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## Knowledge Exchange Seminar Series (KESS)

### A pension for those seriously injured: Repairing the past\*

#### Introduction

Discussions on dealing with the past over the past few years have concentrated on seeking truth and justice for those bereaved. Although important issues, other ways to deal with the past and victims, such as those seriously injured and their needs, have been neglected. The suffering of those seriously injured is worsening as they are getting older, requiring carers and mobility assistance, unable to work and build up a pension, and are thus dependent on state benefits or the support of friends and families. The passage of time has compounded their problems as many suffer increasing physical distress, as a result of deteriorating health and chronic pain. While the Victims and Survivors Service (VSS) funds numerous groups to deliver services to victims, such support is inadequate in providing for the long terms needs of seriously injured victims, many of who have no financial security as they get into their old age. This briefing examines the proposed pension bill for seriously injured victims that hopes to fill this gap, in particular the contention around the definition of who would be eligible. The pension is based on the research of Marie Breen-Smyth that identified the needs of those seriously injured and their lack of a pension.<sup>1</sup> As a result, WAVE and its associated injured victims group have advocated for a pension,<sup>2</sup> which has been endorsed by the Commission for Victims and Survivors.<sup>3</sup> The proposed pension for those seriously injured would serve to acknowledge the harm endured and alleviate their daily suffering, by providing them financial security in their old age. The number of those eligible are likely to be less than 500 with most averaging a 50% rate of pension based on the level of their disablement, based on data collected by WAVE from NI Memorial Fund and payments made through the VSS. However, given the past experience over government payments to victims and who is eligible, this briefing focuses on how to determine eligibility drawing from the experiences in other countries and the case law of regional human rights courts.

#### Northern Ireland Context

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\* Dr Luke Moffett, School of Law, Queen's University Belfast ([l.moffett@qub.ac.uk](mailto:l.moffett@qub.ac.uk))

<sup>1</sup> Marie Breen-Smyth, The needs of individuals and their families injured as a result of the Troubles in Northern Ireland, Wave Trauma Centre (2012).

<sup>2</sup> Stuart Magee, Exploring models for the proposal of special pension provision for those injured in the Northern Ireland 'Troubles', WAVE Trauma. Wave Trauma Centre is a cross-community organisation formed in 1991 to support those bereaved, injured or traumatised during the Troubles.

<sup>3</sup> A Pension for people severely injured in the Troubles Commission Advice Paper 11 June 2014.

In the past victims during the Troubles/conflict in and around Northern Ireland were able to bring compensation claims to the courts, or through the administrative Criminal Injuries Compensation Scheme from 1968. From 1969 until 31<sup>st</sup> March 1998 the Compensation Agency had paid out some £186 million to victims of terrorist violence in Northern Ireland, with £26 million paid to relatives of those killed, and £160 million to those injured.<sup>4</sup> Compensation amounts awarded under these schemes or awarded by the court were often seen as insufficient as they were based on income rather than need, i.e. relatives of those killed in the 1970s were only awarded a few hundred pounds.<sup>5</sup> The compensation schemes have been more substantively criticised. Relatives of those paramilitaries killed during the conflict have been denied compensation, due to their membership of an unlawful organisation or engagement in terrorist activities at any time in the past or present.<sup>6</sup> This exclusion also denied compensation to the relatives of those paramilitaries who had served their sentences and were subsequently killed on release.<sup>7</sup> This is further complicated by numerous other individuals who were never convicted, but able to claim compensation. Victims who were injured also faced their compensation being cut after 16 years, despite their deteriorating health and increasing dependency as they become older.<sup>8</sup> In addition, victims' life expectancy was underestimated, and as they were unable to work as result of their injuries the compensation awarded prevented their subsequent state benefit allowances.<sup>9</sup>

