

**HUMAN RIGHTS ISSUES AT THE FORMER SITE OF  
THE MOTHER AND BABY HOME, TUAM, CO. GALWAY**



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## **ABBREVIATIONS AND ACRONYNS**

<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CMC</b>	Cuprija Medical Centre
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ETG</b>	Expert Technical Group
<b>GRO</b>	General Register Office
<b>IACmHR</b>	Inter-American Commission on Human Rights
<b>IACtHR</b>	Inter-American Court of Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Court of Justice
<b>ICRC</b>	International Committee of the Red Cross
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>MADEKKI</b>	Inspectorate of Quality Control for Medical Care and Working Capability
<b>PSNI</b>	Police Service of Northern Ireland
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNCAT</b>	United Nations Convention against Torture
<b>UNCRC</b>	United Nations Convention on the Rights of the Child

## PREFACE

This report has been prepared pursuant to a request from the Minister for Children, Dr. Katherine Zappone TD in a letter (dated 7 December 2017) to me in my capacity as Special Rapporteur on Child Protection. The request involves a general consideration of the human rights issues that appear to arise in the wake of the discovery of juvenile human remains at the site of the former Mother and Baby Home in Tuam, County Galway. In particular, I have been asked to examine the following matters:

- (i) human rights issues relating to the right of an individual to a respectful and appropriate burial;
- (ii) obligations, if any, under international human rights law, including under the European Convention on Human Rights, arising from the right to respect for family life. This is to include an examination of the entitlement of living family members to know the fate of their relatives;
- (iii) any obligation on the State under human rights law to fully investigate the deaths so as to vindicate the right to life of those concerned;
- (iv) on a more general level, the applicable domestic law and human rights law in place between the years 1920 to 1960, and how this might impact on the right to respect for family life, and/or the right to a respectful and appropriate burial.

In Section 1, I consider the absence of unified mass-grave protection guidelines for States to follow when they are faced with the discovery of sites, such as the burial site at the former Mother and Baby Home in Tuam. Section 2 addresses the human rights issues under the European Convention on Human Rights relating to the right of an individual to a respectful and appropriate burial and any entitlement of living family members to know the fate of their relatives.

In Section 3, I comprehensively set out the obligations under international human rights law relevant to the report. I outline in Section 4 any legal obligations based on customary international law.

In Section 5, I consider the provisions in the Irish Constitution relevant to the report. In Sections 6 and 7, I outline the statute law and common law in place between the years 1920 to 1960, and how this might impact on the right to respect for family life, and/or the right to a

respectful and appropriate burial. Finally, Section 8 considers the limitation periods which might apply to legal proceedings arising out of events which occurred at the site of the former Mother and Baby Home in Tuam.

It is hoped this report may assist in informing any determination that is to be made concerning the treatment of the remains buried at the Tuam site, guiding consideration of the five options proposed by the Expert Technical Group.

This report does not examine or make any determinations on the deaths of the infants at the former Mother and Baby Home in Tuam nor does it seek to make any determination on whether the burials were appropriate or inappropriate.

## EXECUTIVE SUMMARY

It is worth noting at the outset that in international law, there are no unified mass-grave protection guidelines in place for States to follow when they are faced with the discovery of sites, such as the burial site at the former Mother and Baby Home in Tuam, despite the existence of guidelines to deal with situations of armed conflict and investigations of missing persons.<sup>1</sup> Calls have been made to work toward a more comprehensive set of legal guidelines for the protection of such graves at an international level. This would assist in achieving a number of desired aims, including ensuring that family members are informed of the fate of their relatives, allowing survivor populations be aware about what happened at the site in question and enabling proper investigations to take place - answering questions and finding those responsible where possible.<sup>2</sup> While the site at Tuam cannot be considered to be a mass grave in terms of what is typically associated with violence or conflict, physical investigation of the site has necessitated use of the skillset designed to forensically investigate mass graves and similar legal issues are thus raised.

## EUROPEAN CONVENTION ON HUMAN RIGHTS

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR) came into force in 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding. Its contracting states are obliged to secure to everyone within their jurisdiction the rights and freedoms set out in section 1 of the ECHR. The ECtHR is tasked with enforcing the provisions of the ECHR and its judgments, in some cases, have broadened the interpretation of the Convention. In Ireland, the European Convention of Human Rights Act 2003 was introduced to give further effect to the ECHR in Irish law. The Act did not incorporate the Convention into Irish law, but rather requires Irish courts to interpret legislation in line with the Convention insofar as it is possible to do so. It

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<sup>1</sup> For instance, the Geneva Conventions and their Additional Protocols form the core of international humanitarian law, regulating the conduct of armed conflict and seeking to limit its effects. With regard to missing persons, the International Committee of the Red Cross (ICRC), “Guiding Principles/Model Law on the Missing” (2009) and the International Convention for the Protection of All Persons from Enforced Disappearance are of assistance.

<sup>2</sup> See Melanie Klinkner, “Towards mass-grave protection guidelines” *Human Remains and Violence*, Volume 3, No.1 (2017) 52-70. This article, however, concerns primarily the protection of mass-graves in post-conflict situations.

also requires that certain public bodies perform their functions in a manner compatible with the Convention, unless precluded by law.

### **Application of Article 8 principles**

Article 8 of the ECHR may be of relevance in relation to the particular set of circumstances arising from the discovery of juvenile remains at Tuam. Article 8 has been broadly interpreted, providing family members of deceased persons with a substantial number of rights capable of assertion. While these rights are not absolute, and may be proportionately interfered with, their existence is of considerable importance and the State should be careful to ensure no illegitimate infringement of such rights. Family members may possess the right to have their loved one's body returned to them. Moreover, relatives may have a right to know the fate of their family members, including information surrounding the death and/or burial of their loved ones. A failure to provide relatives with definite and/or credible information may fall foul of the positive obligation under Article 8, even where the death occurred before the Convention came into force in the relevant county, where the failure to provide information continues following the coming into force of the ECHR. It is also of note, that where samples are sought to be taken from a corpse, the consent of the family member is a relevant concern and should be borne in mind in any approach taken in relation to the subject matter of this report. Irish authorities are required to carry out their functions in a manner compatible with the ECHR and Article 8 rights in particular must be positively vindicated. Regard should be given to the distress and anguish of family members seeking information surrounding the death and/or burial of their loved ones. Nonetheless, it should also be borne in mind that there may be limits to the information which can or must be provided for the purposes of complying with Article 8. The decisions of the ECtHR confirm that Article 8 rights include information concerning the fate and place of burial of the deceased but it may not necessarily extend to additional matters (although these may be covered by Articles 2 and 3 ECHR).

The Court's Article 8 case law has been concerned so far with negative interferences on the part of the State with the right of family members to the return or disposal of bodies, or to information about their disposal. The Court does not yet appear to have considered whether

Article 8 imposes a more extensive positive obligation on the part of State authorities to assist or ensure that a burial takes place in the particular manner desired by the family.

Furthermore, any Article 8 ECHR right should be considered having regard to the extreme delicacy of any exhumation and further investigation at the Tuam site, as determined by the Expert Technical Group. The report of the ETG states that: “There are a number of factors that make this situation unique: The forensic requirement of the site; The ‘significant’ quantities of juvenile remains; The commingled or intermixed state of the remains; The position of the remains within subsurface chambers, with limited access.” The report<sup>3</sup> concludes that the comingled state of the remains renders identification “particularly challenging”. Moreover, the ETG states there is a “risk of destruction to human remains” that raises ethical issues.

In terms of pursuing any claim for violation of Convention rights, it is the family members alone who are capable of asserting these rights. The deceased no longer possess human rights and they are not capable of asserting same. This approach is similarly demonstrated in the Council of Europe’s Additional Protocol on Transplantation of Organs and Tissues of Human Origin.<sup>4</sup> Pursuant to Article 18, “Respect for the human body”, it is provided that during removal of organs and/or tissues, the human body must be treated with respect and all reasonable measures must be taken to restore the appearance of the corpse. The Explanatory Comment to Article 18 states; “A dead body is not legally regarded as a person, but nonetheless should be treated with respect.”

Therefore, it is the family members who assert their rights under the Convention. They are not asserting the rights of the deceased, but their own as relatives. It is even questionable whether the deceased possess any human rights, as realistically due to their death, they are not capable of asserting same. This issue was considered by Rosenblatt in relation to the investigation of mass graves in *International Forensic Investigations and the Human Rights of the Dead*.<sup>5</sup> He states:

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<sup>3</sup> Report of the Expert Technical Group, December 2017, (i).

<sup>4</sup> Adopted 24 January 2002, entered into force 1 May 2006; See Comment to Article 18, Additional Protocol on Transplantation of Organs and Tissues of Human Origin.

<sup>5</sup> *Human Rights Quarterly*, Volume 32, Number 4, November 2010, pp. 921-950 (Article) published by The Johns Hopkins University Press.



... [H]uman rights for the dead are philosophically unworkable and irreconcilable with the practical limitations of forensic work; therefore, we should not think of the dead as having human rights. However, this conclusion does not end discussion about what forensic investigators do for dead bodies. Rather, it makes room for a modest but rich sense of how exhumation can restore the identity, physical location, and care that have been denied to victims of atrocity.

## **Articles 2 and 3 ECHR**

While much of the discussion above focuses on Article 8 ECHR rights and the right to respect private and family life, Articles 2 and 3 of the Convention also warrant consideration. Article 2 protects the right to life. The obligation of States to protect life is set out in the Convention, but is similarly recognised in other international human rights instruments, including the Universal Declaration of Human Rights (Article 3). As with Article 8, the ECtHR has interpreted Article 2 as placing a positive obligation on States. While, therefore, it requires States to refrain from the intentional and unlawful taking of life, they must positively take appropriate steps to safeguard the lives of those within their jurisdiction. Procedurally, there exists an obligation upon States to effectively investigate a killing or suspicious death within their territory. Article 3 prohibits torture, inhuman or degrading treatment or punishment. A similar obligation to investigate arises out of Article 3 ECHR. Where inhuman or degrading treatment is alleged, a State has a duty to investigate a complaint made.

The ECtHR case law concerning Article 2 in particular demonstrates that the procedural obligation upon a State to investigate effectively arises where the death occurs in suspicious circumstances or where an individual has gone missing in life-threatening circumstances. The purpose of such investigations is to ensure that domestic law in place to protect the right to life is implemented. The Last Rights Project, in its article *The Dead, the Missing and the Bereaved at Europe's International Borders – Proposal for a Statement of the International Legal Obligations of States* (May 2017), sets out the criteria which the ECtHR has required to be met for an investigation to satisfy international human rights standards as follows:

- State initiative – the State authorities must take the initiative to investigate once the matter has come to their attention and may not leave it to the next of kin to bring proceedings;
- Independence – those carrying out the investigation must be independent from those implicated in their death;

- Effectiveness – the investigation must be capable of leading to a determination of whether the action taken by State officials was justified in the circumstances and to a determination of the culpability of those responsible for the death. Steps must be taken to secure all relevant evidence in relation to the death;
- Promptness – the investigation must take place promptly and must proceed with reasonable expedition;
- Transparency - the investigation must be open to public scrutiny to a degree sufficient to provide accountability in the circumstances of the case.<sup>6</sup>

### **Duty to investigate incidents which took place before the ECHR came into force**

The Convention duty to investigate incidents may include incidents that happened some time ago. It is, however, a more limited duty in relation to historical incidents which occurred before the State in question signed the Convention. Nevertheless, relatives of the deceased should be involved in the investigation to a sufficient degree to safeguard their legitimate interests.<sup>7</sup>

The ECtHR has stated that its temporal jurisdiction to review a State's compliance with its procedural obligation under Article 2 to carry out an effective investigation into alleged unlawful killing by State agents was not open-ended where the deaths had occurred before the date the Convention entered into force in respect of that State. In such cases, the Court has jurisdiction only in respect of procedural acts or omissions in the period subsequent to the Convention's entry into force, provided there was a "genuine connection" between the death as the triggering event and the entry into force. For a "genuine connection" to be established, the period between the death and the entry into force had to have been reasonably short, no more than 10 years, and a major part of the investigation had or ought to have been carried out after the date of entry into force. The emergence of new, credible information about such past events, however, may trigger the duty to investigate.

The unsettled position in the UK should be noted. In *Re McKerr*,<sup>8</sup> the UK Supreme Court held that an obligation to initiate an investigation under Article 2 only applies to deaths occurring after the Human Rights Act 1988 came into force in 2000. A similar approach was followed by the UK Supreme Court in *Keyu v Secretary of State for Foreign and*

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<sup>6</sup> The Last Rights Project - *The Dead, the Missing and the Bereaved at Europe's International Borders – Proposal for a Statement of the International Legal Obligations of States* (May 2017) at p.11.

<sup>7</sup> *Edwards v UK* [2002] ECHR 303.

<sup>8</sup> [2004] 1 WLR 807.

*Commonwealth Affairs*, discussed in this report. This approach, however, was called into question in other decisions and the current position is unclear.<sup>9</sup>

The question arises whether relatives of those interred in Tuam could contend that their rights pursuant to Article 3 ECHR have been violated. Whether any such claim would be successful would depend on the specific set of facts prevailing in each individual case as a minimum level of severity must be achieved.

In order to ensure the effective vindication of the abovementioned ECHR rights, there appears to be an inferred duty on the Irish State to collect, as far as reasonably possible, the remains of those interred at Tuam. The Tuam site, according to the Expert Technical Report, will test the boundaries of forensic investigation in every regard. The Expert Technical Group, due to the varied nature of the complexities at the site in Tuam, notes the limitations of the forensic possibilities involved in excavation and examination on the site. It states that given that the site holds a group of collectively interred individuals, “it may only ever be possible to provide collective answers”, and the potential to identify individuals interred there poses many challenges. These limitations therefore must be borne in mind and where the State fails to collect remains for these reasons, it is unlikely to fall foul of its duty where it takes all reasonable steps to investigate the possibility of retrieval and, if proportionate and justified, undertakes reasonable measures to retrieve the bodies in question.

## **INTERNATIONAL HUMAN RIGHTS LAW: THE UN FRAMEWORKS**

International human rights law also warrants consideration. The Universal Declaration of Human Rights (UDHR) is crucial in this regard. Drafted by representatives with different

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<sup>9</sup> See *In Re McCaughey* ([2011] UKSC 20) where Lord Phillips reflected on the *Silih* judgment [(2009) 49 EHHR 372] of the Grand Chamber:

I believe that the most significant feature of the decision ... is that it makes it quite clear that the Article 2 procedural obligation is not an obligation that continues indefinitely ... [j]ust because there has been a historic failure to comply with the procedural obligation imposed by Article 2 it does not follow that there is an obligation to satisfy that obligation now. In so far as Article 2 imposes any obligation, this is a new free-standing obligation that arises by reason of current events. The relevant event in these appeals is the fact that the coroner is to hold an inquest into [the applicants’] deaths. *Silih* ... establishes that this event gives rise to a free standing obligation to ensure that the inquest satisfies the procedural requirements of Article 2.

However in that same judgment, Baroness Hale doubted whether the decision grounded any free-standing right to open a new investigation. See also *Re McGuigan* [2017] NIQB 96.

legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations. It sets out the fundamental human rights that are to be universally protected. These are enforced through supervision and reporting by expert bodies, some of which may also deal with individual complaints. The state has an obligation to respect, protect and fulfil the rights guaranteed in these instruments pursuant to section 1 and as a member of the United Nations since 1955, Ireland is expected to uphold its principles, and to protect the rights set out in international treaties through its laws, policies and practices.

## **CUSTOMARY INTERNATIONAL HUMANITARIAN LAW**

The international human rights norms may not be directly relevant to this review, as Ireland has been quite slow to ratify the relevant instruments. The older humanitarian law is also not directly legally applicable, as they are legal norms that are active only when death occurred in, and as a result of, wartime atrocities, although the jurisprudence on dignity and State custom and practice may shed light on the requirement of the Irish constitution in this regard discussed later.

Much of the material included in this section is either human rights in times of war (customary international humanitarian rights), or instances of ‘gross’ or ‘systemic’ violations of human rights (under the various human rights frameworks of the United Nations). It is therefore subject to a number of qualifications.

Firstly, the UDHR is generally regarded as not legally binding.

The two International Covenants (the ICCPR and ICESCR) were not in existence until 1966, and Ireland did not ratify both until 1989. Ratification is key to legal effect in a particular jurisdiction. It is not clear therefore that there were any legally recognisable breaches of human rights in the 1920 to 1960 period. Moreover, it is not clear whether the right to know – which seems to be the legally strongest right – can be based on breaches of human rights before the state ratified the relevant instruments (as it cannot be stated at the time they were breaches).

In summary, if it was not a breach at the time, it is difficult to legally determine it so retrospectively. Therefore, there may be very limited grounds for the right to know which is parasitic upon the basic rights in the UN Charter (the conceptual instrument combining the UN Declaration and both Covenants together).

If inhuman or degrading treatment and violations of privacy can be characterised as continuing, it may constitute a violation of the UNCAT, ICCPR or CEDAW.

The most relevant jurisprudence on this matter relates to Enforced Disappearance. This is the most fruitful area of international human rights law to review, as it has an express right to truth/right of victims and their families to know. It is also closely tied to the ICCPR which, as stated above, Ireland ratified in 1989. It seems there may not be a requirement that the ICCPR was ratified by the member state when the ‘disappearances’ took place. There are interesting parallels between the experience in South America, where much of this law emerged, and the experience of the institutional abuse of women and children in settings such as the mother and baby homes. It should be noted, however, that Ireland has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance, although it codifies what is already implied in many international human rights instruments to which Ireland is a party.

## **STATUS OF INTERNATIONAL OBLIGATIONS**

It is important to bear in mind that the obligations imposed on the State by international agreements occur and are enforceable, if at all, under international law only. Article 29.6 of the Constitution provides that:

No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.

The Supreme Court explained in *McD v L*<sup>10</sup> that this means that:

The obligations undertaken by a government which has ratified the Convention arise under international law and not national law. Accordingly those obligations reside at international level and in principle the state is not answerable before the national

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<sup>10</sup> [2010] 2 IR 199.

courts for a breach of an obligation under the Convention unless express provision is duly made in national legislation for such liability.<sup>11</sup>

This means that even if it could be factually established that a breach of obligations under these international agreements has occurred in Tuam, this would not provide a right of action under Irish law or before an Irish court in respect of that breach.

## THE IRISH CONSTITUTION

Irish case law confirms the importance of dignity under the Constitution and, in particular, the importance attached to the circumstances associated with a person's death. Clearly, this is of potential significance in the Tuam context. It raises the question as to whether there was a failure to take account of considerations of the dignity of the deceased children in the circumstances of their burial; and whether, if so, this would give rise to a breach of the Constitution? Applying the reasoning in *PP v HSE*, there is an argument that constitutional considerations of dignity may have continued to be engaged after the deceased children had passed away. If that is the case, the questions then raised include how, to what acts and for what period of time, those considerations continued to apply. As the decision in *Fleming* indicates, there may also be a distinct question as to whether – assuming considerations of dignity did apply to the burial and may continue to apply thereafter – the circumstances give rise to an enforceable constitutional right or claim, whether on the part of the deceased or of other persons.

On this last question, Irish law recognises a cause of action for breach of constitutional rights, insofar as the right breached is not vindicated by other legal mechanisms.<sup>12</sup> Importantly, where a person is incapable of asserting a right on his/her own behalf, the Irish courts have recognised that the right can be asserted by another appropriate person.<sup>13</sup> As such, if this is a breach of constitutional rights and is not addressed by the law of torts (discussed below), a question arises as to whether there could potentially be an action in respect of a breach of constitutional rights, which would be actionable at the suit of the families of the deceased, or appropriate other parties, on behalf of the deceased.

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<sup>11</sup> At p. 247.

<sup>12</sup> *Meskill v C oras Iompair  ireann* [1973] IR 121, *Hanrahan v Merck Sharpe and Dohme (Ireland) Ltd.* [1988] ILRM 629.

<sup>13</sup> *SPUC v Coogan (No.1)* [1989] 1 IR 734. The Society for the Protection of Unborn Life was entitled to litigate to protect the right to life of the unborn.

While the decision of the Supreme Court in *Fleming* confirms that the values of autonomy and dignity are not absolute, the analysis in *Ward of Court* indicates that the right to life and the related constitutional commitment to dignity extend to the manner and process of dying. Moreover, the High Court decision in *PP v HSE* suggests that considerations of dignity may be capable of applying after the point of death.

The capacity of rights to be asserted on the part of the deceased could be a challenge in an Irish context. The recent Article 40.3.3<sup>o</sup> Supreme Court decision in *M* places considerable emphasis on the inability of the unborn to invoke constitutional rights because it has not been born and is therefore not a rights-holder. The corollary of the concept of rights-holder that emerges in that judgment (and that is consistent with some judicial decisions in recent cases about whether non-citizens are necessarily rights-holders) might be that deceased are not rights-holders for constitutional purposes. This would probably place the deceased in a position of being entitled to respect, but not to have specific rights under the Constitution invoked on their behalf.

