoing/imminent risk, notifying information providers)

- *Staff confidentiality*
- *Redactions policy (for all public products and material released or transferred to public archives)*

In terms of internal policies, if the Forum has a mandate to research the nature and scope of historic child abuse in Scotland for example, and at the same time it wishes to provide as much information as possible to individual survivors about their own case, an internal structure which allows to the greatest extent possible a free flow of information between researchers or investigators is crucial. Certain commissions have divided the case and thematic and system analysis, potentially to the detriment of both if there information barriers exist. A policy on archiving open source material will also maximise potential for research and reform efforts.[401]

A policy created by national legal expertise will also be required so that the Forum's archive of confidential information cannot be subject to claims by individuals seeking to know what the Forum collected about them.

If the Forum makes findings regarding State responsibility for specific human rights violations, the State has no human right under the ECHR or other instrument to a fair hearing.[402] Generally, commissions of inquiry have a policy of offering the State the right to respond to allegations; as well as being good practice it increases the legitimacy and accuracy of their findings.

In relation to mental health, the International Tribunals and some Commissions of Inquiry[403] use pre-interview psychological screening of persons who are going to give a statement to the Forum in order to assess the potential harm that may occur and take steps to provide the person with psychological accompaniment before, during and after giving their statement. This is used routinely, for example in relation to victims of

[401] Such as those recommended by Tom Shaw, Historic Abuse Systemic Review.

[402] The situation under domestic constitutional and administrative law procedures is another matter.

[403] For example, the Moroccan IER with an in-house medical unit.

sexual offences during armed conflict and child victims, as well as increasingly in domestic criminal systems.

The practical and logistical implications of ensuring no further violations of human rights are caused by the operations of the Forum itself will clearly increase the need for specialised human resources and technical backup on security issues. Obviously, the more staff the Forum has, the wider the risk of breaches of privacy, and therefore contact with the survivors and access to their testimonies should be kept to the minimum number of staff possible.

2. Participation and information rights

According to the International Covenant on Civil and Political Rights (ICCPR, Article 25) people have a right to participate in decisions which affect the realisation of their human rights.[404] The Convention on the Rights of Persons with Disabilities contains several protections of the right of persons with physical and mental disabilities to participate in decisions (CRPD, Article 4 on general principles, Article 21 on access to information, article 26 on support for participation, article 29 on right to participate in public life).

Article 8 of the ECHR, the right to respect for private and family life, home and correspondence, includes a right to informed consent to limitations of human rights and to participation in decisions which affect human rights. The European Court of Human Rights has stated that this right encompasses, among other things, *"the right to personal autonomy, personal development"*[405] and the right *"to conduct one's life in the manner of one's choosing"*.[406] The Grand Chamber of that Court has also found that Article 8 includes a right to *free* and *informed consent* to limitations of

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404 Interpreted to cover "all aspects of public administration, and the formulation and implementation of policy", Human Rights Committee, General Comment No. 25, *The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25)*, UN Doc. CCPR/C/21/Rev.1/Add.7. The Human Rights Committee has found that individuals have the right to participate in decision-making which may affect the realisation of their rights in e.g. *Apirana Mahuika et al v New Zealand* (CCPE/C/70/D/547/1993).

405 *Evans v UK*, Grand Chamber (2007) citing *Pretty v UK* (2002)

406 *Pretty v UK* (2002)

human rights.[407] It has also clarified a number of elements of the process of ensuring participation in decisions which affect human rights, including timing: *"when all options are open and effective public participation can take place*".[408]

The right to information is also a component of the right to freedom of expression (article 10, ECHR; article 19 ICCPR; article 21 CRPD[409]) and increasingly recognised as a freestanding right to information in a form and language which enables an individual to participate in decisions which affect their human rights. This includes the right to accessible information for people with disabilities. CRPD Article 9(2)(f) requires the promotion of, "*other appropriate forms of assistance and support to persons with disabilities to ensure their access to information*".

In both the design and the delivery of the forum, the participation and information rights of everyone should be upheld. This will mean ensuring that the design and implementation take into account the needs of diverse survivors, including those with physical or mental disabilities, to information in a form which is accessible to them, and to different forms of support to enable them to fully participate and take decisions on, for example the form of reparations which would best respond to their needs. The UN Set of principles to combat impunity include a requirement to publicise reparations procedures[410] using public and private media, both within and outside the country, using consular services particularly in countries where a large number of victims live. They envisage *"outreach programmes aimed at informing as many victims as possible of procedures through which they may exercise [their right to a remedy]"*.[411]

3. The rights of persons with disabilities

It is possible that the forum may extend to institutions which were directed to mental health care and treatment or to the care of children with

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407 *D. H. and others v Czech Republic*, Grand Chamber, application no. 57325/0, 13 November 2007.