More comprehensive compensation to those bereaved to acknowledge their suffering was suggested under the Consultative Group on the Past through a 'one-off ex-gratia recognition payment' of £12,000 to be paid to the relatives of those killed during the conflict, to acknowledge the loss they have endured.<sup>10</sup> The language of 'ex-gratia' is important, as it implies that such a payment is charitable, rather than based on any legal obligation of the government. Nonetheless, this one recommendation proved politically controversial, as family members of terrorists who were killed would receive money, arguably equating their suffering with those of 'innocent' civilian victims. Moreover, an overlooked issue was that this payment excluded those who had been seriously injured. As a result of the recognition payment recommendation, the whole report was rejected, despite its comprehensive proposals on addressing truth and justice. Discussions on the past since 2009 have been muted on reparations, with only the issue of the pension for seriously injured victims gaining traction since 2014 with a mention in the Stormont House Agreement.<sup>11</sup> Before discussing models on how to deal with the issue of eligibility of victims for the proposed pension for seriously injured victims, it is worth examining the experience in other countries and case law before regional human rights courts on this issue.

### Comparative experience

There is no uniform state practice as to whether to include or exclude members of paramilitary or terrorist organisations who have been seriously injured or killed for reparations. In countries like Colombia and Peru, which have suffered from protracted internal armed conflict, involving violence by both state and non-state armed groups, have excluded members of terrorist groups from being eligible for reparations. In Colombia the 2011 restitution of land law stipulates that members of illegal armed groups are not considered victims, except for those children or adolescents who have been demobilised when they were under 18.<sup>12</sup> Interestingly family

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<sup>4</sup> The Compensation Agency, Northern Ireland Affairs Committee, Appendix 1, HC 271, 5 May 2004.

<sup>5</sup> Consultative Group on the Past Final Report (2009) p91; and Magee n.2, p10.

<sup>6</sup> S.6(3), Criminal Injuries (Compensation) (Northern Ireland) Order 1977; and s.5(9), Criminal Injuries (Compensation) (Northern Ireland) Order 1988. MacBride p4. This has been only recently changed in 2009 under the New Criminal Injuries Compensation Scheme, which allows the Secretary of State to reduce or refuse any award based on the actions of the claimant (para.14).

<sup>7</sup> Patricia MacBride, *Reparations in Northern Ireland - A duty to victims?* Commission for Victims and Survivors, (2011) p4.

<sup>8</sup> *Ibid*; and Marie Breen-Smyth, *The needs of individuals and their families injured as a result of the Troubles in Northern Ireland*, May 2012, p9.

<sup>9</sup> *Ibid*.

<sup>10</sup> Report of the Consultative Group on the Past (2009), p92. A similar payment was made by the Irish government through their Remembrance Commission's Acknowledgement Payment.

<sup>11</sup> Paragraph 28.

<sup>12</sup> Article 3(2), 2011 Ley de Víctimas y Restitución de Tierras en Colombia en Contexto. See Cristián Correa, From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia, International Center for Transitional Justice, October 2015.

members of individuals in non-stated armed groups are recognised as victims where the person is killed, but not if they are injured. In the case of Peru the truth commission recognised the harm suffered by members of non-state armed groups, such as the Shining Path or Túpac Amaru Revolutionary Army (MRTA), but held that they were ‘victims, but not beneficiaries’ of reparations.<sup>13</sup> Similarly the Peruvian reparations law explicitly excludes members of ‘subversive groups’ from reparations.<sup>14</sup> However, in both countries state forces are eligible for reparations, despite being implicated in atrocities.<sup>15</sup> Similarly Iraq’s 2009 compensation law excluded only those individuals convicted of terrorism offences.<sup>16</sup> In Spain members of terrorist groups are excluded from reparations.<sup>17</sup> Yet in Basque and Navarre reparations laws do not explicitly exclude members of terrorist groups.<sup>18</sup> Though the Spanish government has successfully challenged these laws.