The rights that could be invoked to challenge any prosecutions brought include the right to a trial within a reasonable time. The courts may be reluctant to require the State to take steps if those steps are unlikely to produce any practical benefit.

The report of the Expert Technical Group also raises significant practical concerns about the results that would be obtained from any exhumation or retrieval. The obligations imposed on the State by the Constitution are to defend and vindicate the personal rights of the citizen “as far as practicable”. The decision in *PP v HSE* highlights the important point in this context that the Constitution does not require the taking of steps to promote or vindicate a constitutional value (in that case the right to life of the unborn) if those steps will not produce any practical benefit. This suggests that the views expressed in the expert report should be given weight in considering the steps to be taken in this matter.

It also should be stated that there may be a countervailing dignity interest in disturbing the burial site. That could also be a factor that a court would weigh in assessing the practical benefits of exhumation. If there are countervailing constitutional considerations which may incline against exhumation, the fact that exhumation may not produce any practical benefits may weaken any claim that it is constitutionally required.

Finally, there is a general judicial reluctance to litigate matters after several decades, even though attitudes may have changed to the practices in question. On a practical level, a major problem for a claimant in any litigation could be the apparent indication that these deaths were registered. This makes it much more difficult to argue that there was a lack of knowledge or concealment. There might be a separate issue about the circumstances of the burials although this might run into factual problems if the indication was that it was known in the local area about the burials.

## **STATUTE LAW**

It may be the case that all deaths which took place at the Tuam Mother and Baby Home were duly notified to the registrar. There is no doubt, in any event, that a clear statutory duty existed in respect of such notification. Auditing the obligation to register a death should be considered in the context of Tuam. This might be undertaken by matching the death certificates to the number of juvenile human remains.

## **COMMON LAW**

At common law, the body of law derived from judicial decisions rather than statute or constitutions, there has long since been recognition of the right to a decent burial, and of a range of rights and duties concerning dead bodies. The common law of England and Ireland was a unified body of law until 1922. After that, Irish common law diverged in various ways, although in certain respects the common law in each jurisdiction remained the same. Because of the nature of this topic, many of the key common law precedents date from before 1922, and thus the English cases can be taken as a strong indication of the common law in both England and Ireland. Precedents from other common law jurisdictions such as Australia, Canada and the United States, are also of assistance in stating what, precisely, the common law of Ireland is in this area, and what it was in the relevant period.



It seems that the operators of the Mother and Baby Home at Tuam may have been under a common law duty to bury those who died under their roof. This duty to bury incorporates a duty to bury decently and with dignity, in a Christian burial.<sup>14</sup>

A question that arises in the present review is whether the original actions of the operators of the Tuam Mother and Baby Home could have constituted prevention of a lawful and decent burial. Moreover, were the relevant authorities to refuse to exhume, sort and bury the remains, could this constitute a continuing offence of prevention of a lawful and decent burial? In contrast to the tortious claim considered below, this crime does not require there to be any identifiable family member who is affected by the failure to bury.

One option which may merit further consideration is whether there is an inherent jurisdiction on the part of the High Court to determine whether and how the remains should be dealt with. There is some (although limited) support from other jurisdictions for the proposition that the courts retain a common law power to determine disputes concerning the duty to dispose of the body of the deceased. In the New Zealand Supreme Court decision of *Takamore v Clarke*,<sup>15</sup> Elias CJ suggested that “where there is a dispute as to burial, either party (meaning personal representatives) has standing to bring the dispute to the High Court for resolution”. The High Court of England and Wales reached a similar conclusion in *Oldham MBC v Makin*<sup>16</sup> where a dispute arose as to the manner and timing of the disposal of the remains of the Moors Murderer, Ian Stewart-Brady. While the Court decided the matter on other grounds, it observed that:

In my judgment, the court does have an inherent jurisdiction to direct how the body of a deceased person should be disposed of. The court will normally, as I have said, be deciding between the competing wishes of different sets of relatives, and will only need to decide who should be responsible for disposal rather than what method of disposal should be employed. I cannot see, however, why the court’s inherent jurisdiction over estates is not sufficiently extensive to allow it, in a proper case, to give directions as to the method by which a deceased’s body should be disposed of.

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<sup>14</sup> It is probably the case that the modern duty to bury is not solely one of Christian burial but rather about burial reasonably appropriate to the deceased person’s known values and religious practices. At the relevant time, it seems that Christian burial would have been the appropriate entitlement.

<sup>15</sup> [2012] NZSC 116.

<sup>16</sup> [2017] EWHC 2543.

Perhaps most relevantly, the High Court of England and Wales held in *In re K* that it had an inherent jurisdiction to authorise arrangements to be made for the disposal of a child's body where the parents had neglected to make any arrangements.<sup>17</sup>

It should be emphasised that this does not necessarily mean that the Irish courts have such an inherent power, or that it would be engaged in the case of the Tuam deceased. Aside from the fact that these cases provide limited persuasive authority for the existence of such a power, the courts in those cases are dealing with situations where there is a dispute between personal representatives of an estate; and where the body remains to be dealt with. The legal context of any application here might be quite different. There is also the obvious factual difference that the question at Tuam would be one not of burial but of possible exhumation and re-burial. Nonetheless, the reasoning of the courts in these cases is based in part on the existence of a common law duty to dispose of remains. As discussed elsewhere in this Report it is arguable that duty is engaged and/or may have been breached in the situation in Tuam.

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<sup>17</sup> [2017] 4 WLR 112.

## CONCLUSIONS

### European Convention on Human Rights

#### *Application of Article 8 principles*

1. Article 8 of the ECHR may be of relevance in relation to the particular set of circumstances arising from the discovery of juvenile remains at Tuam. Article 8 has been broadly interpreted, providing family members of deceased persons with a substantial number of rights capable of assertion. While these rights are not absolute, and may be proportionately interfered with, their existence is of considerable importance and the State should be careful to ensure no illegitimate infringement of such rights. Family members may possess the right to have their loved one's body returned to them. Moreover, relatives may have a right to know the fate of their family members, including information surrounding the death and/or burial of their loved ones. A failure to provide relatives with definite and/or credible information may fall foul of the positive obligation under Article 8, even where the death occurred before the Convention came into force in the relevant county, where the failure to provide information continues following the coming into force of the ECHR.
2. Irish authorities are required to carry out their functions in a manner compatible with the ECHR and Article 8 rights in particular must be positively vindicated. Regard should be given to the distress and anguish of family members seeking information surrounding the death and/or burial of their loved ones. Nonetheless, it should also be borne in mind that there may be limits to the information which can or must be provided for the purposes of complying with Article 8. The decisions of the ECtHR confirm that Article 8 rights include information concerning the fate and place of burial of the deceased but it may not necessarily extend to additional matters (although these may be covered by Articles 2 and 3 ECHR).
3. The Court's Article 8 case law has been concerned so far with negative interferences on the part of the State with the right of family members to the return or disposal of bodies, or to information about their disposal. The Court does not yet appear to have

considered whether Article 8 imposes a more extensive positive obligation on the part of State authorities to assist or ensure that a burial takes place in the particular manner desired by the family.

4. Any Article 8 ECHR right should be considered having regard to the extreme delicacy of any exhumation and further investigation at the Tuam site, as determined by the Expert Technical Group. The report of the ETG states that: “There are a number of factors that make this situation unique: The forensic requirement of the site; The ‘significant’ quantities of juvenile remains; The commingled or intermixed state of the remains; The position of the remains within subsurface chambers, with limited access.” The report<sup>18</sup> concludes that the comingled state of the remains renders identification “particularly challenging”. Moreover, the ETG states there is a “risk of destruction to human remains” that raises ethical issues.
5. In terms of pursuing any claim for violation of Convention rights, it is the family members alone who are capable of asserting these rights. The deceased no longer possess human rights and they are not capable of asserting same.

#### *Articles 2 and 3 ECHR*

6. As with Article 8, the ECtHR has interpreted Article 2 as placing a positive obligation on States. Procedurally, there exists an obligation upon States to effectively investigate a killing or suspicious death within their territory. Article 3 prohibits torture, inhuman or degrading treatment or punishment. A similar obligation to investigate arises out of Article 3 ECHR. Where inhuman or degrading treatment is alleged, a State has a duty to investigate a complaint made.

#### *Duty to investigate incidents which took place before the ECHR came into force*

7. The Convention duty to investigate incidents may include incidents that happened some time ago. It is, however, a more limited duty in relation to historical incidents which occurred before the State in question signed the Convention. Nevertheless,

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<sup>18</sup> Report of the Expert Technical Group, December 2017, (i).

relatives of the deceased should be involved in the investigation to a sufficient degree to safeguard their legitimate interests.<sup>19</sup>

8. The ECtHR has stated that its temporal jurisdiction to review a State's compliance with its procedural obligation under Article 2 was not open-ended where the deaths had occurred before the date the Convention entered into force in respect of that State. In such cases, the Court has jurisdiction only in respect of procedural acts or omissions in the period subsequent to the Convention's entry into force, provided there was a "genuine connection" between the death as the triggering event and the entry into force. For a "genuine connection" to be established, the period between the death and the entry into force had to have been reasonably short, no more than 10 years, and a major part of the investigation had or ought to have been carried out after the date of entry into force. The emergence of new, credible information about such past events, however, may trigger the duty to investigate.
9. The question arises whether relatives of those interred in Tuam could contend that their rights pursuant to Article 3 ECHR have been violated. Whether any such claim would be successful would depend on the specific set of facts prevailing in each individual case as a minimum level of severity must be achieved.
10. In order to ensure the effective vindication of the abovementioned ECHR rights, there appears to be an inferred duty on the Irish State to collect, as far as reasonably possible, the remains of those interred at Tuam. The Tuam site, according to the Expert Technical Report, will test the boundaries of forensic investigation in every regard. The Expert Technical Group, due to the varied nature of the complexities at the site in Tuam, notes the limitations of the forensic possibilities involved in excavation and examination on the site. It states that given that the site holds a group of collectively interred individuals, "it may only ever be possible to provide collective answers", and the potential to identify individuals interred there poses many challenges. These limitations therefore must be borne in mind and where the State fails to collect remains for these reasons, it is unlikely to fall foul of its duty where it takes all reasonable steps to investigate the possibility of retrieval and, if

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<sup>19</sup> *Edwards v UK* [2002] ECHR 303.

proportionate and justified, undertakes reasonable measures to retrieve the bodies in question.

## **International Human Rights Law**

11. The international human rights norms may not be directly relevant to this review, as Ireland has been quite slow to ratify the relevant instruments. The older humanitarian law is also not directly legally applicable, as they are legal norms that are active only when death occurred in, and as a result of, wartime atrocities, although the jurisprudence on dignity and State custom and practice may shed light on the requirement of the Irish constitution in this regard discussed later.
  
12. Much of the material included in the customary international humanitarian section of the report is either human rights in times of war (customary international humanitarian rights), or instances of ‘gross’ or ‘systemic’ violations of human rights (under the various human rights frameworks of the United Nations). It is therefore subject to a number of qualifications. Firstly, the UDHR is generally regarded as not legally binding. Furthermore, the two International Covenants (the ICCPR and ICESCR) were not in existence until 1966, and Ireland did not ratify both until 1989. Ratification is key to legal effect in a particular jurisdiction. It is not clear therefore that there were any legally recognisable breaches of human rights in the 1920 to 1960 period. Moreover, it is not clear whether the right to know – which seems to be the legally strongest right – can be based on breaches of human rights before the state ratified the relevant instruments (as it cannot be stated at the time they were breaches). In summary, if it was not a breach at the time, it is difficult to legally determine it so retrospectively. Therefore, there may be very limited grounds for the right to know which is parasitic upon the basic rights in the UN Charter (the conceptual instrument combining the UN Declaration and both Covenants together).
  
13. If inhuman or degrading treatment and violations of privacy can be characterised as continuing, it may constitute a violation of the UNCAT, ICCPR or CEDAW.

14. The most relevant jurisprudence on this matter relates to Enforced Disappearance. This is the most fruitful area of international human rights law to review, as it has an express right to truth/right of victims and their families to know. It is also closely tied to the ICCPR which, as stated above, Ireland ratified in 1989. It seems there may not be a requirement that the ICCPR was ratified by the member state when the ‘disappearances’ took place. There are interesting parallels between the experience in South America, where much of this law emerged, and the experience of the institutional abuse of women and children in settings such as the mother and baby homes. It should be noted, however, that Ireland has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance, although it codifies what is already implied in many international human rights instruments to which Ireland is a party.

### **Status of International Agreements**

15. It is important to bear in mind that the obligations imposed on the State by international agreements occur and are enforceable, if at all, under international law only. Article 29.6 of the Constitution provides that:

No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.

### **The Irish Constitution**

16. Irish case law confirms the importance of dignity under the Constitution and, in particular, the importance attached to the circumstances associated with a person’s death. Clearly, this is of potential significance in the Tuam context. It raises the question as to whether there was a failure to take account of considerations of the dignity of the deceased children in the circumstances of their burial; and whether, if so, this would give rise to a breach of the Constitution? There may also be a distinct question as to whether – assuming considerations of dignity did apply to the burial and may continue to apply thereafter – the circumstances give rise to an enforceable constitutional right or claim, whether on the part of the deceased or of other persons.

17. While the decision of the Supreme Court in *Fleming* confirms that the values of autonomy and dignity are not absolute, the analysis in *Ward of Court* indicates that the right to life and the related constitutional commitment to dignity extend to the manner and process of dying. Moreover, the High Court decision in *PP v HSE* suggests that considerations of dignity may be capable of applying after the point of death.
18. The capacity of rights to be asserted on the part of the deceased could be a challenge in an Irish context. The recent Article 40.3.3<sup>o</sup> Supreme Court decision in *M* places considerable emphasis on the inability of the unborn to invoke constitutional rights because it has not been born and is therefore not a rights-holder. The corollary of the concept of rights-holder that emerges in that judgment (and that is consistent with some judicial decisions in recent cases about whether non-citizens are necessarily rights-holders) might be that deceased are not rights-holders for constitutional purposes. This would probably place the deceased in a position of being entitled to respect, but not to have specific rights under the Constitution invoked on their behalf.
19. The report of the Expert Technical Group also raises significant practical concerns about the results that would be obtained from any exhumation or retrieval. The obligations imposed on the State by the Constitution are to defend and vindicate the personal rights of the citizen “as far as practicable”. The decision in *PP v HSE* highlights the important point in this context that the Constitution does not require the taking of steps to promote or vindicate a constitutional value (in that case the right to life of the unborn) if those steps will not produce any practical benefit. This suggests that the views expressed in the expert report should be given weight in considering the steps to be taken in this matter.
20. It also should be stated that there may be a countervailing dignity interest in disturbing the burial site. That could also be a factor that a court would weigh in assessing the practical benefits of exhumation. If there are countervailing constitutional considerations which may incline against exhumation, the fact that exhumation may not produce any practical benefits may weaken any claim that it is constitutionally required.



## Statute Law

21. It may be the case that all deaths which took place at the Tuam Mother and Baby Home were duly notified to the registrar. There is no doubt, in any event, that a clear statutory duty existed in respect of such notification. Auditing the obligation to register a death should be considered in the context of Tuam. This might be undertaken by matching the death certificates to the number of juvenile human remains.

## Common Law

22. At common law, the body of law derived from judicial decisions rather than statute or constitutions, there has long since been recognition of the right to a decent burial, and of a range of rights and duties concerning dead bodies. It seems that the operators of the Mother and Baby Home at Tuam may have been under a common law duty to bury those who died under their roof. This duty to bury incorporates a duty to bury decently and with dignity, in a Christian burial.<sup>20</sup>

23. A question that arises in the present review is whether the original actions of the operators of the Tuam Mother and Baby Home could have constituted prevention of a lawful and decent burial. Moreover, were the relevant authorities to refuse to exhume, sort and bury the remains, could this constitute a continuing offence of prevention of a lawful and decent burial? In contrast to the tortious claim considered below, this crime does not require there to be any identifiable family member who is affected by the failure to bury.

24. One option which may merit further consideration is whether there is an inherent jurisdiction on the part of the High Court to determine whether and how the remains should be dealt with. There is some (although limited) support from other jurisdictions for the proposition that the courts retain a common law power to

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<sup>20</sup> It is probably the case that the modern duty to bury is not solely one of Christian burial but rather about burial reasonably appropriate to the deceased person's known values and religious practices. At the relevant time, it seems that Christian burial would have been the appropriate entitlement.

determine disputes concerning the duty to dispose of the body of the deceased. The legal context of any application here might be quite different. There is also the obvious factual difference that the question at Tuam would be one not of burial but of possible exhumation and re-burial. Nonetheless, the reasoning of the courts in these cases is based in part on the existence of a common law duty to dispose of remains. As discussed elsewhere in this Report it is arguable that duty is engaged and/or may have been breached in the situation in Tuam.

## 1. INTRODUCTION

It is worth noting at the outset that in international law, there are no unified mass-grave protection guidelines in place for States to follow when they are faced with the discovery of sites, such as the burial site at the former Mother and Baby Home in Tuam, despite the existence of guidelines to deal with situations of armed conflict and investigations of missing persons.<sup>21</sup> Calls have been made to work toward a more comprehensive set of legal guidelines for the protection of such graves at an international level. This would assist in achieving a number of desired aims, including ensuring that family members are informed of the fate of their relatives, allowing survivor populations be aware about what happened at the site in question and enabling proper investigations to take place - answering questions and finding those responsible where possible.<sup>22</sup> While the site at Tuam cannot be considered to be a mass grave in terms of what is typically associated with violence or conflict, physical investigation of the site has necessitated use of the skillset designed to forensically investigate mass graves and similar legal issues are thus raised.

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<sup>21</sup> For instance, the Geneva Conventions and their Additional Protocols form the core of international humanitarian law, regulating the conduct of armed conflict and seeking to limit its effects. With regard to missing persons, the International Committee of the Red Cross (ICRC), “Guiding Principles/Model Law on the Missing” (2009) and the International Convention for the Protection of All Persons from Enforced Disappearance are of assistance.

<sup>22</sup> See Melanie Klinkner, “Towards mass-grave protection guidelines” *Human Remains and Violence*, Volume 3, No.1 (2017) 52-70. This article, however, concerns primarily the protection of mass-graves in post-conflict situations.

## 2. EUROPEAN CONVENTION ON HUMAN RIGHTS

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR) came into force in 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding. Its contracting states are obliged to secure to everyone within their jurisdiction the rights and freedoms set out in section 1 of the ECHR. The ECtHR is tasked with enforcing the provisions of the ECHR and its judgments, in some cases, have broadened the interpretation of the Convention. In Ireland, the European Convention of Human Rights Act 2003 was introduced to give further effect to the ECHR in Irish law. The Act did not incorporate the Convention into Irish law, but rather requires Irish courts to interpret legislation in line with the Convention insofar as it is possible to do so. It also requires that certain public bodies perform their functions in a manner compatible with the Convention, unless precluded by law.

Section 1 of the ECHR contains the rights and freedoms that the Convention is designed to protect. Article 8 ECHR is of crucial importance for present purposes, however it is necessary to set out in full the following provisions;

### Article 2: **Right to life**

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

### Article 3: **Prohibition of torture**

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

### Article 8: **Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

## **2.1 Article 8 ECHR**

Article 8 is crucial in considering the options available with respect to the Tuam Mother and Baby Home as it is most likely that the right to family life and privacy contained therein is particularly engaged in these circumstances, bearing in mind both the rights of the deceased and their family members. While Article 8 is therefore the primary provision of consideration, it is worth noting that the protections contained within Article 8 can operate at the same time as those contained in other articles. For instance, in cases of detention, the Court may find a violation of both Article 8 and Article 3 where the conditions are particularly poor and privacy concerns are raised. With regard to Article 8, while it specifically guarantees the right to respect for an individual's private and family life, home and correspondence, its scope has been interpreted in a broad manner by the ECtHR, with rights being inferred from its provisions even where same are not expressly enumerated therein.

In determining complaints as to whether Article 8 has been breached, the ECtHR will first consider whether the applicant's claim falls within the scope of Article 8 and the interests it is designed to protect. The Court will then examine whether there has been an interference with that right or whether the State's positive obligations to protect that right has been engaged. This will involve a consideration of the circumstances within which the State may curtail the enjoyment of a particular right as set out in Article 8.2 namely, where the interference is in accordance with law and necessary in a democratic society in the interests of national security, public safety, economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It is worth noting at the outset that while Article 8 is couched in negative terms, giving individuals protection against arbitrary interferences with their private and family life and mandating that the State refrain from such interference, the ECtHR has held that there may

also be positive obligations placed upon the State to secure respect for private life. This may oblige the State to adopt measures designed to safeguard this right. This principle was first set out in the decision of *Marckx v Belgium*.<sup>23</sup> In this case, the parents of a child born out of wedlock challenged the provisions of the Belgian Civil Code which detailed the process of establishing the maternal affiliation of an “illegitimate” child. Essentially, under Belgian law at that time, no legal bond between an unmarried mother and her child resulted from the mere fact of birth. Instead, the maternal affiliation of an “illegitimate” child was established by means of either a voluntary recognition by the mother or of legal proceedings taken for this purpose. Furthermore, in order to increase the rights of the child, for example for inheritance purposes, the parents were required to adopt their own “illegitimate” child. The parents therefore complained that their rights pursuant to Article 8 were infringed.