408 *Taşkın and Others v. Turkey,* ECHR, 10 November 2004, para 99.

409 This latter includes a specific requirement to take appropriate measures including: *"Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost"*.

410 UN Doc. E/CN.4/2005/102/Add.1, Principle 33.

411 UN Doc. E/CN.4/2005/102, para. 60.

disabilities. It is therefore worth considering the rights of persons with disabilities from the beginning of the process of designing the forum. The UN Convention on the Rights of Persons with Disabilities, in addition to the various references already made above, includes a number of specific provisions which may be relevant. These include:

Article 4(1)(c) – take into account the rights of persons with disabilities in the development of the forum

Article 4(1)(i) – to train those involved with the forum on the rights of persons with disabilities so as to better reflect their rights in the forum

Article 4(3) – to closely consult and actively involve persons with disabilities in the development of the forum

Article 9 – to ensure that the forum and information and services related to the forum are equally accessible to persons with disabilities

Article 13 – access to justice – ensure access to justice on an equal basis, including through procedural accommodation

Article 16 – violence and abuse – (4) take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who were victims of any form of violence or abuse. Such recovery and reintegration must take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender and age-specific needs.

Article 21 – freedom of expression and access to information – provide information on the forum to persons with disabilities in accessible formats

Article 26 – habilitation and rehabilitation

Article 29 – participation rights.

Annex 1: Note on addressing the issue of apology and liability

Concerns around the civil liability of organisations associated with apologies for harm have been raised in a number of contexts from alleged medical negligence to child abuse.[412] Examples of where this question has been raised in the context of historic abuse include in Tasmania,[413] British Columbia[414] and Ontario.[415] In the context of the Cornwall Inquiry into historic abuse in Ontario the inquiry commissioned a paper from Leslie Macleod, an expert on alternative dispute resolution, on the legal and ethical implications of apologies.[416] What follows is largely a summary of the relevant parts of her findings, supplemented by a series of other sources.[417] This paper focuses on the legal implications of an apology and the trend towards legislating to limit the legal consequences of an apology. It does not cover research on the ideal form or content of an apology, although Ms McLeod's paper contains useful insights on those questions also. This paper does not present findings of SHRC and should not be attributed as such although the Commission may consider these points in

412 Research has indicated that concern about legal liability has impeded institutions from apologising or from offering language in an apology which accepted responsibility. There are, however, indications that, in contrast, some organisations have actually lowered their liability costs by taking responsibility. See Janet Bavelas, *An analysis of formal apologies by Canadian churches to First Nations*, Victoria, B.C.: The Centre for Studies in Religion and Society, University of Victoria, Department of Psychology, July 2004.

413 Office of the Ombudsman of Tasmania, *Listen to the Children – review of claims of abuse from adults in state care as children*, Hobart, November 2004.

414 Ombudsman of British Columbia, *The Power of an Apology: removing legal barriers*, special report no. 27, February 2006.

415 www.cornwallinquiry.ca

416 Leslie Macleod, *A Time for Apologies: the legal and ethical implications of apologies in civil cases,* 12 April 2008*,* http://www.cornwallinquiry.ca/en/healing/research/pdf/Macleod_Apologies.pdf

417 For additional information see, e.g. British Columbia the Office of the Ombudsman, *The Power of an Apology: removing the legal barriers (special report no. 27)*, February 2006, Cohen, Jonathan R., "Legislating Apology: The Pros and Cons", (2002) 70 University of Cincinnati Law Review 819 at 872; Cohen, Jonathan R., "Advising Clients to Apologize", (1999) 72 Southern California Law Review, 1009; Shuman, Daniel W., "The Role of Apology in Tort Law", (2000) 83 Judicature 180,; Alter, Susan, "Apologizing for Serious Wrongdoing: Social, Psychological and Legal Consideration", Law Commission of Canada, 1999; Van Dusen, Virgil and Spies, Alan, "Professional Apology: Dilemma or Opportunity", American Journal of Pharmaceutical Education 2003; 67 (4) Article 114, p. 3; "Why Sorry Works!" Works: Overview of the Sorry Works Program for the Medical Malpractice Crisis, www.victims&families.com/sorry.phtml; Morris, Catherine, "Legal Consequences of Apologies in Canada", Draft Working Paper presented at a workshop on "Apologies, Non-Apologies and Conflict Resolution", October 3, 2002, www.peacemakers.ca/publication.

developing our own recommendations.