Other countries have included injured members of terrorist or paramilitary groups in reparation programmes, including those members of non-state armed groups who were injured, such as in Sierra Leone or Timor Leste.<sup>19</sup> In Kosovo the reparation law includes veterans, martyrs, members of the Kosovo Liberation Army, and civilians as eligible for reparations.<sup>20</sup> This law is similar to that in Tunisia, reflecting the victory of one side in overthrowing the old regime, benefiting their own veterans or ‘martyrs’ as victims.<sup>21</sup> In South Africa a number of victimised perpetrators were recommended by the TRC for reparations. For example, three AWB (Afrikaner Resistance Movement)<sup>22</sup> members who were murdered by a police officer (who received an amnesty) in Mafikeng in March 1994, their family members were recognised as victims eligible for reparation.<sup>23</sup> As such, there is no consistent state practice on whether victimised-perpetrators should be eligible for reparations. Instead eligibility is determined depending on the prevailing political context as to whether reparation can be inclusive as measures of reconciliation, or exclusive and measures of justice.

### Human rights decisions

Regional human rights courts have been dealing with the issue of whether or not members of terrorist organisations should be eligible for reparations over the past twenty years. In general terms human rights law provides for non-discrimination of victims who are claiming a remedy, but this has been controversial for victimised members of terrorist groups.<sup>24</sup> At the European Court of Human Rights an appropriate example is in the case of *McCann v United Kingdom*, which concerned the shooting dead of three members of the IRA by British special forces in Gibraltar as they were planning to bomb a military parade. Although the court ruled that

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<sup>13</sup> Comisión de la Verdad y Reconciliación (CVR) Report, vol. IX, pp. 149, 153. See Rebecca K. Root, *Transitional Justice in Peru* (New York: Palgrave MacMillan, 2012), p131.

<sup>14</sup> Article 4, Ley que crea el Plan Integral de Reparaciones (PIR), Ley N° 28592 2006.

<sup>15</sup> See Luke Moffett, Reparations for ‘guilty victims’: Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms, *International Journal of Transitional Justice* (forthcoming 2016).

<sup>16</sup> Article 17, Compensation for those affected by Military Operations, Military Mistakes and Terrorist Actions, Law No. 20, 2009.

<sup>17</sup> Article 4(3), Law 2/2003.

<sup>18</sup> In Basque country Decree 107/2012, of June 12, (this has been successfully challenged by the Spanish government); and in Navarre, Regional Law 16/2015, of 10 April.

<sup>19</sup> Sierra Leone Truth and Reconciliation Commission Final Report, 2004 Vol.II, Chapter 4, paras.69-70; Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR), *Chega!* (2006); Final Report of the Truth, Justice and Reconciliation Commission of Kenya (2013), vol. IV.

<sup>20</sup> 2011 Law no.03/L-054 on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Civilian Victims and their Families.

<sup>21</sup> See Tunisia’s 2011 Decree law No. 97 on reparation for the families of the ‘martyrs’ and wounded persons of the revolution.

<sup>22</sup> Afrikaner Weerstandsbeweging, a far right paramilitary Afrikaner group.

<sup>23</sup> Application in Terms of Section 18 of the Promotion of National Unity and Reconciliation Act, No.34 of 1995. Ontlametse Bernstein Menyatsoe Applicant (AM 7498/97), 5 August 1999, involving the deaths of Jacobus Stephanus Uys, Alwyn Wolfaardt and Nicolaas Cornelius Fourie.

<sup>24</sup> Article 14, European Convention of Human Rights; Article 2(3), International Covenant on Civil and Political Rights; Article 25, American Convention on Human Rights; and principle 25, 2005 UN Basic Principles on Right to Remedy and Reparations.

their deaths were a result of unlawful use of force and a violation of article 2 on the right to life, compensation for families of those killed was deemed inappropriate, as ‘the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar’.<sup>25</sup> However, in a more recent case involving unlawful detention of a convicted member of the terrorist group ETA in the *Del Río Prada v Spain* case, the European Court awarded compensation to the victim.<sup>26</sup> A distinction could be perhaps drawn between this case and *McCann*, with the latter involving members of a terrorist organisation in an active operation to carry out a bombing, whereas *Del Río Prada* was in the custody of the state.