The ECtHR duly held that the Belgian system infringed the right to private and family life by reducing inheritance rights for “illegitimate” children, finding that this Article made no distinction between the legitimate or “illegitimate” family. While the Court commented that the purpose of Article 8 is to protect the individual against arbitrary interference by the public authorities, it went on to state that Article 8 “...does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective ‘respect’ for family life.” In this case, the indictment was against Belgian law which was found to be wanting in respect of the family life of the applicants. This positive obligation means that the State, in its domestic legal system, determines the provisions applicable to certain family ties, including to those between an unmarried mother and her child and the State must act in a manner to enable those concerned to lead a normal family life. Article 8 demands the existence in domestic law of legal safeguards that enable a child to integrate with his or her family from the moment of birth. A law of the State that fails to satisfy this requirement violates Article 8.1, without the necessity to examine the provisions of Article 8.2.

In cases where a positive obligation is claimed, the Court will consider whether the importance of the interest at issue requires the imposition of a positive obligation as sought by the applicant. The ECtHR in *Hämäläinen v Finland*<sup>24</sup> considered certain factors as relevant in assessing the content of positive obligations on the State. Specifically, the Court

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<sup>23</sup> (1979) 2 EHRR 330.

<sup>24</sup> [GC], no. 37359/09, ECHR 2014.

stated that the importance of the interest at stake and whether ‘fundamental values’ or ‘essential aspects’ of private life are in issue are relevant, as well as the impact on an applicant of a discordance between the social reality and the law and the impact of the alleged positive obligation on the State concerned. In implementing their positive obligations, States enjoy a margin of appreciation, however that margin will be narrower where a particularly important facet of individuals’ existence or identity is at stake.

In relation to the site at Tuam and the juvenile remains interred therein, the positive obligation inferred from Article 8 ECHR may be of relevance. Given the rights at issue, discussed in full below, the question arises as to whether the State has a duty to take particular action at Tuam – to investigate and where possible, to return the remains to family members and provide relatives with information on the fate of their loved ones.

An exhaustive examination of Article 8 is not possible herein. For present purposes, therefore, specific regard will be had to issues concerning the death and burial of family members and judgments given by the ECtHR interpreting Article 8 and addressing this subject. The question examined is whether there exists a right of family members to have the remains of their loved ones returned to them under the Convention. The existence of any such right should be considered in informing the State’s response to the Tuam site. In the relevant ECtHR decisions, it is clear that the rights of the family of the deceased are engaged and not those of the deceased themselves. These cases have involved challenges brought by individuals against a State who they claim failed to grant access to the remains of their family members or where excessive delays have occurred in the restitution of a body after an autopsy or following completion of a criminal investigation. Essentially, in its line of authorities, the ECtHR has inferred a right to bury family members into Article 8’s protection for private and family life. There also exists a right of family members to be informed and provided with information surrounding the circumstances of their relative’s death, an additional entitlement that requires particular attention in assessing what course of action is best with regard to the Tuam site. Furthermore, decisions of the ECtHR regarding the treatment of the body of the deceased are considered, with a particular focus on the requirement for the consent of the deceased’s next of kin.

The applications considered below have been brought in a variety of contexts and understandably, no case on its facts can be said to mirror the particular set of circumstances at

issue in relation to the discovery of human remains at the site of the former Mother and Baby Home in Tuam. Nevertheless, comparisons can be drawn and it is necessary to consider each case below to fully consider the applicable rights under ECHR law. It must be remembered that the rights recognised and vindicated therein are not absolute and a failure to return a dead body to the relatives for burial, or disclose where it was buried for instance, may only constitute a violation of Article 8 if the interference with these rights cannot be justified by the State in question. A key question is whether sufficient justification is given and whether the necessity and proportionality of the interference are considered.

## **2.2 Returning body to family member – delay between death and burial**

In a number of cases that have come before the ECtHR, complaints have been made concerning the return of a deceased's body to his or her family members. Specifically, the length of time between death and the burial of the deceased is a pertinent issue. This warrants consideration bearing in mind that those interred in the Tuam site have not as of yet been returned to their family members for a respectful and appropriate burial. The proximity of family relationships is also likely to be relevant. The cases set out below all seem to concern immediate family members. I understand that may apply in some cases in Tuam but not necessarily in all cases. It is possible to envisage the Irish courts drawing a line between the rights of immediate family members and the interests of more distant relatives.

### **2.2.1 *Pannullo and Forte v France*<sup>25</sup>**

In June 1996, the daughter of Italian parents had died following a postoperative check-up in France at age four. Investigations were carried out by French authorities into the cause of her death and an examination took place into her diagnosis and treatment. These investigations caused a delay in the return of her body to her parents. An autopsy had been carried out in July 1996, but the body was not returned to her parents until February 1997. Medical evidence demonstrated that there was no necessity to keep the body for investigative purposes after the autopsy had been completed. Furthermore, the forensic scientist carrying out an expert report had indicated to the investigating judge following the autopsy that the necessary samples had been taken and the body could be repatriated. Despite this

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<sup>25</sup> Number 37794/97, ECHR 2001-X.



notification, the body was still not released. It was therefore claimed by her parents that the delay constituted an unjustified interference with their right to respect for their private and family life pursuant to Article 8 ECHR. On behalf of France, the delay was not disputed and it was accepted that it constituted an interference with the parent's Article 8 rights, but it was argued that the various formalities carried out in the release of the body had pursued a legitimate aim of preventing crime and therefore Article 8 was not breached.

The Court noted:

...[W]hile the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation.<sup>26</sup>

It found that the interference with the applicants' rights was in accordance with law and pursued the legitimate aim of preventing crime. The question here therefore was whether the interference was necessary in a democratic society. In this regard, the Court took account of the fact that more than seven months passed between the child's death and the issuance of the burial certificate. While it determined that the deceased's body was required for the autopsy, it was clear that her body should have been returned to her parents immediately after same. Having regard to the circumstances of the case and the tragedy for the parents of losing their child, the Court concluded that the French authorities failed to strike a fair balance between the applicant's right to respect for private and family life and the legitimate aim pursued. The Court thus held that there was a violation of Article 8 ECHR.

This case makes it clear that the unjustified delay in the restitution of a body after an autopsy may constitute an interference with both the private life and family life of surviving family members.

### **2.2.2 *Girard v France*<sup>27</sup>**

In this case, the applicants were two French nationals whose daughter had disappeared in November 1997. More than a year and a half later, she was found murdered. In an action

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<sup>26</sup> Ibid., at para. 35.

<sup>27</sup> Number 22590/04, 30 June 2011.

against French authorities, relying on Article 2 of the Convention, the right to life, they argued that there had been a failure to properly investigate their daughter's disappearance. They further argued that the delay in returning samples taken from the deceased's body constituted an interference with their Article 8 rights.

The Court found that an extended delay in returning samples taken from the applicant's daughter's body by police, which prevented the applicants from burying her in a timely manner, violated Article 8. It placed weight on the delay of over four months that elapsed between the decision of the authorities to return the samples to the applicants and the actual return of said samples, similar to the unnecessary delay at issue in *Pannullo and Forte* demonstrated above. Furthermore, the Court held that there had been a violation of Article 2 ECHR due to the lack of an effective investigation into the deceased's disappearance. This case essentially recognises that under Article 8 – there exists a right to bury one's relatives – and demonstrates the link that may occur between Articles 2 and 8 in certain situations.

Distinct from a State's obligations under the ECHR, there is also an obligation on States under international humanitarian law, to 'facilitate the return of the remains of the deceased and of personal effects to the home country'. This obligation is included in Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, discussed in greater detail below.<sup>28</sup> While the Geneva Convention applies in circumstances of armed conflict, it is worthwhile noting that the aim even in these circumstances is to ensure the return of the deceased's body to his/her home county, to the family. Similarly, in the UN's Inter Agency Standing Committee's Operational Guidelines on Human Rights and Natural Disasters, it is recommended that appropriate measures should be taken "to facilitate the return of remains to the next of kin...Measures should allow for the possibility of recovery of human remains for future identification and reburial if required". On an international level, whether during times of armed conflict or natural disasters, there therefore also exists an obligation upon States to seek to secure the return of the deceased to their loved ones. As stated above, the international humanitarian law obligations are examined later in this report.

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<sup>28</sup> Additional Protocol I, Art. 34(2).

### **2.3 Right to know the fate of a family member – information surrounding circumstances of death**

Following the death of a loved one, it is understandable that his/her relatives will seek information concerning the circumstances of his/her passing. Where a family member is missing, his/her relatives will usually seek to obtain the truth of his/her fate. There are various reasons for seeking and ascertaining these details. It may assist in securing the return of remains for burial and commemoration purposes and enable a death certificate to be obtained. Information and investigations surrounding the death or disappearance of a relative may explain what happened, restoring the human dignity of the deceased, or ultimately leading to answers, accountability and criminal justice proceedings. On a larger scale, the provision of such information to the public itself may promote transparency and prevent similar situations from arising again. The right to know the fate of a family member has been at issue in certain ECtHR decisions, as set out below.

#### **2.3.1 *Hadri-Vionnet v Switzerland*<sup>29</sup>**

The case concerned the conditions under which the municipal authorities conducted the burial of the applicant's stillborn child without consulting her on the matter. In this case, the applicant gave birth to a stillborn baby while she was residing in a centre for asylum seekers in Switzerland. She and the child's father decided that they did not wish to see the child's body. An autopsy was then performed on the body and the baby was buried in a communal grave for stillborn babies. This burial took place without the parents being present and without a ceremony. The applicant mother challenged the manner in which this burial occurred, arguing that the burial took place without her knowledge in a communal grave and that she had not been entitled to attend. She contended that this was an infringement of her Article 8 rights under the Convention.

First, the ECtHR found that Article 8 was applicable in these circumstances. It thus found that the State's failure to inform the mother about the location and time of the burial of her still-born son was not authorised by law and violated her rights under Article 8. This arguably demonstrates that knowledge is crucial – namely, that a family member of a

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<sup>29</sup> Number 55525/00, 14 February 2008.

deceased has the right to know where the deceased is buried and the failure to provide information regarding a burial may be in breach of Article 8 ECHR.

### 2.3.2 *Marić v Croatia*<sup>30</sup>

In *Marić v Croatia*, the ECtHR found again that the disposal of the body in a manner which left the parents with no information as to the whereabouts of the remains breached the parents Article 8 rights. The Court relied on its previous decisions as clearly establishing that Article 8 was engaged by the applicant's complaint that he was prevented from knowing where the child was buried. However, it might also be noted that the Court described the case as one where:

it is not a question of whether the applicant had the right to a particular type of ceremony or to choose the exact location of the child's place of rest, as could be understood from the Government's arguments, but whether there has been an interference with the applicant's rights under Article 8 by the body of his stillborn child being disposed of as clinical waste.

It is clear that the Court in this case was responding to the Croatian government's arguments rather than making a positive decision on the scope of the Article 8 obligation. It does, however, draw attention to the fact that the Court's Article 8 case law has been concerned so far with negative interferences on the part of the State with the right of family members to the return or disposal of bodies, or to information about their disposal. The Court does not yet appear to have considered whether Article 8 imposes a more extensive positive obligation on the part of State authorities to assist or ensure that a burial takes place in the particular manner desired by the family.

### 2.3.3 *Zorica Jovanović v Serbia*<sup>31</sup>

A similar concern regarding being informed of the circumstances of a family member's death arose in the case of *Zorica Jovanović v Serbia*. In this case, in October 1983, the applicant gave birth to a healthy child in the Cuprija Medical Centre (CMC), a State-run hospital. A few days after his birth, the applicant's son was taken to a separate room for new-born babies as was standard procedure. The following day, the applicant was informed by a doctor that

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<sup>30</sup> Application no. 50132/12.

<sup>31</sup> Number 21794/08, ECHR 2013.

he had died. She was told that an autopsy would be performed on his body in Belgrade, thus his body could not be released to his parents at that stage. His body was never returned to the applicant.

From 2001 onwards, the Serbian media began reporting extensively on numerous cases similar to that of the applicant's where new-born babies had "gone missing" following their alleged deaths in hospital wards. The applicant requested information regarding her son's death – seeking all relevant documentation from the CMC, requesting information from the Municipality of Cuprija and lodging a criminal complaint against the medical staff of the CMC for her son's "abduction". She was informed by the CMC that her son's death had been from an unknown cause and that no other information was available because its archives had been flooded and many documents had been destroyed. The Municipality informed her that her son's birth was registered in their records, but his death was not. The criminal complaint was rejected as unsubstantiated as "there was evidence that the applicant's son had died on 31 October 1983". The body of the applicant's son was never released to her, nor was she ever provided with an autopsy report or informed as to when and where he was allegedly buried.

It is worth noting, that in light of the hundreds of similar cases to that of the applicant, an Investigating Committee was established in Serbia. The findings of the Committee concluded that there had been serious shortcomings in the legislation in place at the relevant times and in the procedures in place; that the situation justified the parents' concerns as to what really happened to their children; and that a concerted effort should be made on the part of all government bodies to provide parents with adequate redress. An Ombudsman report similarly found that there were no coherent procedures in place at the time; that the autopsy reports were usually incomplete, inconclusive and of highly dubious veracity; and that it could not rule out that the babies in question were indeed removed from their family unlawfully. In response, Parliament adopted the findings of the Committee and new procedures were put in place in Serbia in 2003 regarding the burial of new-born babies who die in hospital, setting out a detailed procedure to prevent any unlawful removal of babies from hospital wards.

In its judgment, the Court noted that the applicant's son allegedly died or went missing on 31 October 1983, whilst the Convention came into force in Serbia in March 2004. Nevertheless,

the Court emphasised that it was claimed that the respondent State continued to fail to provide the applicant with any definitive and/or credible information as to the fate of her son and that said failure had continued. In these circumstances, the Court determined that the applicant's complaint related to a continuing situation and the Court was competent to examine the complaint in so far as it related to the respondent State's alleged failure to fulfil its procedural obligations under the ECHR as of March 2004. It could, however, consider the facts prior to ratification inasmuch as they could be considered to have created a continuous situation extending beyond that date.

With regard to "family life" the court stated that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8. It noted that the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, but that there may also be positive obligations inherent in this provision extending to the effectiveness of any investigating procedures relating to one's family life.

The Court determined that the failure of the hospital to provide information to the applicant regarding the death of her infant son and the subsequent disappearance of his body violated Article 8 and its respect for private and family life. Although the child had died in 1983, it found that there had been an ongoing failure of the State to provide the applicant with information surrounding what had occurred to her son. The Court noted that the amended legislation only improved the position for the future and effectively offered nothing to those parents who endured the ordeal in this case. It concluded that the applicant suffered a continuing violation of Article 8 of the Convention due to the respondent's continuing failure to provide her with credible information as to the fate of her son.

The two decisions (discussed above) of the ECtHR demonstrate that under the Convention, family members of a deceased have a right to information regarding the fate of their loved one – whether this means being informed of the burial time, autopsy results or the location of his or her last resting place. A State's failure to provide such information may violate Article 8 where it is in breach of the positive obligation upon it to have in place effective investigative procedures even where the death occurred prior to the coming into force of the ECHR in the State in question, as long as there was a continued failure post-ECHR to provide the relevant information. While there are differences between the situation in *Zorica*

*Jovanovic* and Tuam, the decision in *Zorica Jovanović* may be of potential relevance given that it is likely that the deaths of many of the juveniles interred in the Tuam site occurred prior to the coming into force of the ECHR in Ireland, but the discovery of unrecorded burials only took place in recent years.

However, it should be noted that the English courts have held that questions concerning the burial or exhumation of deceased persons do not necessarily engage the Article 8 rights of blood relatives. In *R (Rudewicz) v Secretary of State for Justice*,<sup>32</sup> the Court of Appeal held that the claimant's Article 8 rights were not affected by a decision to exhume a deceased relative. Although she was the deceased's closest living relative, she had never met him or had a close family connection to him. While the exhumation might offend her religious feelings or beliefs, Lord Neuberger MR (as he then was) held that this was different from impacting on her family or private life.

At a further historical remove, the Article 8 rights of blood relatives were also briefly discussed in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice*.<sup>33</sup> This was a challenge by a descendant of Richard III to decisions concerning his exhumation and proposed re-burial. Ultimately, the Article 8 arguments were not pursued at trial, an approach described by the Divisional Court as sensible given that they were "doomed to fail".

## **2.4 Treatment of body – samples and consent**

In certain ECtHR cases, the treatment of a deceased's body is at issue – particularly in relation to the removal of bodily materials and samples from same for certain purposes. This also raises the issue of consent and whether permission must be sought from the deceased's family. Across all cultures, it is a common belief that the dead should be treated with respect. This is demonstrated in the criminal legislation of many States, which provide that mutilation of a corpse is an offence. In relation to the use of tissue or organs from a deceased person for donation or other purposes, the domestic law of most countries will specifically set out the circumstances in which this may take place. In Ireland, for example, at present there is an opt in/explicit consent position with regard to organ donation. If a person wishes to become an organ donor after his/her death, potential donors are advised to inform his/her next of kin of

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<sup>32</sup> [2012] 3 WLR.

<sup>33</sup> [2014] EWHC 1662.

his/her intentions and to carry an organ donor card. Next of kin are always asked for consent in order for a donation to proceed and consent is never presumed, even if a donor card has been signed.<sup>34</sup>

#### **2.4.1 *Petrova v Latvia***<sup>35</sup>

In this case, the applicant's son sustained serious injuries in a car accident in May 2002. He died in hospital a few days later. Immediately following his death, a laparotomy was performed on the body, in the course of which the kidneys and the spleen were removed for organ transplantation purposes. The applicant had not visited the hospital, but claimed that she was in permanent contact with the doctors there during her son's stay. She said that she had not been informed that his condition was deteriorating, had not been asked whether her son had consented to being an organ donor and had not been asked whether she would consent to organ transplantation in the absence of any wishes expressed by her son. She claimed that the removal of her son's organs without her consent constituted an interference with her private and family life. The State claimed that the hospital did not have any information on record providing the contact details of any relative – thus there was no contact with the applicant whatsoever when her son was in hospital. It argued that the “presumed consent system” in place in Latvia permitted interference with an individual's right to private life under Article 8 ECHR and that in this case, the organ removal had been carried out in accordance with the domestic law.

At that time in Latvia, the relevant law provided that every person with legal capacity was entitled to consent or object in writing to the use of his or her body after death. A person was required to apply to the Office of Citizenship and Migration Affairs to exercise the right to consent or object. Only such refusal or consent as was recorded in the Population Register had legal effect. The procedure which the State institutions had to follow to request and receive the relevant information from the Population Register, however, had not been adopted at the time of the applicant's son's death. The law also provided that the organs and tissues of a deceased person could not be used against his or her wishes as expressed during his or her lifetime. In the absence of express wishes, the organs could be used if none of the closest

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<sup>34</sup> In July 2017, the Government approved the preparation of the General Scheme and Heads of a Human Tissue Bill, providing for an opt-out system of consent for organ donation in Ireland.

<sup>35</sup> Number 4605/05, 24 June 2014.



relatives objected. It went on to state that the organs could be removed if he or she had not objected to such removal during his or her lifetime and if the closest relatives had not prohibited it. A stamp on a person's passport added before 31 December 2001 denoting objection or consent to the use of his or her body after death had legal effect until a new passport was issued or an application to the Office of Citizenship was submitted. The domestic law was later amended in 2004.

At a domestic level, the applicant made numerous complaints and in response, the Inspectorate of Quality Control for Medical Care and Working Capability (the MADEKKI), carried out an investigation. It concluded that the hospital complied with the relevant domestic law in taking the decision to remove organs and carrying out the surgery. The MADEKKI noted that there was no information at its disposal as to whether or not there had been a stamp on the deceased's passport signifying an objection to the use of his body tissues and organs. As the applicant had not been informed about the imminent removal of her son's organs, it determined that she neither consented nor refused. It was further concluded by a prosecutor considering the criminal complaint that the domestic law required consent from parents or guardians only in cases where organs were removed from a deceased child's body for transplantation purposes.