In response to a recognition that apologies can satisfy the desire of many for recognition of harm and responsibility, there is a current trend in many jurisdictions towards the enactment of apology legislation to encourage public authorities and others to apologise, without fear of legal liability. In 2001, the Ombudsman of New South Wales, for example, proposed apology legislation to help resolve complaints which would be inadmissible in civil proceedings. As the Ombudsman stated,

> *"the practical consequence of introducing legislation of this kind should be that more public sector officials would be encouraged to say 'sorry' and more members of the public are more likely to feel satisfied that their grievance has been taken seriously. An apology shows an agency taking moral, if not legal, responsibility for their actions and the research shows that most people would be satisfied with that."*[418]

The relevance of this to historic child abuse was demonstrated in Tasmania where the Ombudsman conducted a Review, in which over 300 people came forward to report childhood abuse, most people requesting an apology. The following year the Government of Tasmania issued a comprehensive apology, as a result of apology legislation which limited civil liability flowing from an apology.

The thrust of apology legislation is to shield apologizers from having their apologies used against them in civil suits. Among other benefits of apology laws is that they encourage public and private institutions to offer full apologies which often satisfy an individual's desire for acknowledgement and the acceptance of moral responsibility for the harm they have suffered and as such they may lead to a reduction in litigation and an emphasis on reparation and the future rather than an adversarial backward-looking process.

Such laws are in place in around 30 US states, all Australian states and a number of Canadian provinces. The Uniform Law Conference of Canada has drafted a Uniform Apology Act and recommended its use across the country. These laws take different forms and can be more or less

[418] The Office of the Ombudsman of New South Wales, *Annual Report 2001-02*, Sydney.

comprehensive:

- *Limited*: protection from liability for an expression of sympathy or regret (*"I am sorry"*) by making this inadmissible in civil suits but the part of an apology which contains an admission of fault or liability is either not explicitly protected or is excluded. This type of apology law is in place e.g. in US states including California, Massachusetts, Florida, Texas; in Australian states including Victoria and Queensland.[419]

- *Robust*: protects both an expression of sympathy or regret and admission of fault or liability (*"I am sorry, and it was my fault"*). This type of apology law exists in e.g. Colorado, Oregon and Australian state such as NSW and Canadian provinces such as British Columbia, Saskatchewan and in the Uniform Apology Act proposed for all Canadian provinces.

MacLeod's paper in respect of Ontario, and others including the Ombudsmen of New South Wales, and British Columbia have successfully argued in favour of a more robust apology laws on the basis, among others, that a limited law may in many jurisdictions amount to the status quo at common law and as it is difficult to determine when an admission of liability is reached, a limited law may have little effect in promoting genuine apologies.[420]

These laws extend to different forms of civil actions and can be broader or narrower (e.g. solely medical negligence or other forms of accidents, or all tort claims). Some may extend only to unintentional harms (unintentional torts/delicts) but such a law would be likely to lead to apologies which would be unacceptable to survivors such as *"We are sorry for any harm we*

[419] E.g. the Calif legislation provides, "the portion of statements, writings or benevolent gestures expressing sympathy or a general a sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of or in addition to, any of the above, shall not be inadmissible pursuant to this section." Cal. Evidence Code, #1160(2000), cited in Ministry of Attorney General, British Columbia, *Discussion paper on apology legislation*, 30 January 2006.

[420] MacLeod, op. cit., Ombudsman of New South Wales, Annual Report 2003-04, Ombudsman of British Columbia op. cit.

may have unintentionally caused".

Pages 81-93 of MacLeod's report provide an overview of the arguments in favour and against apology legislation; challenges the perceived wisdom that apologies may be used in civil suits to determine liability;

Considering that an admission of liability is frequently used to void insurance contracts, MacLeod notes that an explicit protection of an admission of liability may be necessary to provide reassurance to apologisers. New South Wales legislation was specifically worded to ensure that an apology cannot be taken to be an expression of liability for the purposes of voiding an insurance contract.[421] The British Columbia Apology Act 2006 likewise provides that an apology made by or on behalf of a person in *"connection with any matter"* does not constitute an express or implied admission of fault or liability, does not void insurance coverage and must not be taken into account in determining fault or liability.

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[421] This is noted in Ministry of Attorney General, British Columbia, *Discussion paper on apology legislation*, 30 January 2006, p 6, citing the submission of the Law Council of Australia to the Negligence Review Panel of the Review of the Law of Negligence, 2 August 2002, Cohen, "Advising Clients to Apologize", op cit. pp 1025-28, and Morris, op cit. p 5. The relevant sections of the New South Wales Civil Liability Act 2002 are sections 68 and 69:

s. 68 Definition

In this Part:

"apology" means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.

s. 69 Effect of apology on liability

(1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person:

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and

(b) is not relevant to the determination of fault or liability in connection with that matter.

(2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.