In contrast the Inter-American Court of Human Rights, which has been dealing with decades of state violence, has until very recently generally recognised members of non-state armed groups as victims as eligible for reparations. In one of the notable cases of *Miguel Castro Castro v Peru*, state forces stormed a high security prison, which contained a number of members of the rebel group, the Shining Path, resulting in the deaths of 41 female inmates and the injury of 175 others. The state also subsequently failed to properly investigate claims of extrajudicial executions and ill-treatment. Although the state admitted its partial responsibility for those killed and injured, it was reluctant to acknowledge them as victims who could claim reparations. The Peruvian government instead directed the Court to place such violations in the ‘context’ of an ‘extremely serious situation of internal conflict’, with reparations to be determined in line with domestic policies.<sup>27</sup> The Inter-American Court rejected the state’s claims, awarding substantial compensation to victims and their next of kin, based on the state’s responsibility under human rights law.

In more recent cases at the Inter-American Court involving hostage/siege situations where state forces executed or disappeared suspects, the Court has been more responsive to the issue of the responsibility of victims in the amount or form of reparations. In the *Disappearances from the Palace of Justice v Colombia* case, the terrorist group M-19 attacked the highest court in Bogotá,<sup>28</sup> where at least 94 people were killed, including 11 Supreme Court judges. After storming the building the Colombian army disappeared 11 suspects, mostly innocent cafeteria workers, including Irma Franco Pineda a law student and member of M-19. The Colombian government argued that Irma should be ineligible for reparations and would be barred from any compensation in domestic law.<sup>29</sup> However, the Court ruled that the family of Irma should receive \$5,000 compensation in comparison to other victims not affiliated with M-19 who received \$105,000-\$140,000 for their harm.<sup>30</sup> Similarly in the case of *Cruz Sanchez et al. v Peru*, another hostage crisis by the terrorist group MRTA at the Japanese embassy ended with a raid by Peruvian special forces where 14 died, including 11 of the MRTA hostage takers.<sup>31</sup> The Inter-American Court found that the Peruvian commandos had extra-judicially executed at least three members of MRTA who had surrendered, including Eduardo Cruz Sanchez. The Court held that it was inappropriate to order compensation for Sanchez, and rehabilitation and publication of the judgment against Peru would be sufficient.<sup>32</sup> It is apparent that the issue of reparation for victimised members of terrorist groups remains highly controversial even with international human rights courts, which are premised on redress for violations and non-discrimination. In most cases, victimised-perpetrators are excluded or have their reparations limited, due to the unlawful nature of their organisations and actions.

### Models for dealing with eligibility

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<sup>25</sup> *McCann v UK*, (Application no. 18984/91), 27 September 1995, para.219.

<sup>26</sup> Cf. Joint Partly Dissenting Opinion of Judges Villiger, Steiner, Power-Forde, Lemmens and Gričco in *Del Río Prada v Spain*, Application no. 42750/09, 21 October 2013.

<sup>27</sup> *Miguel Castro Castro Prison v Peru*, Merits, Reparations and Costs, Judgment 25 November 2006, Series C No.160, paras.135 and 142.

<sup>28</sup> Case of *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia*, Judgment Of November 14, 2014 (Preliminary objections, merits, reparations and costs).

<sup>29</sup> Judgment of the Council of State of September 11, 1997, in the proceedings instituted by the next of kin of Irma Franco Pineda. *Rodríguez Vera et al v Colombia*, para.587 and 594.

<sup>30</sup> *Rodríguez Vera et al v Colombia*, para.591-604.

<sup>31</sup> *Cruz Sánchez et al. (Japanese embassy siege) v Peru*, Preliminary Objections, Merits, Reparations and Costs. Judgment of April 17, 2015. Series C No. 292.

<sup>32</sup> *Cruz Sánchez et al.* para.483-485.

Drawing from these experiences there are some models in moving forward on the eligibility for the pension for serious injured victims during the Troubles: inclusive; qualified; or exclusion.