The ECtHR, in considering the case, determined that the removal by the hospital of the deceased's organs without informing his mother and without seeking her consent was not carried out in accordance with law and violated her rights to private life under Article 8 ECHR. It noted that Article 8's purpose is to protect the individual against arbitrary interference by public authorities. Interferences may be justified as necessary in a democratic society if proportionate and they pursue a legitimate aim. This requires the domestic law to be formulated with sufficient precision to afford adequate legal protection against arbitrariness and it must indicate with sufficient clarity the scope of discretion conferred on the appropriate authorities. In this case, the dispute between the parties was not with regard to the content of the Latvian law – which expressly provided the deceased's closest relatives with a right to express their wishes on organ removal following the death - but how this right was to be exercised. The applicant contended that the domestic authorities had not fulfilled their duty to provide conditions whereby her wishes could be expressed. The State, on the other hand, claimed the relatives involved were expected to take positive steps if they wished to veto any organ removal. It was concluded by the Court that the law was not sufficiently

clear as regards the implementation of this right. At no time when the applicant's son was still alive, was a procedure in place for the State institution to follow in order to establish that person's own views on organ transplantation, nor was there a legal duty on State institutions to inform the closest relatives about imminent organ removal. It stated that it was unclear how the claimed "presumed consent system" operated in practice in the circumstances in which the applicant found herself whereby she had certain rights, but was not informed as to how and when these rights might have to be exercised. The Court thus found that the applicable Latvian law was not formulated with sufficient precision or afforded adequate legal protection against arbitrariness. The interference with the applicant's Article 8 rights was not in accordance with law and a violation of Article 8 was held to have occurred.

On the same reasoning, the Court also upheld the applicant's complaint that she had been subjected to inhuman and degrading treatment on account of the fact that the removal of her son's organs had been carried out without his prior consent or the consent of the applicant.

#### **2.4.2 *Elberte v Latvia*<sup>36</sup>**

In 2001, the applicant's husband had died in hospital following a car accident. His body was transported from the hospital to the State Centre for Forensic Medical Examination in Riga. To establish the cause of death, an autopsy was carried out. Following the autopsy, tissue was removed from his body – the outer layer of the meninges - by a forensic expert who stated that he had verified that there was no stamp on the deceased's passport denoting his objection to the use of his body tissue. The applicant argued that the expert could not have verified that there was no stamp on her husband's passport as that passport had been in their home at the time.

The applicant only became aware that tissue had been removed from her husband's body two years later, when police informed her that a criminal inquiry had been opened into the illegal removal of organs and tissue for supply to a pharmaceutical company in Germany. There was in existence an agreement between the Forensic Centre and the German company to provide organs and tissue for scientific research. Under the agreement, experts carrying out tissue removal were to comply with domestic law and were to verify whether the potential

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<sup>36</sup> Number 61243/08, ECHR 2015.

donor had objected to the removal of organs or tissues by checking his/her passport for the presence of the stamp. If relatives objected to the removal, their wishes were to be respected. Experts, however, did not attempt to contact relatives to establish their wishes. Ultimately, the criminal inquiry was discontinued. In this decision, it was held that the experts did not have any legal obligation to inform anyone about his/her right to consent to or refuse organ or tissue removal. While the domestic law provided for the right of the closest relatives to object to the removal of material from deceased persons, it did not place an obligation on experts to explain these rights to the relatives.

Reiterating the principles of clarity as set out in *Petrova*, the ECtHR held that Article 8 ECHR had been violated in this case. The domestic law was not formulated with sufficient precision to enable relatives to exercise their rights to object to the removal of bodily material from their family member. In this case, tissue was removed from the deceased without the knowledge and consent of his spouse. This occurred due to the lack of clarity in the domestic law and the absence of legal safeguards against arbitrariness. The ECtHR therefore held that Article 8 had been violated in this case.

#### **2.4.3 *Estate of Kresten Filtenborg Mortensen v Denmark*<sup>37</sup>**

The case concerned the removal of DNA from the body of a deceased for the purposes of a paternity suit. It was claimed by two brothers that the deceased was their biological father. Following other testing, the City Court decided that his body was to be exhumed for the purpose of taking DNA samples – this being the only remaining option to establish paternity. The estate of the deceased, represented by his legitimate son, appealed against the decision and the case ultimately was considered by the Supreme Court of Denmark. The Supreme Court permitted the taking of biological material from the corpse despite the fact that the relevant domestic legislation did not contain any specific rules on forensic genetic testing of deceased persons.

In the challenge to the ECtHR, the deceased's estate complained that the exhumation of the corpse for the purposes of taking DNA samples constituted a breach of Article 8 ECHR as same was not "in accordance with law".

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<sup>37</sup> Number 1338/03, ECHR 2006-V.

In considering this case, the Court emphasised that the applicant for the purposes of these proceedings was “the estate of KFM”. It was complained that the Supreme Court’s decision violated “the rights of the estate of KFM”. While the concept of “private life” is a broad term, the Court stated that it would stretch the reasoning developed in case law too far to hold that the proposed testing on the deceased in this case constituted an interference with the Article 8 rights of the deceased’s estate. In cases such as *Pannullo and Forte* (discussed earlier), the Convention was relied upon by individuals who were alive when they lodged their complaint with the Court who maintained that their right to respect for private or family life had been breached, as opposed to the deceased person’s right to respect for private or family life. The ECtHR stated:

In the present case the individual in question, namely KFM, was deceased when the alleged violation took place and hence when his estate, on his behalf, lodged the complaint with the Court alleging an interference with his right, or rather his corpse’s right, to respect for private life. In such circumstances, the Court is not prepared to conclude that there was an interference with KFM’s right to respect for private life within the meaning of Article 8.1 of the Convention.

While the representative for the estate, the legitimate son, did not make a claim in his own right as a family member of the deceased, submissions were made to the Court that the exhumation of the corpse also constituted an intrusion of that son’s privacy rights. On the facts of this case, however, the Court rejected this assertion on the grounds that there was no evidence that the son complained at any point during the domestic proceedings that his rights had been violated. This submission was therefore inadmissible due to the non-exhaustion of domestic remedies.

These cases demonstrate that in terms of pursuing any claim for violation of Convention rights, it is the family members alone who are capable of asserting these rights. The deceased no longer possess human rights and they are not capable of asserting same. This approach is similarly demonstrated in the Council of Europe’s Additional Protocol on Transplantation of Organs and Tissues of Human Origin.<sup>38</sup> Pursuant to Article 18, “Respect for the human body”, it is provided that during removal of organs and/or tissues, the human body must be treated with respect and all reasonable measures must be taken to restore the appearance of

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<sup>38</sup> Adopted 24 January 2002, entered into force 1 May 2006; See Comment to Article 18, Additional Protocol on Transplantation of Organs and Tissues of Human Origin.

the corpse. The Explanatory Comment to Article 18 states; “A dead body is not legally regarded as a person, but nonetheless should be treated with respect.”

## **2.5 Specific requests regarding burial**

### **2.5.1 *Elli Poluhas Dödsbo v Sweden*<sup>39</sup>**

In this case, the ashes of the applicant’s husband were buried in a family grave in Fagersta, Sweden, where the family had been living for some time. Years later, the applicant moved to be closer to her children. She thus requested that the cemetery authorities allow the transfer of her husband’s urn to her family plot in Stockholm. She submitted that her children agreed to the removal, that she had no connection to Fagersta any longer and that she was sure her husband would not have objected to the transfer. Her request was refused by authorities in deference to the notion of a “peaceful rest” under the Funeral Act 1990 and her appeals were also refused. The relevant domestic law provided that when a person dies, his or her wishes concerning cremation and burial should, as far as possible, be followed. Where a dispute arises between survivors, it is for the county administrative board to decide. Once remains or ashes have been buried, moving them from one place to another is in principle not allowed unless permission is granted if special reasons exist. These provisions were based on respect for the sanctity of the grave. This requires that the provisions regarding the removal of remains and ashes be restrictive. A deceased’s grave should be left in peace and may only be disturbed in special circumstances.

The applicant therefore complained that the refusal to allow her to transfer the urn containing her husband’s ashes to her family burial plot in Stockholm was in breach of Article 8 ECHR. It was not disputed by the State that the refusal to grant permission to remove the urn from one burial place to another involved an interference with the applicant’s private life, but it was argued that the interference was in accordance with law, that it served legitimate aims and was justified under Article 8.2.

As to the legitimate aims, the government emphasised that the principle of the sanctity of graves had a long-standing tradition and was founded on respect of the deceased. Thus, the

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<sup>39</sup> Number 61564/00, ECHR 2006-I.

strict approach taken by its law, and by the public authorities in applying the law, served to prevent disorder and to protect morals in society at large. It also submitted that the restrictive approach was necessary to prevent conflicts arising amongst relatives and that the living were entitled to be assured that, after death, their remains would be treated with respect. Regarding the issue of necessity, Sweden submitted that States should be afforded a wide margin of appreciation in cases of this kind, where the authorities had to balance the interests of the person requesting the removal with society's role in ensuring graves are not disturbed. In this case, there were no indications that the husband had not been buried in accordance with his wishes; he was buried in the region where he had lived and worked for twenty-five years; the burial site was a family grave, large enough for his entire family; and there was no obstacle to the applicant having her final resting place in the same cemetery as that of her husband.

The ECtHR acknowledged that the applicant's Article 8 right to private life was engaged. It stated that the concepts of "private and family life" are broad terms not susceptible to exhaustive definition and it noted the findings of the Commission that an applicant's wish to have his ashes spread over his own land fell within the sphere of private life in *X v Germany*.<sup>40</sup> It found, however, that the State's refusal to transfer an urn from one burial plot to another did not violate Article 8. The Court held that the decision to refuse to transfer the remains was made with due consideration to the interests of the deceased's wife and fell within the margin of appreciation available in such cases, finding that in such an important and sensitive issue, States should be afforded a wide margin of appreciation.

## **2.6 Application of Article 8 principles**

It is clear from the foregoing body of case law that Article 8 of the ECHR may be of relevance in relation to the particular set of circumstances arising from the discovery of juvenile remains at Tuam. Article 8 has been broadly interpreted, providing family members of deceased persons with a substantial number of rights capable of assertion. While these rights are not absolute, and may be proportionately interfered with, their existence is of considerable importance and the State should be careful to ensure no illegitimate infringement of such rights. Family members may possess the right to have their loved one's

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<sup>40</sup> Commission decision of 10 March 1981, no. 8741/79.

body returned to them. Moreover, relatives may have a right to know the fate of their family members, including information surrounding the death and/or burial of their loved ones. A failure to provide relatives with definite and/or credible information may fall foul of the positive obligation under Article 8, even where the death occurred before the Convention came into force in the relevant county, where the failure to provide information continues following the coming into force of the ECHR. It is also of note, that where samples are sought to be taken from a corpse, the consent of the family member is a relevant concern and should be borne in mind in any approach taken in relation to the subject matter of this report. Irish authorities are required to carry out their functions in a manner compatible with the ECHR and Article 8 rights in particular must be positively vindicated. Regard should be given to the distress and anguish of family members seeking information surrounding the death and/or burial of their loved ones. Nonetheless, it should also be borne in mind that there may be limits to the information which can or must be provided for the purposes of complying with Article 8. The decisions of the ECtHR confirm that Article 8 rights include information concerning the fate and place of burial of the deceased but it may not necessarily extend to additional matters (although these may be covered by Articles 2 and 3 ECHR).

Furthermore, any Article 8 ECHR right should be considered having regard to the extreme delicacy of any exhumation and further investigation at the Tuam site, as determined by the Expert Technical Group. The report of the ETG states that: “There are a number of factors that make this situation unique: The forensic requirement of the site; The ‘significant’ quantities of juvenile remains; The commingled or intermixed state of the remains; The position of the remains within subsurface chambers, with limited access.” The report<sup>41</sup> concludes that the comingled state of the remains renders identification “particularly challenging”. Moreover, the ETG states there is a “risk of destruction to human remains” that raises ethical issues.

It is clear from the foregoing that it is the family members who assert their rights under the Convention. They are not asserting the rights of the deceased, but their own as relatives. It is even questionable whether the deceased possess any human rights, as realistically due to their death, they are not capable of asserting same. This issue was considered by Rosenblatt in

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<sup>41</sup> Report of the Expert Technical Group, December 2017, (i).

relation to the investigation of mass graves in *International Forensic Investigations and the Human Rights of the Dead*.<sup>42</sup> He states:

... [H]uman rights for the dead are philosophically unworkable and irreconcilable with the practical limitations of forensic work; therefore, we should not think of the dead as having human rights. However, this conclusion does not end discussion about what forensic investigators do for dead bodies. Rather, it makes room for a modest but rich sense of how exhumation can restore the identity, physical location, and care that have been denied to victims of atrocity.

## **2.7 Articles 2 and 3 ECHR**

While much of the discussion above focuses on Article 8 ECHR rights and the right to respect private and family life, Articles 2 and 3 of the Convention also warrant consideration. Article 2 protects the right to life. The obligation of States to protect life is set out in the Convention, but is similarly recognised in other international human rights instruments, including the Universal Declaration of Human Rights (Article 3). As with Article 8, the ECtHR has interpreted Article 2 as placing a positive obligation on States. While, therefore, it requires States to refrain from the intentional and unlawful taking of life, they must positively take appropriate steps to safeguard the lives of those within their jurisdiction. Procedurally, there exists an obligation upon States to effectively investigate a killing or suspicious death within their territory. Article 3 prohibits torture, inhuman or degrading treatment or punishment. A similar obligation to investigate arises out of Article 3 ECHR. Where inhuman or degrading treatment is alleged, a State has a duty to investigate a complaint made.

## **2.8 Duty to investigate**

The obligation to carry out an effective investigation was given explicit recognition by the European Court of Human Rights in the case of *McCann and Others v United Kingdom*.<sup>43</sup> In *McCann*, three IRA suspects had been shot dead by Special Forces operatives in Gibraltar as a result of a conjoined anti-terrorist operation involving British, Gibraltarian, and Spanish authorities. The Court provided a lengthy and detailed judgment which examined the

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<sup>42</sup> *Human Rights Quarterly*, Volume 32, Number 4, November 2010, pp. 921-950 (Article) published by The Johns Hopkins University Press.

<sup>43</sup> Number 17/1994/464/545, 27 September 1995.



planning and control of the operation and it created an obligation to carry out an effective investigation inherent in Article 2:

The obligation to protect the right to life under this provision (art 2) read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in the [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as result of the use of force by, inter alios, agents of the State.<sup>44</sup>

This principle has been applied in a number of subsequent cases since then, and its application has been extended to deaths which occur not just as a result of lethal force, but also in circumstances involving negligence within public health authorities.

### **2.8.1 *Osman v United Kingdom***<sup>45</sup>

In this case, the applicants were the wife and son of the deceased, Mr Ali Osman. The deceased was killed by his son's former teacher and his son, Ahmet, was seriously wounded in the same incident. The teacher, during the course of the son's time as a pupil at a school in London, formed a disturbing attachment to him, giving him money, taking photographs of him and following him home. The school authorities investigated the matter and a police officer visited the school on several occasions, but no further action was taken. As the behaviour of the teacher escalated, he was suspended from teaching duties pending an investigation by the education authority into his unprofessional conduct towards Ahmet Osman. A number of attacks were then made on the Osmans' property: a brick was thrown through a window of their house; the tyres of Mr Osman's car were slashed and the windscreen smashed; and paraffin and dog excrement were applied to their doorstep. Following each of those incidents, the Osman's complained to the police. A police officer interviewed the teacher on two occasions and he was later interviewed at his own request by officers from the education authority, to whom he stated he was thinking of doing a "Hungerford" (an indiscriminate mass killing carried out in the town of Hungerford).

The police were informed and in December 1987, the police went to the teacher's home to arrest him on suspicion of causing criminal damage to the Osmans' property. He was not at

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<sup>44</sup> Ibid., at p. 161.

<sup>45</sup> Number 87/1997/871/1083, 28 October 1998.

home and he later failed to attend for work. Between January and March 1988, he travelled around England, periodically returning to his home address, and on 7 March 1988, he went to the Osmans' home where he shot and killed Ali Osman and shot and injured Ahmet. He was later convicted. It was argued by the applicants that the police authorities had failed to protect the lives of the deceased and his son.

The Court noted that it was not disputed that Article 2 of the Convention might in well-defined circumstances imply a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. However, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, this obligation must be interpreted in a manner which does not impose an impossible or disproportionate burden on the authorities.

The Court considered that where there was an allegation that the authorities had violated its positive obligation to protect the right to life in the context of its duty to prevent and suppress offences against the person it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that it failed to take measures within the scope of its powers which, judged reasonably, might have been expected to avoid that risk. With regard to the particular circumstances at issue in this case, the Court found that there had not been a violation of Article 2 as the applicants had failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from the teacher.

### **2.8.2 *Aslakhanova v Russia*<sup>46</sup>**

This case concerned five joined applications by families who complained about the disappearance of their eight male relatives in two particular districts of Russia between 2002 to 2004. In all of the cases, the facts were similar in both the style of the abductions, which were conducted in a manner resembling a security operation, and in the resulting criminal

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<sup>46</sup> Number 2944/06, 8300/07, 50184/07, 332/08, 42509/10, 18 December 2012.

investigations, which remained pending without having produced any tangible results. The Government did not dispute the principal facts of each case as presented by the applicants, but claimed that as the domestic investigations were pending, any conclusions about the exact circumstances of the crimes would be premature. It was also argued that it had not been established with sufficient certainty that the applicants' relatives had been detained by State agents or that they were dead.

In its decision, the ECtHR found that the evidence established that the family members of the applicants must be presumed dead following unacknowledged detention by State agents. It therefore held that there was a substantive violation of their right to life under Article 2 of the Convention. Importantly, the Court also found that a procedural violation of Article 2 had occurred due to the failure of the State to carry out effective investigations into the disappearances. Furthermore, there was found to be a violation of Article 3's prohibition on inhuman and degrading treatment as a result of the distress and anguish caused to the families by reason of the abduction of their relatives and due to the Russian authorities' response to their suffering.

### **2.8.3 *El-Masri v Former Yugoslav Republic of Macedonia*<sup>47</sup>**

In this case, the ECtHR stressed the importance of an effective investigation in establishing the truth. This was recognised as not only being of benefit to the relatives of victims, but also for other victims, as well as for the general public who have the right to know what transpired.

In this case, the applicant was a German national of Lebanese origin. He had been a victim of a secret "rendition" operation in 2003 during which he was arrested, held in isolation, questioned and ill-treated in a hotel in Skopje for 23 days regarding his alleged ties with terrorist organisations. He was then transferred to CIA agents who brought him to a secret detention facility in Afghanistan, where he was further ill-treated over four months. Amongst the legal action taken by the applicant, he lodged a criminal complaint against the former Yugoslav Republic of Macedonia against unidentified law-enforcement officials due to his unlawful detention and abduction. This complaint was dismissed by the Skopje public

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<sup>47</sup> [GC] no. 39630/09, 13 December 2012.

prosecutor. The position of the Government of the former Yugoslav Republic of Macedonia was that the applicant had entered the country, had been interviewed by police on suspicion of travelling with false documents, had been allowed entry into the country and then had left the country, crossing into Kosovo. In the proceedings before the ECtHR, however, the Minister for the Interior of the former Yugoslav Republic of Macedonia confirmed that the Macedonia law-enforcement authorities, acting upon a valid international arrest warrant issued by US authorities, had detained the applicant and kept him in Skopje under the constant supervision of agents of the State Intelligence Service. He later had been handed over to the custody of the CIA rendition team.

The Court held that the applicant's allegations, in light of the evidence available, were sufficiently convincing and established beyond reasonable doubt. It therefore held that there had been a violation of Article 3 of the Convention in this case arising out of the inhuman and degrading treatment to which the applicant was subjected. The Court also held that there had been a violation of Article 3 due to the failure of the State to carry out an effective investigation into his allegations of ill-treatment. It observed that the applicant had brought his allegations of ill-treatment to the attention of the Macedonian public prosecutor, supported by evidence which had emerged from the international and other foreign investigations. The State, therefore, had been under an obligation to carry out an effective investigation. Apart from contacting the Ministry for the Interior for information, however, the prosecutor had not undertaken any investigative measure to examine those allegations before rejecting the complaint for lack of evidence. In particular, the applicant had not been interviewed, nor had the personnel working in the hotel at the time of his alleged captivity there. No steps were taken to establish why the aircraft suspected of having been used to transfer the applicant to Afghanistan had landed or to investigate the identity of the passenger who boarded it. The prosecutor had relied solely on the report of the Ministry, whose officials were suspected of having been involved in the applicant's alleged ill-treatment, thus this fell short of what should have been expected from an independent authority.

It was emphasised by the Court that investigation of the case was important not only for the applicant, but also for the victims of similar crimes and for the general public, who had the right to know what had happened. The summary investigation that had been carried out was not an effective one capable of establishing the truth and leading to the identification and

punishment of those responsible. The applicant's rights pursuant to Article 3 were thus violated with regard to the lack of an effective investigation into his allegations.

The ECtHR case law concerning Article 2 in particular demonstrates that the procedural obligation upon a State to investigate effectively arises where the death occurs in suspicious circumstances or where an individual has gone missing in life-threatening circumstances. The purpose of such investigations is to ensure that domestic law in place to protect the right to life is implemented. The Last Rights Project, in its article *The Dead, the Missing and the Bereaved at Europe's International Borders – Proposal for a Statement of the International Legal Obligations of States* (May 2017), sets out the criteria which the ECtHR has required to be met for an investigation to satisfy international human rights standards as follows:

- State initiative – the State authorities must take the initiative to investigate once the matter has come to their attention and may not leave it to the next of kin to bring proceedings;
- Independence – those carrying out the investigation must be independent from those implicated in their death;
- Effectiveness – the investigation must be capable of leading to a determination of whether the action taken by State officials was justified in the circumstances and to a determination of the culpability of those responsible for the death. Steps must be taken to secure all relevant evidence in relation to the death;
- Promptness – the investigation must take place promptly and must proceed with reasonable expedition;
- Transparency - the investigation must be open to public scrutiny to a degree sufficient to provide accountability in the circumstances of the case.<sup>48</sup>

## **2.9 Duty to investigate incidents which took place before the ECHR came into force**

The Convention duty to investigate incidents may include incidents that happened some time ago. It is, however, a more limited duty in relation to historical incidents which occurred before the State in question signed the Convention. Nevertheless, relatives of the deceased should be involved in the investigation to a sufficient degree to safeguard their legitimate interests.<sup>49</sup>

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<sup>48</sup> The Last Rights Project - *The Dead, the Missing and the Bereaved at Europe's International Borders – Proposal for a Statement of the International Legal Obligations of States* (May 2017) at p.11.

<sup>49</sup> *Edwards v UK* [2002] ECHR 303.

### 2.9.1 *Janowiec v Russia*<sup>50</sup>

The position with regard to atrocities and killings which took place before the Convention came into force was clarified by the Grand Chamber in *Janowiec v Russia*.<sup>51</sup> In this decision, the applicants, who were family members of Polish officers and officials detained in Soviet camps or prisons following the Red Army's invasion of Poland in 1939, complained about the alleged failure of the State to adequately account for the fate of these prisoners, believed to have been executed by Soviet secret police at Katyń in 1940 and buried in mass graves. Investigations into the mass murders were started in 1990 but discontinued in 2004. The ECtHR upheld Russia's preliminary objection based on the fact that the deaths occurred 58 years before the Convention entered into force in the respondent State.

It stated that its temporal jurisdiction to review a State's compliance with its procedural obligation under Article 2 to carry out an effective investigation into alleged unlawful killing by State agents was not open-ended where the deaths had occurred before the date the Convention entered into force in respect of that State. In such cases, the Court has jurisdiction only in respect of procedural acts or omissions in the period subsequent to the Convention's entry into force, provided there was a "genuine connection" between the death as the triggering event and the entry into force. For a "genuine connection" to be established, the period between the death and the entry into force had to have been reasonably short, no more than 10 years, and a major part of the investigation had or ought to have been carried out after the date of entry into force. The emergence of new, credible information about such past events, however, may trigger the duty to investigate.

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<sup>50</sup> [2014] 58 EHRR 30.

<sup>51</sup> See also *Silih v Slovenia* (2009) 49 EHRR 37 and *Mocanu v Romania* (2015) 60 EHRR 19. The ECtHR in *Silih* established that breaches which have taken place before the coming into force ('critical date') of the Convention might also give rise to an obligation to investigate. It found that the Article 2 duty to investigate is free-standing, and did not require the triggering event to have taken place during the relevant State's period of formal obligation under the Convention.

The Grand Chamber in *Silih* set out four constraints on when a pre-ratification free-standing obligation to investigate suspicious death crystallises:

- (a) That only procedural acts and/or omissions occurring after the critical date fell within the court's temporal jurisdiction.
- (b) That there must exist a genuine connection between the death and the entry into force of the Convention in respect of the Respondent State for the procedural obligation to come into effect.
- (c) That a significant proportion of the procedural steps will have been or ought to have been carried out after the critical date.
- (d) However, in certain circumstances, the connection could be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.

On the evidence, the applicants' relatives were presumed to have been executed by the Soviet authorities in 1940. Russia did not ratify the Convention until May 1998. This period of time was much longer than the periods which had triggered the procedural obligation under Article 2 in previous cases and furthermore, the Court stated that it was too long in absolute terms for a genuine connection to be established between the deaths and the entry into force of the Convention in respect of Russia. The Court was unable to accept that a re-evaluation of the evidence, a departure from previous findings or a decision regarding the classification of the investigation materials could be said to have amounted to the "significant proportion of the procedural steps" required for establishing a "genuine connection" for the purposes of Article 2. It also noted that no relevant piece of evidence or substantive item of information had come to light in the period since the critical date. Accordingly, neither criterion for establishing the existence of a "genuine connection" had been fulfilled.

### **2.9.2 *Keyu v Secretary of State for Foreign and Commonwealth Affairs*<sup>52</sup>**

The UK Supreme Court in *Keyu v Secretary of State for Foreign and Commonwealth Affairs* rejected an appeal against the decision of the UK's Foreign and Defence Secretaries to refuse to hold a public inquiry into the Batang Kali deaths. The Supreme Court held that as the alleged breach of Article 2 had come into effect prior to the 1998 Human Rights Act, there was no continuing breach beyond the creation of the Act.

In this case, the UK Supreme Court considered whether the respondents should be required to hold a public inquiry into the Batang Kali deaths – that is, a series of events in 1948 in which it is alleged that a Scots Guard patrol shot and killed 24 unarmed civilians in the village of Batang Kali, in Selangor. In 2008, a campaign group called 'The Action Committee Condemning the Batang Kali Massacre' presented a petition seeking a public inquiry from the British government. The respondents informed the appellants by letters on 29 November 2010 and 4 November 2011 of their decision to refuse to hold an inquiry into the killings.

The appellants sought to judicially review the refusal to hold a public inquiry, arguing that a public inquiry was required on three different grounds: (i) under Article 2 (right to life) of the ECHR; (ii) under the common law by virtue of its incorporation of principles of customary

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<sup>52</sup> [2012] EWHC 2445 (Admin); [2015] UKSC 69.

international law; and (iii) under the common law by judicial review of the respondents' exercise of their discretion under section 1 of the Inquiries Act 2005. Treacy J. in the High Court had held that as the alleged breach of Article 2 ECHR had occurred prior to the 1998 Human Rights Act, there was no continuing breach beyond the creation of the Act and a public inquiry was refused. The applicant appealed this decision.

The Supreme Court ultimately dismissed the appeal, finding that a requirement for a public or other inquiry could not be imposed in this case. It noted that where a death occurs prior to the date upon which the relevant Member State contracted to the ECHR, two criteria must be satisfied if the investigative duty under Article 2 is to arise – there must be (i) relevant 'acts or omissions' after the critical date, and (ii) a 'genuine connection' between the death and the critical date. As to the second criterion, in order for there to be a genuine connection, the lapse of time between the death triggering the investigative duty and the critical date must remain reasonably short, and should not exceed ten years. In this case, the alleged deaths took place prior to the Convention. No further incident or supervening event occurred to create any obligation upon the State after the ECHR came into effect.

There was a distinction made by the Court on the question of whether the critical date is the date of the coming into force of the ECHR or the date when the right of petition was recognised by the UK. The ECHR came into force for the UK on 3 September 1953, whereas the UK recognised the right of an individual to petition the European Court of Human Rights in January 1966. The majority held that it was the date when the right to petition was recognised that is the relevant critical date and on this basis, as the killings occurred more than ten years before the critical date, there was no genuine connection. The Article 2 claim therefore failed. While Lady Hale similarly dismissed the Article 2 claim, she considered that the critical date was the date that the ECHR came into force. Nonetheless, she dismissed the Article 2 claim because the inquiry was sought for the purposes of establishing historical truth rather than legal liability and as a matter of principle, there was a difficulty in finding that there could be a "genuine connection" between killings which occurred before the coming into effect of the ECHR and obligations imposed by the ECHR.

The Court then considered the position of customary international law within the UK. It determined that same had not developed to impose a duty on the State to hold a public inquiry. However, even if that conclusion was incorrect, and it was a principle of customary



international law that a State must investigate deaths such as the alleged incident in Batang Kali, the Court took the view that this principle could not be incorporated into common law.

It noted:

... Parliament has expressly provided for investigations into deaths (i) through the coroners' courts in the Coroners and Justices Act 2009, and its predecessors, and (ii) through inquiries in the 2005 Act, and its subject-specific predecessor statutes. It has also effectively legislated in relation to investigations into suspicious deaths through the incorporation of Article 2 in the 1998 Act. In those circumstances, it appears to be quite inappropriate for the courts to take it onto themselves, through the guise of developing the common law, to impose a further duty to hold an inquiry, particularly when it would be a duty which has such potentially wide and uncertain ramifications, given that it would appear to apply to deaths which had occurred many decades – even possibly centuries – ago.

### 2.9.3 *Re McGuigan*<sup>53</sup>

*Re McGuigan* concerned the interrogation of the “Hooded Men”. During the period of internment in 1971 to 1972, twelve men in Northern Ireland suspected of being involved in terrorist activity were taken to an interrogation centre, now known to have been located at a British Army base. They there underwent “interrogation in depth” over the period from 11 to 17 August 1971. Two further men underwent similar interrogation in October 1971. The deep interrogation process involved “the five techniques” i.e. prolonged hooding, subjection to continuous loud noise, sleep deprivation, deprivation of food and water, and the maintenance of stress positions over long periods of time. Owing to the first of these techniques, these 14 men came to be known as the “Hooded Men”.

In this case, the applicants challenged the decision of the Police Service of Northern Ireland not to take further steps to investigate the question of identifying and prosecuting those responsible for criminal acts during the interrogation of the “Hooded Men”. They sought judicial review of the decision made by PSNI that there was no evidence to warrant an investigation, compliant with Articles 2 and 3 of the ECHR, into the allegation that the UK Government authorised the use of torture in Northern Ireland. They also challenged decisions of all three respondents as constituting a continuing failure to order and ensure a full, independent and effective investigation into torture at the hands of the United Kingdom

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<sup>53</sup> [2017] NIQB 96.

Government and/or its agents in compliance with Articles 2 and 3 of the ECHR, common law, and customary international law. The application was brought by Francis McGuigan, one of the Hooded Men, and the daughter of another of the “Hooded Men”.

McGuire J., in the High Court in Belfast, ultimately quashed the PSNI’s decision, finding that the decision to end the inquiry was seriously flawed. Three legal issues were considered in this case.

First was the ECHR issue. The applicants argued that the respondents were guilty of failing to ensure an effective investigation was carried out relating to the performance by the UK of its procedural obligation under Articles 2 and 3; and that there was a duty enforceable in domestic law on the State to carry out an effective official investigation into the treatment of the “Hooded Men”, capable of leading to the identification and punishment of those responsible for the methods used.

In determining whether there was a breach of Articles 2 and 3 of the ECHR on the facts of these cases upon which a domestic court could rule, the Court stated that two questions arose:

... the first is whether it is likely that the ECtHR would find a breach and the second is whether it is open to this Court to hold that there is a breach.

In considering whether the ECtHR would find a breach, in line with the Grand Chamber’s decision in *Janowiec*,<sup>54</sup> Maguire J. stated that the Strasbourg Court, in cases of this type where a temporal problem exists, would consider whether the ‘genuine connection’ test is met. The Court took the view that for present purposes the ‘critical date’ must be viewed not as the date when a State acceded to the Convention or agreed to the right of individual petition, but as the date when the Human Rights Act commenced, namely 2 October 2000. He noted that the triggering event in these cases occurred in the early 1970s whereas the equivalent of the ‘critical date’ is 2 October 2000. In the context of the time factor, he noted that the lapse of time between these dates should be ‘reasonably short’, by which is meant a period not exceeding ten years, though there may be, based on some Strasbourg authorities, some room for an element of flexibility on this point. He concluded, however, that on this aspect the distance in time was simply too long to establish the existence of a genuine connection, the gap of over 40 years exceeding significantly the norm of ten years.

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<sup>54</sup> [2014] 58 EHRR 30. See also section 2.9.1 above.

Looking at the balance of the process of investigation as between the period prior to the critical date and the period after it, the Court noted that this involves the question of whether much of the investigation into the relevant event took place or ought to have taken place in the period following the critical date. If the balance favours the view that the majority of relevant actions have or should have taken place after the critical date, this aspect may be satisfied. On the other hand, if the balance is in the other direction, this aspect may not be satisfied. With regard to the present cases, Maguire J. found that this aspect of the genuine connection test was not satisfied as the majority of the activity in respect of the events in this case at issue occurred in the period 1971 to 1978. Thereafter there was a long period when the issues were dormant and he stated that he could not conclude that post 2014 there had been extensive investigative measures taking place. The court therefore held that the two aspects of the ‘genuine connection’ test, both of which would ordinarily have to be satisfied, had not been established.

This, however, was not the end of the inquiry as the court then examined the “Convention values test” – which deals with extraordinary cases which have failed the ‘genuine connection’ test. The court noted the “extremely high hurdle” to fulfil this test and that the language in *Janowiec* describing the sort of circumstances which may meet the test is in very general terms;

What may constitute the underlying values of the Convention or what sort of action or behaviour would amount to a negation of its very foundations invites the application of ideas which are difficult to define.

In considering this test, the court stated that it must bear in mind the circumstances in their totality which give rise to this issue, noting that this case involved the state and state authorities establishing a secret interrogation centre and a system for the deep interrogation of detainees which, when it reached the public domain, it produced such a reaction as to require the immediate establishment of the Compton Inquiry and that the events shortly became the subject of inter-State proceedings within the Convention system. In assessing whether this test was met, the court stated that the Convention is a living instrument and must be interpreted in the light of present day conditions. Maguire J. took the view that if the events herein were replicated today, the ECtHR would be likely to accept the description of torture in respect of these events as accurate. He therefore concluded that the sort of activity at issue in this case had a larger dimension than an ordinary criminal offence and thus would amount

to “...the negation of the very foundations of the Convention.” The “Convention values” test was found to be established.

The court then considered whether the *Brecknell*<sup>55</sup> test was met – whether new information has arisen since the event at issue, reviving the obligation under Article 2 to investigate. The new information in this case comprised materials which were exposed in an RTÉ broadcast of 2014. These materials tended to suggest that torture had been authorised at the time by a senior United Kingdom Minister and that the UK Government had withheld from the Strasbourg institutions evidence which undermined their case that the after effects of the use of the five techniques were not long-lasting or severe. The question was whether the new material could be said to come within the description of ‘plausible or credible allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator’. The court was satisfied that this information fell within the broad description referred to in *Brecknell* and, accordingly, was sufficient to cause, given that the Convention Values test had been surpassed, a revival of the obligation under Article 2 to carry out an effective official investigation. It concluded, therefore, that there was an obligation to take further investigative measures. The court held it was a matter for the authorities to take reasonable steps to comply with this obligation.

The Court, however, did not find in favour of the respondents on the Convention issue and held that, as a matter of domestic law Articles 2 and 3 were not engaged in this case because of the temporal restriction on the operation of the Human Rights Act. The Court stated that following the approach in *Keyu*<sup>56</sup> (in England and Wales) and *Finucane*<sup>57</sup> (in Northern Ireland), the decision in *McKerr*<sup>58</sup> remains the relevant governing authority. This meant that in the present cases no obligation under Article 2 or 3 could be held to operate under the Human Rights Act as a matter of domestic law as the events the court was dealing with long pre-dated 2 October 2000.

Maguire J. then determined the independence issue, namely the complaint regarding the independence of the investigator. He stated that as this argument derives from the jurisprudence of Articles 2 and 3, it must follow that if, as a matter of domestic law, Articles

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<sup>55</sup> *Brecknell v United Kingdom* (2008) 46 EHRR 42 at paras. 66 to 72.

<sup>56</sup> [2015] UKSC 69.

<sup>57</sup> [2017] NICA 7.

<sup>58</sup> [2004] 1 WLR 807.

2 and 3 are not engaged because of the temporal restriction on the operation of the Human Rights Act, this ground of challenge must also fail. On the common law issue, however, he found in favour of the applicants. The applicants claimed that quite apart from any issue of Convention law, there is an obligation of a broadly parallel nature at common law which requires an effective official investigation into a death or an event involving inhuman or degrading treatment or torture. The Court agreed that even if the ECHR as a matter of domestic law does not require the steps referred to above to be taken, such steps were required as a matter of common law - finding that this ground was made out, considering the Supreme Court judgment in *Re McKerr*. Furthermore, it upheld the applicants' claim that the PSNI's decision to end the inquiry of the matter was premature. It found that the decision was seriously flawed and was inconsistent with the broad approach which the Chief Constable had adopted. The Court therefore quashed the decision made on behalf of the PSNI not to take further steps to investigate the question of identifying and, if appropriate, prosecuting those responsible for criminal acts.

In *Ireland v UK (request for revision of the judgment of 18 January 1978)*,<sup>59</sup> the ECtHR dismissed the application by the Irish Government for a revision of the ruling in the 1978 *Ireland v UK ("Hooded Men")* case. The 1978 judgment found that the UK violated the men's rights to be free from inhuman and degrading treatment, but that the treatment the men suffered did not amount to torture. I do not believe the 2018 judgment alters the above analysis regarding the temporality of the procedural obligations under Article 3 ECHR (including the Northern Ireland High Court's appraisal of its jurisdiction under the 1998 Human Rights Act), in that it only addressed the substantive question of whether the techniques would have been classified as torture in 1978 had the Court known what is now available in the public archives.

The case was decided on a narrow evidential ground – i.e. whether RTÉ's 2014 documentary based on newly released UK Government documents under the thirty-year rule constituted "new facts" for consideration. The Court rejected this submission. Moreover, the case also concerned a request for a revision of a previous decision under Rule 80 § 1 and therefore did not trigger any of the temporal issues explored above.

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<sup>59</sup> Number 5310/74 and ECHR 110 (2018), 20.03.2018.

## Summary

In relation to Ireland, while the European Convention on Human Rights Act was only introduced in 2003, the Convention was signed and ratified in this jurisdiction in 1953, entering into force on 3 September 1953. The deaths which occurred at the Tuam Mother and Baby Home are estimated to have occurred in the period between 1920 to 1960. While the majority of that period pre-dates the entry into force of the Convention in Ireland in 1953 and the adoption of the Convention itself in 1950, the remainder of that period post-dates Ireland's ratification of the Convention. Furthermore, the discovery of the remains interred therein only occurred in 2017. In light of the recent evidence of juvenile remains at the site of the former Mother and Baby Home in Tuam, therefore, a question arises as to whether the duty upon the State to investigate is triggered in the present circumstances. A further question to be considered is whether this is the kind of new information that would trigger an Article 2 obligation to investigate. In *Keyu*, one of the judges<sup>60</sup> felt that the ECHR rule was not a right to say that "any assertion or allegation can trigger a fresh investigative obligation under Article 2", but rather that "state authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further".

The unsettled position in the UK should be noted. In *Re McKerr*,<sup>61</sup> the UK Supreme Court held that an obligation to initiate an investigation under Article 2 only applies to deaths occurring after the Human Rights Act 1988 came into force in 2000. A similar approach was followed by the UK Supreme Court in *Keyu v Secretary of State for Foreign and Commonwealth Affairs*, discussed above. This approach, however, was called into question in other decisions and the current position is unclear.<sup>62</sup>

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<sup>60</sup> Para 103.

<sup>61</sup> [2004] 1 WLR 807.

<sup>62</sup> See *In Re McCaughey* ([2011] UKSC 20) where Lord Phillips reflected on the *Silih* judgment [(2009) 49 EHHR 372] of the Grand Chamber:

I believe that the most significant feature of the decision ... is that it makes it quite clear that the Article 2 procedural obligation is not an obligation that continues indefinitely ... [j]ust because there has been a historic failure to comply with the procedural obligation imposed by Article 2 it does not follow that there is an obligation to satisfy that obligation now. In so far as Article 2 imposes any obligation, this is a new free-standing obligation that arises by reason of current events. The relevant event in these appeals is the fact that the coroner is to hold an inquest into [the applicants'] deaths. *Silih* ... establishes that this event gives rise to a free standing obligation to ensure that the inquest satisfies the procedural requirements of Article 2.

## **2.10 The rights of relatives under Articles 2 and 3 ECHR**

The duty to investigate inherent in Article 2 as recognised by the abovementioned ECtHR case law may operate together with the protections set out in Article 3 ECHR in some circumstances. Article 3 prohibits inhuman or degrading treatment. Any violations of Article 3 are significant because the right is absolute making it more difficult to assert resource constraints arguments and time limits for complainants. As demonstrated above in *Aslakhanova v Russia*, relatives of deceased persons may be in great distress following the death of their family member in situations where the actions of or a failure by the State is involved. Accordingly, the Article 3 rights of these family members may be engaged where a State fails to investigate a suspicious death.