## 1. Inclusive/non-discriminatory

An inclusive definition usually starts with the Victims and Survivors (Northern Ireland) Order 2006 of victim as, 'someone who is or has been physically or psychologically injured, [provides substantial amount of care for such a person, or bereaved] as a result of or in consequence of a conflict-related incident.'<sup>33</sup>

However, this definition is inapplicable for constructing a pension programme for seriously injured victims in Northern Ireland as it is specifically stipulated to be construed in terms of the work of the Commission for Victims and Survivors in advocating on victims' interests. In more practical terms in order for reparations to be feasible and include a meaningful amount, it is necessary to consider those who suffer the most and continue to feel the harmful effects, such as injured victims. Such a wide definition under the 2006 Order would make a large victim population eligible, diluting the amount and proportion available for those who suffer the most. Instead WAVE and the Commission for Victims and Survivors have suggest an inclusive approach in their guidance on the pension, but limited to those who have suffered physical injury that results in disablement, as:

- a) The claimant suffered physical injury(s) as a result of Troubles related incident(s);
- b) the injury(s) has resulted in disablement.<sup>34</sup>

This definition is consistent with private law of torts (private wrongs, such as battery) the responsibility of the victim in criminal behaviour does not prohibit them from a remedy.<sup>35</sup>

## 2. Qualified

There are two options of qualifying suffering is to define eligibility as first based on unlawful harm:

- a) The claimant suffered physical injury(s) as a result of Troubles related incident(s), which was unlawfully caused by another person or organisation;
- b) the injury(s) has resulted in disablement.

This would allow a broad category of individuals to be eligible for the pension, but would implicitly exclude those who injured themselves (such as bomb-makers) or were lawfully shot by the security forces. This is compliant with the judgment in the aforementioned *Aidan McKeever v Ministry of Defence*, where the claimant (an unarmed getaway driver for the IRA) was unlawfully shot and injured (four other IRA members were killed) by the British army in February 1992.<sup>36</sup> Accordingly this approach reflects a basic tenet of the rule of law and human rights law that everyone who suffers unlawful intentional harm should have access to a remedy. However, it would put the onus on victims to establish their injury was caused by the unlawful act of another person or organisation.

Alternatively a qualified definition based on conviction would include those:

- a) The claimant suffered physical injury(s) as a result of Troubles related incident(s);
- b) the injury(s) has resulted in disablement;
- c) any person convicted for a serious criminal conviction or scheduled offence their eligibility will be dealt with through the review panel/their amount will be determined through the tariff system.

This would allow ex-combatants to be distinguished from civilians, as responsible actors that were involved in causing suffering to others, but given the seriousness of their individual harm caused by others deserve some form of redress. The benefit with this definition is that it neutralises the issue of eligibility from obstructing the ability of 'innocent' seriously inured victims from obtaining their compensation, as those victimised-perpetrators

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<sup>33</sup> Section 3, The Victims and Survivors (Northern Ireland) Order 2006.

<sup>34</sup> Stuart Magee, Exploring models for the proposal of special pension provision for those injured in the Northern Ireland 'Troubles', WAVE Trauma, p3; A Pension for people severely injured in the Troubles Commission Advice Paper, CVSNI, 11th September 2013, p6.

<sup>35</sup> Glanville L. Williams, *Joint torts and contributory negligence: a study of concurrent fault in Great Britain, Ireland and the common-law dominions*, (Wildy 1951), p197-198; and *Co-Operative Group (CWS) Ltd v Pritchard* [2011] EWCA Civ 329, para.37.