### **2.10.1 *Cyprus v Turkey*<sup>63</sup>**

This case concerned the aftermath of military operations conducted by Turkey in 1974 wherein it occupied part of Northern Cyprus. Cyprus brought an application alleging violations of the Convention arising from the conduct of the Turkish authorities, particularly with regard to their failure to investigate the fate of persons who were missing as a result of the conflict.

Having considered the circumstances of the case, the ECtHR concluded that there had been a continuing violation of Article 2 of the Convention due to the failure of the Turkish authorities to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances. It noted that States have a procedural obligation to effectively investigate, not only when individuals have been killed as a result of agents of the State, but also where individuals who were last seen in the custody of agents of the State, subsequently disappeared in a context which may be considered life-threatening. Such a situation was clearly demonstrated in this case. While Turkey had contributed to the investigatory work of the UN Committee on Missing Persons, the contribution thereto was not sufficient to meet the standards of an effective investigation under Article 2.

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However in that same judgment, Baroness Hale doubted whether the decision grounded any free-standing right to open a new investigation. See also *Re McGuigan* [2017] NIQB 96.

<sup>63</sup> [GC] no. 25781/94, 10 May 2001.

The Court specifically considered the impact upon the relatives of those missing persons, noting the moral pain and mental suffering of relatives. It found that the silence of the Turkish authorities in the face of the real concerns of the relatives reached a “level of severity” which was to be categorised as inhuman treatment and Article 3 was therefore infringed. This decision makes it clear that a violation of Article 3 will be found where the State’s actions go beyond a “minimum level of severity”, inflicting moral pain and mental suffering on relatives.

### **2.10.2 *Çakici v Turkey*** <sup>64</sup>

The applicant in this case alleged that her two sons and her grandson had disappeared in circumstances engaging the responsibility of the respondent State. She claimed they were taken into custody in 1994 by Turkish soldiers and never released. This was disputed by Turkey who did not acknowledge any such detention or disappearance. The European Commission of Human Rights conducted its own investigation with a view to establishing facts in light of the dispute surrounding the disappearance of the men in question. Reviewing the investigation, the ECtHR found that the applicant’s sons must be presumed dead following an unacknowledged detention by security forces. Consequently, it held that the responsibility of the respondent State for their death was engaged. As the authorities did not provide any explanation of what occurred to the men after their apprehension and because they did not rely on any ground to justify the use of lethal force by its agent, the Court held that there had been a violation of Article 2.

The Court then considered whether there had been an effective official investigation into the disappearance of the applicant’s relatives. In this regard, the Court had regard to the length of time taken before an official investigation commenced and before witness statements were obtained. It also had regard to the manner in which relevant information was ignored by the investigating authorities. The Court concluded that the investigation carried out was inadequate and therefore in breach of the State’s procedural obligations to protect the right to life and a violation of Article 2 took place on this account also.

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<sup>64</sup> [GC] no. 23657/94, 8 July 1999.



Finally, the Court considered the applicability of Article 3 in this case – with regard to both the applicant’s sons and the applicant herself. The applicant argued that the respondent State breached her sons’ Article 3 rights. She emphasised the very fact that her sons’ disappearance occurred in a context devoid of the most basic judicial safeguards, which she said must have exposed them to acute psychological torture. She referred to the ill-treatment that she had been told by witnesses that had occurred and she claimed that this must be considered even more compelling in view of the existence of a high level of torture of detainees in the respondent State. The Court found that there was no evidential basis upon which it could conclude that the applicant’s sons endured ill-treatment contrary to Article 3, noting that it requires a standard of proof “beyond reasonable doubt” that ill-treatment of a minimum level of severity occurred. With regard to the claim made by the applicant herself the Court reiterated that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The Court noted that the applicant received no news of her sons for almost six years and was living with the fear that they were dead. Moreover, she had requested the authorities to at least be given their bodies. It stated that the “uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time has undoubtedly caused her severe mental distress and anguish”. Having regard to this and the authorities’ complacency in the face of her distress, the Court found the State to be in breach of Article 3 in respect of the applicant.

### **2.10.3 *Sabanchiyeva v Russia*<sup>65</sup>**

In *Sabanchiyeva v Russia*, the applicants were relatives of deceased persons who died during or soon after an attack on local law enforcement agencies. The authorities determined that this was a terrorist attack and decided not to return the bodies of the deceased to their families but to have them cremated. The applicants claimed a breach of their rights arising from this, including under Articles 3 and 8 of the ECHR.

The Article 3 claim related to the manner in which the bodies were stored during the process of having them identified. This means it bears some similarities to the issues that could be raised in the Tuam context. It was argued that this caused mental suffering to the applicants in breach of Article 3. The Court emphasised the importance of Article 3, as illustrated by

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<sup>65</sup> (2014) 58 EHRR 14.

the fact that it makes no provision for exceptions or derogations. However, the Court also reiterated the fact that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. In the context of mental suffering, the Court gave the example of the suffering “endured by applicants as a result of the acts of security forces who had burnt down their homes and possessions before their eyes”. It also reiterated that allegations of ill-treatment must be proved beyond reasonable doubt.

Applying these principles, the Court accepted that the inadequate storage of the bodies meant relatives may have endured mental suffering. That was even more the case for those who witnessed the bodies in person.

However, the Court drew a distinction between these applicants and previous cases brought by relatives of victims who disappeared as a result of actions by the security forces. This may be an important point given that the situation in Tuam may be more similar to this case, than to the cases of persons ‘disappeared’ or killed by State security forces. The Court also held that the applicants did not suffer any prolonged uncertainty over the fate of their relatives; and that the manner of storage was due to logistical difficulties so that it could “hardly be said to have had as their purpose to subject the applicants to inhuman treatment, and in particular, to cause them psychological suffering”. The Court therefore unanimously found that there was no violation of Article 3. While the applicants were likely to have experienced mental suffering, this was not of “a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to any family member of a deceased person in a comparable situation” so as to violate Article 3.

This decision underlines the high factual and legal threshold that is applied by the Court to allegations of a breach of Article 3. The fact that a deceased’s body is treated in a manner that causes relatives mental suffering is not of itself a contravention of Article 3. The Court’s discussion of its previous case law suggests that substantially greater legal or moral culpability – such as the intentional infliction of mental suffering on relatives; or the direct involvement of security forces in killing or disappearing the deceased – is required to ground an Article 3 claim.

On the Article 8 issue, the Court held that the ban on participation in the funeral and on disclosing the location of the grave permanently cut the link between the applicants and the

deceased's remains in a manner that constituted a severe interference with their Article 8 rights. The Court accepted, however, that the authorities were entitled, in principle, to impose restrictions on the rights in this instance given the activities of the deceased and, in particular, the risk of disturbances or other unlawful actions during or after the burials. Nonetheless, the automatic nature of the measures was a disproportionate breach of Article 8 because it failed to give any consideration to individual situations or to the possibility of less intrusive alternative means.

In light of this decision, the question arises whether relatives of those interred in Tuam could contend that their rights pursuant to Article 3 ECHR have been violated. Whether any such claim would be successful would depend on the specific set of facts prevailing in each individual case as a minimum level of severity must be achieved.

## **2.11 Obligation to collect the bodies of the deceased**

In light of the abovementioned discussion concerning the express and inherent rights pursuant to the Convention, the question arises as to whether there exists an obligation on States to collect the bodies of the deceased. The issue was considered by the Last Rights Project, in *The Dead, the Missing and the Bereaved at Europe's International Borders – Proposal for a Statement of the International Legal Obligations of States* (May 2017).<sup>66</sup> While this work concerns refugees and migrants who die or go missing at international land and sea borders, the principles discussed therein may be relevant to the issue under review. The Last Rights Project notes that while there is a substantial body of legal principles and rules in both customary and treaty law that apply regarding the treatment of the dead in the context of armed conflict, the position is less clear in respect of the treatment of the dead in peacetime contexts. To address this lacuna, it recommends that the principles established in international humanitarian law in relation to armed conflict can serve as a guide with regard to the treatment of the dead in some peacetime situations.

With regard to the collection of the bodies of deceased persons, in cases of armed conflict, international humanitarian law contains an express obligation to collect the bodies of the deceased. This is set out in Article 15 of the Geneva Convention, which provides:

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<sup>66</sup> Lastrights.net.

At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.<sup>67</sup>

Similarly, Article 8 of the Additional Protocol II provides that “...whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay ... to search for the dead, prevent their being despoiled, and decently dispose of them.”<sup>68</sup>

While there does not appear to be express reference in the UDHR or the ECHR stating that there is an express obligation on States to collect the bodies of the dead, it is arguable that the protection of the other human rights obligations discussed above – to investigate the cause of death, to return the remains to family members, to know the fate of one’s relative – necessarily require such collection. In reality, the failure of a State to ensure the collection of bodies of the deceased may prevent it from complying with the positive obligations set out in Articles 2, 3 and 8 ECHR and may constitute an interference with the Convention rights of the family members concerned.

This positive duty to collect remains is not absolute, and the usual limitations apply. In this vein, akin to that set out in the Geneva Convention where States are required to take all possible measures to search for the dead, in collecting the dead in peacetime circumstances, States may be required to take all reasonable measures to discharge this duty. This would prevent a State from being at fault in circumstances where recovery is simply not possible – for instance, where bodies are lost at sea or where, such as is the case with regard to the remains at Tuam, it may simply be impossible to retrieve all of the remains due to the limitations of forensic excavation.<sup>69</sup>

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<sup>67</sup> Article 15, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention 1), adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 85.

<sup>68</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 1125 UNTS 609, Article 8.

<sup>69</sup> See Expert Technical Group Report.

## Summary

In order to ensure the effective vindication of the abovementioned ECHR rights, there appears to be an inferred duty on the Irish State to collect, as far as reasonably possible, the remains of those interred at Tuam. The Tuam site, according to the Expert Technical Report, will test the boundaries of forensic investigation in every regard. The Expert Technical Group, due to the varied nature of the complexities at the site in Tuam, notes the limitations of the forensic possibilities involved in excavation and examination on the site. It states that given that the site holds a group of collectively interred individuals, “it may only ever be possible to provide collective answers”, and the potential to identify individuals interred there poses many challenges. These limitations therefore must be borne in mind and where the State fails to collect remains for these reasons, it is unlikely to fall foul of its duty where it takes all reasonable steps to investigate the possibility of retrieval and, if proportionate and justified, undertakes reasonable measures to retrieve the bodies in question.

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### **3. INTERNATIONAL HUMAN RIGHTS LAW: THE UN FRAMEWORKS**

International human rights law also warrants consideration. The Universal Declaration of Human Rights (UDHR) is crucial in this regard. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations. It sets out the fundamental human rights that are to be universally protected. These are enforced through supervision and reporting by expert bodies, some of which may also deal with individual complaints. The state has an obligation to respect, protect and fulfil the rights guaranteed in these instruments pursuant to section 1 and as a member of the United Nations since 1955, Ireland is expected to uphold its principles, and to protect the rights set out in international treaties through its laws, policies and practices.

The right to life and the rights of the family are emphasised in the UDHR. Article 3 provides that everyone has the right to life, liberty and security of person. Article 8 states that; “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” The importance of the family unit is clear from Article 16 thereof, which recognises that the family is the natural and fundamental unit group of society and is entitled to protection by society and the State. The crucial rights capable of assertion and protection at European level therefore are also recognised within international law.

The Declaration contains a number of rights which are of relevance to the current review: Article 1 (equality and dignity); Article 2 (prohibition on sex discrimination); Article 4 (prohibition on slavery or servitude); Article 5 (prohibition on torture, or cruel, inhuman or degrading treatment or punishment); Article 6 (recognition as a person before the law); Article 7 (equality before the law); Article 9 (prohibition on arbitrary arrest, detention or exile); Article 10 (fair hearing); and Article 25 (minimum standard of living).

Within international human rights law, children are recognised as a specific group requiring particular special protection. In this regard, in 1989, the UN Convention on the Rights of the

Child (UNCRC) was adopted by the UN General Assembly and in 1990, it entered into force. All State parties, including Ireland which ratified the UNCRC in 1992, have duties under the Convention to ensure that their laws, policies and procedures promote the full enjoyment of all the rights contained therein for all children. Article 4 UNCRC provides that States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. Article 6 protects the right to life of every child.

Article 7 provides as follows:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8 protects the child's identity:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

The duty upon States to ensure the accurate identification of children demands the effective collection and preservation of essential data on children, and to collate all data. This necessarily would include the registration of the death of a child and collating the date of children who have died. As the site in Tuam contains a significant quantity of juvenile human remains, the provisions of the UNCRC may be of relevance.

### ***International Covenant on Civil and Political Rights (ICCPR)***

Ireland is a signatory, and since 1989 a State Party<sup>70</sup> to the ICCPR. As Ireland has ratified the Covenant, it can be held accountable for failures to realise the rights contained therein before international human rights fora and courts.

A number of Covenant Rights are relevant to this review: Article 3 (equal rights of men and women); Article 6 (right to life); Article 7 (prohibition on torture or cruel, inhuman or degrading treatment or punishment); Article 8 (prohibition on slavery); Article 9 (security and liberty); Article 10 (human dignity); Article 11 (prohibition on imprisonment “merely on the ground of inability to fulfil a contractual obligation”); Article 16 (recognition as a person before the law); Article 24 (child’s rights including to registration at birth, and nationality); Article 26 (equality before the law).

### ***International Covenant on Economic, Social and Cultural Rights (ICESCR)***

Ireland is a signatory, and since 1989 a State Party<sup>71</sup> to the ICESCR. As Ireland has ratified the Covenant, it can be held accountable for failures to realise the rights contained therein before international human rights fora and courts.

A number of Covenant Rights are relevant to this review: Article 7 (just and favourable conditions of work); Article 10 (rights of mothers during pregnancy and birth); Article 11 (adequate standard of living); Article 12 (right to health); Article 13 (right to education); and Article 15 (right to participate in cultural life).

### ***Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)***

Ireland is a signatory, and since 1985 a State Party<sup>72</sup> to the CEDAW. As Ireland has ratified the Convention, it can be held accountable for failures to realise the rights contained therein before international human rights fora and courts.

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<sup>70</sup> Having ratified the ICCPR.

<sup>71</sup> Having ratified the ICESCR.

<sup>72</sup> Having ratified the CEDAW.



A number of CEDAW rights are relevant to this review: Articles 1, 2, 7, 8, 9, 10, 11, 12 and 13. Other CEDAW rights of significance include: Article 16 (prohibition on discrimination against women); Article 3 (full advancement of women); Article 5 (elimination of prejudice; common responsibility of men and women in the upbringing and development of their children); Article 6 (prohibition on trafficking of women); and Article 14 (rights of rural women).

### **Enforced/Involuntary Disappearance**

Laws prohibiting enforced/involuntary disappearance form part of both customary international humanitarian law,<sup>73</sup> and the UN framework of international human rights law.<sup>74</sup> When part of a widespread or systemic programme, enforced disappearance is a crime against humanity.<sup>75</sup>

Article 2 of the UN's 2006 International Convention for the Protection of All Persons from Enforced Disappearance 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.<sup>76</sup>

Amnesty international states:

[T]he human story is simple: People literally disappear, from their loved ones and their community, when state officials (or someone acting with state consent) grab them from the street or from their homes and then deny it, or refuse to say where they are. It is a crime under international law.<sup>77</sup>

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<sup>73</sup> See Rule 98 “Enforced Disappearance”, in the *International Committee of the Red Cross, Customary International Humanitarian Law: Rules* (Cambridge 2005).

<sup>74</sup> The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) (2005) <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>.

<sup>75</sup> Rome Statute of the International Criminal Court (1998), Article 7(1)(i) [http://legal.un.org/icc/statute/99\\_corr/cstatute.htm](http://legal.un.org/icc/statute/99_corr/cstatute.htm). It is to be noted that Ireland is a State Party to the Rome Statute, having ratified the instrument in 2002.

<sup>76</sup> <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>.

<sup>77</sup> <https://www.amnesty.org/en/what-we-do/disappearances/>.

The crime of systemic enforced disappearance has its roots in the Nazi regime in Germany during the 1940s, and re-emerged into the public consciousness during the era of dictatorships in South American States during the 1960 to 1980s,<sup>78</sup> in international and national wars, and in other repressive regimes throughout the latter half of the 20th century. Enforced disappearances were first codified as a crime in international human rights law in the Vienna Declaration and Programme of Action in 1993,<sup>79</sup> and then again in the Rome Statute in 1998.

Enforced disappearances, involving coercive detaining of individuals or groups, is a legally complex phenomena involving a possible multitude of distinct human rights violations, including the right to security and personal dignity; not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; to humane conditions of detention; to legal representation; to a fair trial; to a family life; and even the right to life, when the abducted person is killed.<sup>80</sup> Enforced disappearances and the prohibition thereof are therefore an integral legal mechanism for preventing and holding to account breaches of a State's obligations under the ICCPR and the ICESCR. The UN's Human Rights Committee, the principal treaty body tasked with overseeing the implementation and adherence to the ICCPR, has noted that enforced disappearances can violate Article 6 (right to life), Article 7 (prohibition on "torture or other cruel, inhuman or degrading treatment or punishment"), Article 9 (liberty and security), and Article 10 (inherent human dignity) of the Convention.<sup>81</sup>

The 2006 Convention, to which Ireland is a signatory, sets out detailed obligations on States to investigate alleged disappearances, and make appropriate accountability mechanisms (criminal and civil) a part of the domestic legal order.

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<sup>78</sup> Vitkauskaitė-Meurice and Žilinskas, "The Concept of Enforced Disappearances in International Law" (2010) 2 *Jurisprudence* 197, 198.

<sup>79</sup> Principle 62 states:

The World Conference on Human Rights, welcoming the adoption by the General Assembly of the Declaration on the Protection of All Persons from Enforced Disappearance, calls upon all States to take effective legislative, administrative, judicial or other measures to prevent, terminate and punish acts of enforced disappearance. The World Conference on Human Rights reaffirms that it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators.

See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>.

<sup>80</sup> Boot and Hall, "Crimes against Humanity", in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (2nd ed, Bloomsbury 2008).

<sup>81</sup> See Communication No. 950/2000, *Sarma v Sri Lanka*, Views adopted on 16 July 2003.

The UN's Human Rights Council (formerly the UN Commission on Human Rights) has, since 1980, established a Working Group on Enforced or Involuntary Disappearance, one of the primary tasks of which "is to assist families in determining the fate or whereabouts of their family members who are reportedly disappeared."<sup>82</sup> The Working Group also monitors State compliance with the UN's 1992 Declaration on the Protection of all Persons from Enforced Disappearances.

The Working Group's General Comment on the Right to the Truth in Relation to Enforced Disappearances states that the "right to truth" is now "an autonomous right at the international level, and through State practice at the national level",<sup>83</sup> having been previously recognised by the Working Group in its first report.<sup>84</sup>

The Working Group's General Comment also echoes Principle 2 of the *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*<sup>85</sup> in emphasising the preventive and educative function of the right to truth: by learning of and understanding past atrocities, States and societies can prepare to avoid their re-occurrence.<sup>86</sup>

In the same General Comment the Working Group stated, applying Article 13 of the 1992 Declaration, that the duty to continue an investigation is not time-limited, as the nature of enforced disappearance is also continuing. It emphasises:

the right of the relatives to know the truth of the fate and whereabouts of the disappeared persons is an absolute right, not subject to any limitation or derogation ... This absolute character also results from the fact that the enforced disappearance causes "anguish and sorrow" (5th preambular paragraph of the Declaration) to the family, a suffering that reaches the threshold of torture, as it also results from article 1§2 of the same Declaration that provides: 'Any act of enforced disappearance (...) constitutes a violation of the rules of international law guaranteeing, (...) the right not

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<sup>82</sup> <http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx>.

<sup>83</sup> The Working Group further state:

The existence of the right to the truth in international law is accepted by State practice consisting in both jurisprudential precedent and by the establishment of various truth seeking mechanisms in the period following serious human rights crises, dictatorships or armed conflicts.

See [http://www.ohchr.org/Documents/Issues/Disappearances/GC-right\\_to\\_the\\_truth.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf). See also *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91), paragraph 21.

<sup>84</sup> E/CN.4/1435, 22 January 1981, § 187.

<sup>85</sup> "The inalienable right to truth"

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>  
E/CN.4/2005/102/Add.1.

<sup>86</sup> "General Comment on the Right to the Truth in Relation to Enforced Disappearances"  
[http://www.ohchr.org/Documents/Issues/Disappearances/GC-right\\_to\\_the\\_truth.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf).

to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.<sup>87</sup>

On paragraph 6 of the General Comment, the Working Group deals with the question of DNA testing within the obligations of the State under the UN Declaration:

The remains of the person should be clearly and indisputably identified, including through DNA analysis. The State, or any other authority, should not undertake the process of identification of the remains, and should not dispose of those remains, without the full participation of the family and without fully informing the general public of such measures. States ought to take the necessary steps to use forensic expertise and scientific methods of identification to the maximum of its available resources, including through international assistance and cooperation.

Paragraph 7 of the General Comment states:

The right to know the truth about the fate and the whereabouts also applies to the cases of children who were born during their mothers' enforced disappearances, and who were thereafter illegally adopted. Article 20 of the Declaration provides that such acts of abduction, as well as the act of altering or suppressing documents attesting to their true identity, shall constitute an extremely serious offence, which shall be punished as such.

While this relates to situations of enforced and/or involuntary disappearances, arguably the mothers and children interred at the site at Tuam could be regarded as the victims of enforced disappearances and the principles set out above may be applicable.

### **The Right to Know/Right to Truth**

Originally part of international humanitarian law<sup>88, 89</sup> and later the international legal developments in the area of enforced/involuntary disappearance (emerging from the jurisprudence on the American Convention on Human Rights<sup>90</sup>), the right to know has evolved to include instances of “gross” or “systemic” human right abuses<sup>91</sup> outside of

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<sup>87</sup> Ibid., para 4.

<sup>88</sup> Laws of war.

<sup>89</sup> *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91), paragraph 5.

<sup>90</sup> Ibid., at paragraph 8; Case 10.488, *Ignacio Ellacuría et al v El Salvador* Report No 136/99 (1999).

<sup>91</sup> Both Article 5 of the International Convention for the Protection of All Persons from Enforced Disappearance, and the commentary on the Principle to combat impunity suggests that ‘massive or systematic violations’ is as defined in current international law (United Nations Commission on Human Rights, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, 18 February 2005, E/CN.4/2005/102, para 20).

wartime,<sup>92</sup> culminating in formal codification in Article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance.<sup>93</sup> Various states and national courts have also recognised the right to truth, either as an implied component of their domestic law in the aftermath of gross or systemic human rights abuses, or as part of international human rights law.<sup>94</sup> For example, the Courts of Argentina have found that in cases of enforced disappearances the right to the truth is based on the right to mourning (*derecho al duelo*<sup>95</sup>), and also to add to the State's systemic capacity to prevent future re-occurrence.

The 2006 Convention on Enforced Disappearance grants each victim “the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party must take appropriate measures in this regard.” “Victim” in this area of law, also covers the family of the victims, their representatives, and often includes the society or community at large.<sup>96</sup> The 2006 Convention codifies what is already implied in many international human rights instruments to which Ireland is a party.

The right of victims to know is also to be found in the 2006 Basic Principles,<sup>97</sup> with Principles 24 holding:

[V]ictims and their representatives should be entitled to seek and obtain information on the causes leading to their victimisation 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.

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<sup>92</sup> *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91), paragraph 8.

<sup>93</sup> Ireland has signed, but has yet to ratify the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>94</sup> *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91), paragraphs 21 and 23.

<sup>95</sup> See Agreement of 1 September 2003 of the National Chamber for Federal Criminal and Correctional Matters, Case *Suárez Mason*, Rol 450 and Case *Escuela Mecánica de la Armada*, Rol 761.

<sup>96</sup> Article 24(1) of the International Convention for the Protection of All Persons from Enforced Disappearance defines “victim” as “the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”

<sup>97</sup> *The Basic Principles - 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 General Assembly resolution 60/147 of 16 December 2005.

Klinker states the position as follows:

At its core ... a positive action is required by the state to undertake continued and systematic efforts to investigate the abuses and to gather the evidence in an attempt to answer questions about what happened, why it happened, to identify those responsible, directly and indirectly, and understand the patterns of abuse.<sup>98</sup>

The UN's Commission on Human Rights' (since 2006 the UN Human Rights Council) *Report of the Independent Expert to Update the Set of Principles to Combat Impunity* sets out significant detail on the right to know: containing 17 distinct Principles.<sup>99</sup> These include: "the inalienable right to truth" (Principle 2); "the duty to preserve memory" (Principle 3); "the victim's right to know" (Principle 4). Similar to other literatures on the right to know in the context of abuses of international human rights,<sup>100</sup> these Principles emphasise the central role of commissions of investigation and truth commissions in achieving the right to know (Principles 6-13), along with detailed obligations on states to preserve evidence and archives (Principles 14-18). This approach to the right to truth highlights its value in avoiding future reoccurrence of the same human rights abuses, by holding perpetrators to account and challenging impunity in human rights violations.

The UN High Commissioner for Human Rights' 2006 wide-ranging *Study on the right to truth* found that the right is part of the State's broader duty to protect and guarantee human rights.<sup>101</sup>

## **Birth and Death Registration and International Human Rights**

### ***Birth Registrations***

The UN High Commissioner for Human Rights, in a 2014 report to the UN Human Rights Council entitled *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law*, emphasised the right to a birth registration is a fundamental human

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<sup>98</sup> Klinker, "Towards Mass Grave Protection Guidelines" (2017) 3(1) *Human Remains and Violence* 52, 57.

<sup>99</sup> Report of Diane Orentlicher, independent expert to update the set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity (February 2005) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>.

<sup>100</sup> *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91), paragraph 13-15.

<sup>101</sup> *Study on the right to the truth - Report of the Office of the United Nations High Commissioner for Human Rights* (E/CN.4/2006/91), paragraph 45.

right.<sup>102</sup> The report notes how the right is recognised in Article 24 of the ICCPR, as well as Article 7 of the Convention on the Rights of the Child. It argues that the right to birth registration is instrumentally beneficial/essential to the realisation of other fundamental human rights in the civil and socio-economic domains. The report states as follows:

Birth registration is the continuous, permanent and universal recording within the civil registry of the occurrence and characteristics of birth, in accordance with the national legal requirements. It establishes the existence of a person under law, and lays the foundation for safeguarding civil, political, economic, social and cultural rights. As such, it is a fundamental means of protecting the human rights of the individual.<sup>103</sup>

There does not appear to be an express right to a birth certificate under the right to birth registration, though Gerber *et al*, writing on the experience of indigenous Australians, argue that such a right is implicit in the right to birth registration given its similarly central role in realising other civil, political and socio-economic rights.<sup>104</sup>

### ***Death Registrations***

There does not appear to be an equivalent right of families to death registration, though it may be implicit within the broader array of family rights under international humanitarian and human rights law discussed above. Drawing on numerous rights guaranteeing state recognition and registration of major life events<sup>105</sup> in conventions such as the ICCPR, Powell notes the fundamental relationship between human rights and the registration of “vital events” in general – which would include death.<sup>106</sup> He states:

[T]he existence of such a right [to death registration] is implied in Article 12(2)(a) of the International Covenant on Economic, Social and Cultural Rights wherein it is stated that, to achieve the full realization of the right to health, the States Parties to the Covenant must make ‘provision for the reduction . . . of infant mortality.’ . . . [T]he death register can provide the number of infant deaths (deaths under one year of age) – that is the basis for the measurement of infant mortality. Without this number, provided by a death register, and the number of live births from the register of births, it would not be feasible to compute the infant mortality rate over time and for various

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<sup>102</sup> <http://www.ohchr.org/EN/Issues/Children/BirthRegistration/Pages/ReportOnBirthRegistration.aspx>.

<sup>103</sup> *Ibid.*, at paragraph 4.

<sup>104</sup> Gerber, Gargett and Castan, “Does the Right to Birth Registration include the Right to a Birth Certificate?” (2011) 29(4) *Netherlands Quarterly of Human Rights* 434.

<sup>105</sup> See <https://unstats.un.org/unsd/vitalstatkb/KnowledgebaseArticle50302.aspx>.

<sup>106</sup> Nora Powell, *Human Rights and the Registration of Vital Events* (International Institute for Vital Registration and Statistics, March 1980) available at [https://www.cdc.gov/nchs/data/isp/007\\_human\\_rights\\_and\\_registration\\_of\\_vital\\_events.pdf](https://www.cdc.gov/nchs/data/isp/007_human_rights_and_registration_of_vital_events.pdf).

population groups. Hence, it would not be possible to monitor the trend of the rate and to plan for and assess its reduction.



#### **4. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: TREATMENT OF THE DEAD AND THE RIGHT TO KNOW**

Some of the strongest legal obligations on States with respect to treatment of human remains are based on customary international law, specifically the laws of war codified in the Geneva Conventions (1929 and 1949), of which Ireland is a signatory, and has ratified.

The main provisions, as set out in codified form in the International Committee of the Red Cross, are Rule 112 (Search for and collection of the dead); Rule 113 (Treatment of the Dead); Rule 115 (Disposal of the Dead); and Rule 116 (Accounting for the Dead).

The International Committee of the Red Cross (ICRC) has also concluded that the right to truth in relation to the treatment of war dead is a norm of customary international law applicable in both international and non-international armed conflict, according to which “each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.<sup>107</sup> The Secretary General of the UN has also recognised the right to truth as being a customary norm of international humanitarian law.<sup>108</sup>

Applying Article 130 of the Fourth Geneva Convention (“honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, properly maintained, and marked in such a way that they can always be recognized”) in 2002,<sup>109</sup> the Israeli High Court upheld “that burial of the deceased must be

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<sup>107</sup> Rule 117 in ICRC, *Customary International Humanitarian Law, Volume I, Rules*, (Cambridge 2005), 421. See also, *Practice Relating to Rule 117. Accounting for Missing Persons*, Section D. Right of the families to know the fate of their relatives [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule117\\_section](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule117_section).

<sup>108</sup> Secretary General’s bulletin, “Observance by United Nations Forces of international humanitarian law” (ST/SGB/1999/13).

<sup>109</sup> *Jenin (Mortal Remains) Case* [2002], Israel, High Court of Justice.

performed with respect, in a timely manner and according to religious custom, and if possible, the remains must be returned to the families of the deceased.”<sup>110</sup>

Israeli courts have applied these customary international law norms on a number of occasions, emphasising the centrality of human dignity to such legal norms, even after death:

Human dignity is not only a matter for the period of the life of the individual, but also relates to the time after the person passes away ... This fundamental value also includes respect for the dead, respect for the family of the deceased, and even respect for the public.<sup>111</sup>

Former President of the Supreme Court of Israel similarly found:

Human dignity is not limited to the dignity of a living person. It also refers to dignity after death, and the dignity of his loved ones who preserve his memory in their hearts. This dignity is expressed, in part, by placing the gravestone, visiting the cemetery on memorial days and public ceremonies, and caring for the gravesite. This is the same relationship – at times rational and at times irrational – between the living and the dead, which develops the human being within us, and which gives expression to the yearnings of the soul. This is the ‘hand’ that the living extend to the dead. This is the external expression that reflects the internal relationship between the generations.<sup>112</sup>

In drawing on the foundational moral norm of human dignity, even in death, these international human rights law-based judgments echo core principles of the UDHR. Rosenblatt similarly finds human dignity, and its central status within the UDHR, as the core normative basis of his elucidation of the “human rights of the dead”.<sup>113</sup>

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<sup>110</sup>“Special Focus: Holding the Bodies of Deceased Palestinians by Israel” <http://www.alhaq.org/component/content/article/85-field-updates-201...pecial-focus-holding-the-bodies-of-deceased-palestinians-by-israel> (visited 18 February 2018).

<sup>111</sup> Justice Menachem Alon, Civ App 506/88, *Yael Sheffer v State of Israel*, *Piskei Din* 38(1) 87, 102, 103.

<sup>112</sup> Iv App 294/91, *Hevra Kadisha v Kastenbaum*, *Piskei Din* 46(2) 464, 523.

<sup>113</sup> Rosenblatt, “International Forensic Investigations and the Human Rights of the Dead” (2010) 32(4) *Human Rights Quarterly* 921.

## *Mass Graves*

Within the broader literature around treatment of the dead, and the distinct legal sphere of Forced/Involuntary Disappeared Persons (see above), there is an increasing concern over the legal status of mass graves in international law. More specifically, there are calls for discrete protections for mass graves, in the form of State obligations to preserve and protect such sites, in order to both realise traditional customary international human rights obligations of States with respect to war dead, but also to preserve evidence for possible future prosecution of individuals under domestic or international criminal law.

While there is no legal definition of ‘mass grave’, Klinker and Kather describe such sites as “a site containing a multitude of human remains; a site of harrowing human loss, suffering and unimaginable acts of cruelty.”<sup>114</sup> Those authors also suggest that legal protection for mass graves is essential for the “realisation of the right to truth, effective remedies and reparation for families of the deceased”, as required under the UN’s *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*<sup>115</sup> (‘Basic Principles’), adding that such protections would “contribute to ensuring transparency, and ending impunity.”

## *Genocide*

It has been suggested that, given the scale of the Tuam site and the likelihood that there were common social and religious characteristics between the deceased, issues relating to the crime of genocide may arise. As a matter of law, however, it seems highly unlikely that criminal proceedings for genocide could be brought in respect of the Tuam site. Leaving aside the question of whether there may or may not be evidence which would establish a factual basis for a charge of genocide, there would be significant legal obstacles to such a charge.

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<sup>114</sup> Klinker and Kather, “The Legal Protection of Mass Graves”, *Blog of the European Journal of International Law* <https://www.ejiltalk.org/the-legal-protection-of-mass-graves/> (visited 17 February 2018).

<sup>115</sup> Adopted and Proclaimed by General Assembly Resolution 60/147 of 16 December 2005 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

Section 2 (1) of the Genocide Act 1973 establishes the crime of genocide in Irish law. The definition of genocide is that provided by Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The definition makes clear that there are a number of elements which must be established before genocide legally arises. In particular, it should be emphasised that the fact that there has been mass murder or abuse of a large group of persons does not constitute genocide.

First of all, one of the acts identified in subsection (a) to (e) must have occurred.

Secondly, that act must have been carried out with the intention of destroying a group. In other words, the purpose of the acts must have been to destroy a particular group. It should be noted that the intention need not be to destroy the whole group. It is sufficient if the intention is to destroy part of a group, although it has generally been accepted that it must be a substantial part of the protected group.<sup>116</sup>

Thirdly, the group against whom the acts are directed must fall within one of the four categories identified by the Convention: a national, ethnic, racial or religious group. Membership of a social or economic group does not come within the definition.

It is also important to note that these requirements are rigorously applied. The International Criminal Tribunal for the former Yugoslavia reiterated that:

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<sup>116</sup> International Law Commission: “[T]he crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group”. See also the ICTY Chamber decision in *Prosecutor v Jelusic* (Case no IT-95-10-T) (Trial Chamber judgment, 14 December 1999) that “Given the goal of the Convention to deal with mass crimes, it is widely acknowledged that the intention to destroy must target at least a substantial part of the group”.

The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements—the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part—guard against a danger that convictions for this crime will be imposed lightly.<sup>117</sup>

Given this strict approach, there is a significant doubt that a court would regard the acts in Tuam (if proven) as coming within the remainder of the definition. The ICJ observed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* that:

[G]enocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics.<sup>118</sup>

Whether a particular group comes within one of the aforementioned four categories is to be assessed on a case-by-case basis.<sup>119</sup> Both the objective characteristics of the group and the subjective view of the alleged perpetrators and group members are relevant. However, while it is likely the deceased at the former Mother and Baby Home in Tuam may have some of the protected characteristics in common (such as religion), this would not be sufficient to demonstrate that they were seen as a targeted religious group by either group members or alleged perpetrators, or that this characteristic (i.e., that the deceased were Catholic) was the purpose for the targeting of the deceased. This would also mean that the necessary intention to target and destroy the protected group was lacking.

Furthermore, while it might be argued that these criteria could be given a different and more expansive interpretation in the modern era, any application of those criteria to the events at Tuam would likely constitute retrospective penal conduct. This is prohibited by Article 15.5.1<sup>o</sup> of the Constitution and by Article 7 of the ECHR. There is an exception to the principle under Article 7 for conduct which was recognised as criminal under the general principles of the law. However, an attempt to prosecute persons under a more expansive

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<sup>117</sup> *Prosecutor v Krstic*, (Case no IT-98-33-A) (ICTY Appeals Chamber judgment, 19 April 2004).

<sup>118</sup> [2007] ICJ Rep 43.

<sup>119</sup> *Prosecutor v Rutaganda* (Case no ICTR-96-3-T) (Trial Chamber of the International Tribunal for Rwanda, 6 December 1999).

definition of genocide for acts committed in 1953 was found by a majority of the Grand Chamber to violate Article 7 ECHR in *Vasiliauskas v Lithuania*.<sup>120</sup>

### **Status of International Obligations**

It is important to bear in mind that the obligations imposed on the State by international agreements occur and are enforceable, if at all, under international law only. Article 29.6 of the Constitution provides that:

No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.

The Supreme Court explained in *McD v L*<sup>121</sup> that this means that:

The obligations undertaken by a government which has ratified the Convention arise under international law and not national law. Accordingly those obligations reside at international level and in principle the state is not answerable before the national courts for a breach of an obligation under the Convention unless express provision is duly made in national legislation for such liability.<sup>122</sup>

This means that even if it could be factually established that a breach of obligations under these international agreements has occurred in Tuam, this would not provide a right of action under Irish law or before an Irish court in respect of that breach.

### **Summary**

The international human rights norms may not be directly relevant to this review, as Ireland has been quite slow to ratify the relevant instruments. The older humanitarian law is also not directly legally applicable, as they are legal norms that are active only when death occurred in, and as a result of, wartime atrocities, although the jurisprudence on dignity and State custom and practice may shed light on the requirement of the Irish constitution in this regard discussed later in this report.

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<sup>120</sup> Application no. 35343/05 (October 20, 2015).

<sup>121</sup> [2010] 2 IR 199.

<sup>122</sup> At p. 247.

Much of the material included in these last two sections are either human rights in times of war (customary international humanitarian rights), or instances of ‘gross’ or ‘systemic’ violations of human rights (under the various human rights frameworks of the United Nations). It is therefore subject to a number of qualifications.

Firstly, the UDHR is generally regarded as not legally binding.

The two International Covenants (the ICCPR and ICESCR) were not in existence until 1966, and Ireland did not ratify both until 1989. Ratification is key to legal effect in a particular jurisdiction. It is not clear therefore that there were any legally recognisable breaches of human rights in the 1920 to 1960 period. Moreover, it is not clear whether the right to know – which seems to be the legally strongest right – can be based on breaches of human rights before the state ratified the relevant instruments (as it cannot be stated at the time they were breaches).

In summary, if it was not a breach at the time, it is difficult to legally determine it so retrospectively. Therefore, there may be very limited grounds for the right to know which is parasitic upon the basic rights in the UN Charter (the conceptual instrument combining the UN Declaration and both Covenants together).

If inhuman or degrading treatment and violations of privacy can be characterised as continuing, it may constitute a violation of the UNCAT, ICCPR or CEDAW.

The most relevant jurisprudence on this matter relates to Enforced Disappearance. This is the most fruitful area of international human rights law to review, as it has an express right to truth/right of victims and their families to know. It is also closely tied to the ICCPR which, as stated above, Ireland ratified in 1989. It seems there may not be a requirement that the ICCPR was ratified by the member state when the ‘disappearances’ took place. There are interesting parallels between the experience in South America, where much of this law emerged, and the experience of the institutional abuse of women and children in settings such as the mother and baby homes. It should be noted, however, that Ireland has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance, although it codifies what is already implied in many international human rights instruments to which Ireland is a party.

## 5. THE IRISH CONSTITUTION

In addressing the issues to be considered in this report, regard must be had to the rights and obligations arising under the Constitution of Ireland as well as the European Convention on Human Rights. While the Constitution is the superior legal instrument in domestic law, the Convention and case law of the European Court of Human Rights form part of Irish law at a sub-constitutional level in the European Convention on Human Rights Act 2003. Both the Constitution and Convention are therefore relevant to this report.

As can be seen throughout the jurisprudence of the ECtHR (discussed in section 2 of this report), the rights that have been held to exist concerning the circumstances of a relative's death and burial stem from Article 8 of the European Convention on Human Rights (ECHR) concerning privacy and the family. The duty upon States to investigate deaths arises so as to vindicate the right to life protected in Article 2 ECHR. In addition, the provision of information to relatives of the 'disappeared' is a matter engaging Article 3 of the ECHR. Irish authorities are required to carry out their functions in a manner compatible with the Convention. The State is also obliged to ensure that it does not violate any Constitutional provisions or rights of its citizens in performing its duties.

The Constitution of Ireland, within Articles 40 to 44, contains the list of fundamental rights to which all citizens of Ireland are entitled. The right to life, the family and children's rights are all protected explicitly therein. In addition to those rights which are expressly protected, the Courts have recognised that certain other rights are protected by the Constitution, and these are known as unenumerated rights.<sup>123</sup> Furthermore, the right to privacy has been inferred by the Supreme Court as also deserving of protection under the Constitution. Article 40.3 provides:

The state guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

The state shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

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<sup>123</sup> *Ryan v AG* [1965] IR 294.