<sup>36</sup> *Aidan McKeever v Ministry of Defence* [2011] NIQB 87.

go through the panel or a specialised committee to decide such cases on the basis of a tariff. The experience of Peru is apt, where victimised-perpetrators were excluded and checks had to be made with every application whether the person were a member of an insurgent group, which had the effect of delaying for years reparations to all victims.<sup>37</sup> To ensure the expediency of claims of civilians who were seriously injured, would involve provision for a review panel. This could be built into the pension legislation to determine whether victimised-perpetrators should be eligible based on their circumstances. Such a review panel is provided for under the Civil Service (Special Advisers) Act (Northern Ireland) 2013, based on whether those convicted of a 'serious criminal conviction' should be allowed to remain special advisors if they show contrition, amongst other factors.<sup>38</sup>

For the purposes of the pension bill the panel could take into account the time victimised-perpetrators served in prison, gravity of their offence(s), their disability, and the impact of their serious injury in daily life.<sup>39</sup> The NI Criminal Injuries Compensation Scheme the amount of compensation can be reduced or withheld, based on: the individual's conduct before, during or after the incident; the individual's failure to inform or cooperate with the police; their 'character' based on his/her criminal convictions; or the minister's discretion that such an award would be inappropriate.<sup>40</sup> Under a qualified scheme the amount of money available for victimised members of terrorist organisations with convictions could be reduced by a symbolic amount of 10% to reflect their role in victimising others, with those in more senior command positions or convicted of multiple serious offences having their amount reduced further.

### 3. Exclusion

A partial or complete exclusion could be a final alternative. A partial exclusion would mean those few victimised convicted members of terrorist organisation apply to a pension through a private trust fund to avoid the pension bill handing a 'terrorist' a monthly government cheque. Those 'innocent' victims who suffered serious injuries would automatically receive their pension from the government. However, those victimised-perpetrators would receive a comparable amount through the private trust fund, allowing them access to a pension as a victim, without attaching government money to it. Such funds could come from private charitable donors, international organisations, or even prisoner groups to ensure that they 'look after their own'. In South Africa a separate pension fund was set up for members of former state and non-state armed groups, such as the ANC military wing MK, on the basis of the sacrifices such forces made in the establishment of democracy.<sup>41</sup>

A complete exclusion of convicted ex-combatants would use a definition such as:

- a) The claimant suffered physical injury(s) as a result of Troubles related incident(s);
- b) the injury(s) has resulted in disablement;
- c) this excludes any person who has been convicted for a serious criminal conviction.

This approach would prevent any convicted terrorist from claiming the pension, but would be dependent on only excluded those who were convicted and would not include those who were wrongfully convicted.

### **Conclusion**

The proposed pension for seriously injured victims offers a unique opportunity to acknowledge and remedy the harm of some of those who continue to suffer the most painful consequences of the Troubles. Although reparations may evoke connotations of responsibility, states often after political violence provide reparations to

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<sup>37</sup> Root n.13, p134.

<sup>38</sup> Article 5. Generally a sentence of over 5 years.

<sup>39</sup> As in Article 4 of the Civil Service (Special Advisers) Act (Northern Ireland) 2013. There should also be provision for appeal to a high court judge if an individual is unhappy with the outcome of the review panel. Alternatively an appeals process could be built into legislation to avoid costly litigation and to provide prompt hearings, before a single sitting judge.

<sup>40</sup> Paragraphs 14(1) and 16 (for those killed). An award can be inappropriate and withheld if it is likely that the assailant would benefit - paragraph 17(a).

<sup>41</sup> Including the South African Defence Forces, Umkhonoto we Sizwe and the Azanian People's Liberation Army, recognising that members did not join liberation movements for financial compensation, but that they were prevented from accumulating a work pension. Some members of MK believed that victims who 'did not fight' did not deserve compensation. Section 189(1) of the Interim South African Constitution (No.200 of 1993), s.1, Government Employees Pension Law 1996 (No.21 of 1996), and Special Pensions Act 1996 (No. 69 of 1996).

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all victims, especially where terrorist groups are responsible for them, on the grounds of social solidarity with victims' plight in the condemnation of such violence, with provisions to claim money from such terrorist groups. The 2005 UN Basic Principles on Reparations and the Criminal Injuries Compensation Scheme reflect this. The issue of eligibility for a pension can be carefully crafted to reflect the complex reality of victimisation and responsibility that is compliant with human rights law, while ensuring those citizens injured get prompt redress.