Pursuant to Article 41.1.1<sup>o</sup>, the state recognises the family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. The Supreme Court reiterated in *HAH v SAA and ors*<sup>124</sup> and *M (Immigration-Rights of Unborn) v Minister for Justice and Equality & ors*<sup>125</sup> in the last 12 months that the family remains the married family for Article 41 purposes. While there is some indication in *M* that the Supreme Court might revisit this issue, I do not believe that Article 41 would apply to the issues engaged by this report.

Article 42A.1 recognises and affirms the natural and imprescriptible rights of all children. This requires that the State shall, as far as practicable, by its laws protect and vindicate those rights. A question arises as to whether this provision applies retrospectively and whether the deceased the subject of this report constitute children within the meaning of Article 42A. The above recent Supreme Court judgment in *M* does not appear to support Article 42A applying retrospectively in the present context.

A centrally important concept in the Irish Constitution is the dignity of the individual. The Irish Constitution is the oldest subsisting constitution to specifically refer to dignity. It provides in its preamble:

We, the people of Éire ... seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured ... [d]o hereby adopt, enact and give to ourselves this Constitution.

This makes it clear that one of the primary goals towards which the enactment of the Irish Constitution is directed is "... the assurance of the dignity of the individual." The Irish courts, in their interpretation of the various provisions of the Constitution, are obliged to interpret this concept harmoniously with the content of the Preamble and in particular, the aim of assuring the dignity of all individuals. The concept of dignity, however, has not yet been fully developed in Irish Constitutional case law. It is important to consider the role of dignity in any consideration of the constitutional rights that may be raised within the decision to be taken at Tuam. Undeniably, an argument can be made that those interred in Tuam did not have their right to dignity upheld in the circumstances of their burial.

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<sup>124</sup> [2017] IESC 40.

<sup>125</sup> [2018] IESC 14.

For present purposes the case of *Fleming v Ireland and ors*<sup>126</sup> is of particular relevance as it is the most significant recent Supreme Court ruling where the claim was based on the right to dignity as well as the rights to autonomy and self-determination. The Supreme Court acknowledged that dignity was a core constitutional value, and that its application in particular circumstances would depend on a concrete analysis of the particular facts in question. The Court observed:

It is undoubted that the Constitution recognises and respects th[e] general values [of autonomy, self-determination and dignity] in the rights protected by it. It does not follow, and it is not claimed, however, that every law which impinges on the life of individuals is even *prima facie* inconsistent with the Constitution. Whether therefore values of autonomy, self-determination and dignity, as they find expression in the rights guaranteed by the Constitution, provide constitutional protection for the performance of specific acts depends on a concrete analysis of the impact of any law which is impugned in a particular case on the life of the individual, and a careful consideration of the provisions of the Constitution and the values it protects in the rights it guarantees.<sup>127</sup>

Ultimately, the Court concluded in *Fleming* that dignity did not provide support for the existence of a constitutional right to be assisted in suicide, noting:

Thus, insofar as the Constitution, in the rights it guarantees, embodies the values of autonomy and dignity and more importantly the rights in which they find expression, it does not extend to a right of assisted suicide. Accordingly the court concludes that there is no constitutional right which the State, including the courts, must protect and vindicate, either to commit suicide, or to arrange for the termination of one's life at a time of one's choosing.<sup>128</sup>

It is clear, therefore, that dignity, whether framed as a constitutional right or as a constitutional value, does not provide support for a right to have death accelerated. That said, it is clear that dignity is highly relevant to the experience of death and dying.

In the earlier case of *Re a Ward of Court*<sup>129</sup> the Supreme Court considered the withdrawal of treatment from a woman who had been in an almost persistent vegetative state for 20 years. In finding that it was lawful for treatment to be withdrawn the Supreme Court found that the woman had a right to die a natural death, and for a majority of the Court this right was

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<sup>126</sup> [2013] IESC 19.

<sup>127</sup> [2013] IESC 19 at para. 110.

<sup>128</sup> [2013] IESC 19 at para. 114.

<sup>129</sup> [1996] 2 IR 79.

founded, in part, on the right to dignity. Denham J found that dignity was a right protected by the Constitution, and that the woman had a right to dignity in life and death. This right supported the Court in making an order allowing treatment be withdrawn. Therefore, the woman was allowed to die naturally in the care of her family. The right to dignity in life and in death is potentially of significance in the context of the Tuam Mother and Baby Home. While the circumstances of the deaths are unknown, the conditions of burial suggest that there may have been an absence of dignity in the manner that the bodies were treated after death.

Subsequent case law has confirmed that as well as protecting the rights of living family members of the deceased, the Constitution may protect certain rights of deceased persons, and in particular the right to dignity. A relevant and instructive case is *PP v HSE*.<sup>130</sup> This case concerned a pregnant woman who had been diagnosed as clinically dead, while the foetus still had a heartbeat. The question before the court was whether life support could be withdrawn in such circumstances. It was suggested that the woman's rights were not engaged due to her having passed away. The High Court rejected this suggestion and commented:

This does not mean that the Court discounts or disregards the mother's right to retain in death her dignity with proper respect for her autonomy with due regard to the grief and sorrow of her loved ones and their wishes. Such an approach has been the hallmark of civilised societies from the dawn of time. It is a deeply ingrained part of our humanity and may be seen as necessary both for those who have died and also for the sake of those who remain living and who must go on. The Court therefore is unimpressed with any suggestion that considerations of the dignity of the mother are not engaged once she has passed away.<sup>131</sup>

This passage confirms the importance of dignity under the Constitution and, in particular, the importance attached to the circumstances associated with a person's death. Clearly, this is of potential significance in the Tuam context. It raises the question as to whether there was a failure to take account of considerations of the dignity of the deceased children in the circumstances of their burial; and whether, if so, this would give rise to a breach of the Constitution? Applying the reasoning of the cited passage in *PP v HSE*, there is an argument that constitutional considerations of dignity may have continued to be engaged after the

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<sup>130</sup> [2014] IEHC 622.

<sup>131</sup> What the decision records is "her right to retain her dignity in death" was outweighed by the interests of the unborn. The case focused on allowing her to die with dignity (which makes it very similar to the *Ward of Court* case).

deceased children had passed away. If that is the case, the questions then raised include how, to what acts and for what period of time, those considerations continued to apply. As the decision in *Fleming* indicates, there may also be a distinct question as to whether – assuming considerations of dignity did apply to the burial and may continue to apply thereafter – the circumstances give rise to an enforceable constitutional right or claim, whether on the part of the deceased or of other persons.

On this last question, Irish law recognises a cause of action for breach of constitutional rights, insofar as the right breached is not vindicated by other legal mechanisms.<sup>132</sup> Importantly, where a person is incapable of asserting a right on his/her own behalf, the Irish courts have recognised that the right can be asserted by another appropriate person.<sup>133</sup> As such, if this is a breach of constitutional rights and is not addressed by the law of torts (discussed below), a question arises as to whether there could potentially be an action in respect of a breach of constitutional rights, which would be actionable at the suit of the families of the deceased, or appropriate other parties, on behalf of the deceased.

While the decision of the Supreme Court in *Fleming* confirms that the values of autonomy and dignity are not absolute, the analysis in *Ward of Court* indicates that the right to life and the related constitutional commitment to dignity extend to the manner and process of dying. Moreover, the High Court decision in *PP v HSE* suggests that considerations of dignity may be capable of applying after the point of death.

The capacity of rights to be asserted on the part of the deceased could be a challenge in an Irish context. The recent Article 40.3.3<sup>o</sup> Supreme Court decision in *M* places considerable emphasis on the inability of the unborn to invoke constitutional rights because it has not been born and is therefore not a rights-holder. The corollary of the concept of rights-holder that emerges in that judgment (and that is consistent with some judicial decisions in recent cases about whether non-citizens are necessarily rights-holders) might be that the deceased are not rights-holders for constitutional purposes. This would probably place the deceased in a position of being entitled to respect, but not to have specific rights under the Constitution invoked on their behalf.

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<sup>132</sup> *Meskeil v C oras Iompair  ireann* [1973] IR 121, *Hanrahan v Merck Sharpe and Dohme (Ireland) Ltd.* [1988] ILRM 629.

<sup>133</sup> *SPUC v Coogan (No.1)* [1989] 1 IR 734. The Society for the Protection of Unborn Life was entitled to litigate to protect the right to life of the unborn.

The rights that could be invoked to challenge any prosecutions brought include the right to a trial within a reasonable time. The courts may be reluctant to require the State to take steps if those steps are unlikely to produce any practical benefit.

The report of the Expert Technical Group also raises significant practical concerns about the results that would be obtained from any exhumation or retrieval. The obligations imposed on the State by the Constitution are to defend and vindicate the personal rights of the citizen “as far as practicable”. The decision in *PP v HSE* highlights the important point in this context that the Constitution does not require the taking of steps to promote or vindicate a constitutional value (in that case the right to life of the unborn) if those steps will not produce any practical benefit. This suggests that the views expressed in the expert report should be given weight in considering the steps to be taken in this matter.

It also should be stated that there may be a countervailing dignity interest in disturbing the burial site. That could also be a factor that a court would weigh in assessing the practical benefits of exhumation. If there are countervailing constitutional considerations which may incline against exhumation, the fact that exhumation may not produce any practical benefits may weaken any claim that it is constitutionally required.

Finally, there is a general judicial reluctance to litigate matters after several decades, even though attitudes may have changed to the practices in question. On a practical level, a major problem for a claimant in any litigation could be the apparent indication that these deaths were registered. This makes it much more difficult to argue that there was a lack of knowledge or concealment. There might be a separate issue about the circumstances of the burials although this might run into factual problems if the indication was that it was known in the local area about the burials.

## 6. STATUTE LAW

The law governing death and dead bodies is primarily a matter of common law rather than statute. However, the requirements concerning the registration of deaths have long been regulated by statute. At the relevant time this was governed by the Births and Deaths Registration Acts (Ireland) 1863–1994 and relevant regulations.<sup>134</sup> These provisions imposed a general duty to report deaths to the registrar. The legislation specified an order of priority of persons on whom that duty was imposed. It fell, in the first instance, on the relatives of the deceased and then on persons present at the death, and then the occupier of the house in which the death took place.<sup>135</sup> House was expressly defined under the Act to include a public institution such as a hospital, and occupier to include the governor, keeper, master, matron, superintendent or other chief resident officer of every public institution.<sup>136</sup>

The following would appear to be the situation in respect of the registration of the deaths at the former Mother and Baby Home in Tuam:

- The 796 juvenile human remains were identified by local historian Catherine Corless by accessing the records of the General Register Office (GRO). They are all registered deaths but there are no records of the burial location of these deceased children.
- The inter-departmental group report, published in 2014, includes some of the data provided to the group by the GRO. This contains a complete list of the 796 names, ages, dates of death, and cause of death provided by the GRO.

It may be the case therefore that all deaths which took place at the Tuam Mother and Baby Home were duly notified to the registrar. There is no doubt, in any event, that a clear statutory duty existed in respect of such notification. Auditing the obligation to register a death should be considered in the context of Tuam. This might be undertaken by matching the death certificates to the number of juvenile human remains.

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<sup>134</sup> Registration of Births and Deaths (Ireland) Act 1863 (26 Vict., c.11); Births and Deaths Registration Act (Ireland) 1880 (43 & 44 Vict., c.13); Regulations for Registrars of Births and Deaths 1880; Regulations for Superintendent Registrars 1981; Vital Statistics and Births, Deaths and Marriages Registration Act 1952; Births, Deaths and Marriages Act 1972; Births, Deaths and Marriages Act 1987; The Stillbirths Registration Act, 1994. Registration of deaths is now governed by the Civil Registration Act 2004.

<sup>135</sup> Sections 10 to 15 of the Births and Deaths Registration Act (Ireland) 1880.

<sup>136</sup> Sections 38 of the Births and Deaths Registration Act (Ireland) 1880.

## 7. COMMON LAW

At common law, the body of law derived from judicial decisions rather than statute or constitutions, there has long since been recognition of the right to a decent burial, and of a range of rights and duties concerning dead bodies. The common law of England and Ireland was a unified body of law until 1922. After that, Irish common law diverged in various ways, although in certain respects the common law in each jurisdiction remained the same. Because of the nature of this topic, many of the key common law precedents date from before 1922, and thus the English cases can be taken as a strong indication of the common law in both England and Ireland. Precedents from other common law jurisdictions such as Australia, Canada and the United States, are also of assistance in stating what, precisely, the common law of Ireland is in this area, and what it was in the relevant period.

### *Burial of Bodies and the Wishes of the Deceased*

The leading English case, upon which the common law in Australia, Canada and New Zealand is also based, is *Williams v Williams*.<sup>137</sup> In this decision, the deceased had instructed the executors of his will to give his body to his friend so that she could dispose of him in accordance with a private letter he had given her, and to reimburse her for the costs of his disposal. In the letter, he had asked that his body be cremated, however his wife instead buried him. The friend later exhumed his body and had it cremated. She sought reimbursement for her expenses but the executors refused. In rejecting her claim, the Court held that; “It is quite clearly the law of this country that there can be no property in the dead body of a human being”. It necessarily follows from this that a person cannot leave binding instructions regarding the disposal of his or her body. Executors therefore do not own the body of the deceased which they are obliged to dispose of. They do, however, have a right to possess the body until it is properly buried.

On the issue of a person’s funeral and burial instructions, different approaches can be discerned in the different common law jurisdictions.<sup>138</sup> Courts in the United States have established a common law right for a person to be disposed of in accordance with his/her

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<sup>137</sup> (1882) 20 Ch D 659, 665.

<sup>138</sup> See Victoria Law Reform Commission, *Funeral and Burial Instructions: Consultation Paper*, 9 November 2015, Chapter 3: Funeral and burial instructions in the common law.

wishes. The deceased's funeral and burial instructions must be carried out unless there is a compelling reason not to do so. On the other hand, in England, Australia and Canada, a person with the right to dispose of a body may do so as he/she wishes, regardless of the deceased person's instructions.<sup>139</sup> New Zealand exhibits a more mixed approach, requiring the person with the right to dispose of the body to make an appropriate decision about the method and place of disposal after taking into account the deceased's wishes, the views of family members and the deceased's cultural or religious background.

### ***The Entitlement to Possess a Body for the Purpose of Burial***

It is generally accepted that a property right, in the usual sense, does not exist in a corpse. However, the common law does recognise a right of possession over the body for the purposes of burial,<sup>140</sup> an entitlement that is akin to a 'right to bury'. For the purpose of burial, persons such as the executors of the deceased's will, the surviving spouse or next of kin have the right to possess the corpse for the purposes of proper burial alone.

### ***The Common Law Duty to Bury***

Alongside the right to possess a body for the purposes of burial, the common law imposes duties in respect of burial. It appears that this duty to bury is a public duty, which attaches to various persons, depending on where the death occurs. In the case of *R v Stewart*,<sup>141</sup> the High Court of England and Wales considered the nature of the public duty to bury. The case concerned the body of a pauper who had died in a hospital in a parish. The hospital sought an order of mandamus<sup>142</sup> seeking to compel the overseers of the parish to remove the dead body and cause it to be buried. Lord Denman CJ commented:

Every person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, has a right to a Christian burial; and that implies the right to be carried from the place where his body lies to the parish cemetery.<sup>143</sup>

Importantly, the court went on to explore the nature of that burial, commenting:

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<sup>139</sup> *In re JS* [2016] EWHC 2859.

<sup>140</sup> *Sharp v Lush* (1879) 10 CH D 468.

<sup>141</sup> (1840) 113 ER 1007.

<sup>142</sup> This is a public law remedy whereby the court makes an order against a state body to take a particular action.

<sup>143</sup> (1840) 113 ER 1007 at 1009.



“That bodies should be carried in a state of naked exposure to the grave, would be a real offence to the living, as well as an apparent indignity to the dead.”<sup>144</sup> We have no doubt, therefore, that the common law casts on someone the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to leave no funds for that purpose.<sup>145</sup>

It is clear from this passage that the common law imposed a public duty to bury, and crucially, that duty was not simply a duty to put the body in a grave of some description. Rather, it incorporated an obligation to afford to the dead body decency and dignity in that burial. The Court went on to consider on whom that common law duty fell, and concluded that it fell on the individual “under whose roof a poor person dies.” This person was under a common law duty to carry the body decently covered to the place of burial, and could not keep the body unburied or do anything which prevented burial.<sup>146</sup>

This foundational case illustrates that the duty to bury is a public duty, which arises from the circumstances of a particular death. It is different, to some extent, from the criminal law rules discussed below, because it could be enforced through public law proceedings to enforce the duty, as were in issue in the case of *R v Stewart*. It appears, however, that a failure to bury – i.e. a breach of the duty to bury - is also a misdemeanour at common law.<sup>147</sup> In essence, the duty is a single common law duty which can be enforced through a range of types of public law proceedings.

Based on these precedents, it seems that the operators of the Mother and Baby Home at Tuam may have been under a common law duty to bury those who died under their roof. This duty to bury incorporates a duty to bury decently and with dignity, in a Christian burial.<sup>148</sup>

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<sup>144</sup> These words were quoted from an earlier judgment: Lord Stowell in *Gilbert v Buzzard* (2 Hagg. Consist. Rep. 333 to 344).

<sup>145</sup> (1840) 113 ER 1007 at 1009.

<sup>146</sup> On the facts, the court decided that the duty to bury lay on the hospital, not the parish.

<sup>147</sup> *R v Vann* (1851) 169 ER 523.

<sup>148</sup> It is probably the case that the modern duty to bury is not solely one of Christian burial but rather about burial reasonably appropriate to the deceased person’s known values and religious practices. At the relevant time, it seems that Christian burial would have been the appropriate entitlement.

### *The Special Duty of Parents to Bury a Child*

The operators of the Mother and Baby Home at Tuam were likely under a further duty to bury arising from the fact that they were in *loco parentis* in respect of the children living in their care. In addition to the public duty to bury at common law there is a specific duty to bury imposed upon those who have a special relationship to the deceased. Spouses were one such category.<sup>149</sup> The common law also imposed a duty on parents to bury their children. The leading case on this point is *R v Vann*,<sup>150</sup> which concerned the question of whether a man who had not the means to bury his child was liable for a misdemeanour for leaving it unburied and allowing it to cause a public nuisance. The court found that there was a general duty on a parent to bury his/her child, but that the parent was not liable for a misdemeanour if he lacked the funds for the burial. Of special relevance to the Tuam circumstances are the Court's comments that while the parent lacking funds could not be indicted for mere non-burial the parent "cannot sell the body, put it into a hole, or throw it into the river."<sup>151</sup> The implication is that such actions would themselves constitute breaches of the duty to bury, and thus would be misdemeanours.

Similar to the general duty to bury, the specific duty to bury has been described by the courts as being "in the nature of a public duty."<sup>152</sup> The special duty of the parent to bury has been confirmed on a number of occasions by the courts,<sup>153</sup> and while the common law duty of a husband to bury his wife is now qualified by the fact that a married woman now has full, independent legal status,<sup>154</sup> children remain in a dependent position as regards their parents or guardians.

It would seem that in addition to the general common law duty to bury, the operators of the Tuam Mother and Baby Home would have been under a special duty arising from the nature of the protective relationship between the operators and the residents of the home. Where a child was concerned, this was in the nature of being *in loco parentis*. As such, both the rights

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<sup>149</sup> *Rees v Hughes* [1946] All ER 2. This duty has now been altered by legislation, changing and enhancing the legal status of married women. Where a married woman dies leaving an estate sufficient to pay for her funeral expenses her husband is no longer liable to pay those expenses.

<sup>150</sup> (1851) 169 ER 523.

<sup>151</sup> (1851) 169 ER 523 at 526.

<sup>152</sup> *Rees v Hughes* [1946] All ER 2.

<sup>153</sup> *Clark v London General Omnibus Company* [1906] 2 KB 648.

<sup>154</sup> *Rees v Hughes* [1946] All ER 2.

and responsibilities of parenthood would have been enjoyed by the operators. As in the general case law on the duty to bury, this special category of duty clearly imports a concept of decency or dignity. The father in *R v Vann* was not entitled to put his child's body in a hole. Even if he as the parent considered that to be appropriate, the common law imposed a duty on him to provide the child with a decent burial, appropriate to the standards expected by society more generally.

### ***Criminal Law – Prevention of a Lawful and Decent Burial***

It is, therefore, widely accepted that at common law there is a right to a decent burial. As well as this being reflected in duties in respect of burial, the criminal law recognises the right to a decent burial through the common law offence of prevention of a lawful and decent burial. This offence, found in its modern incarnation in the law of England and Wales since 1974, has been used in recent prosecutions, is triable by indictment only and is punishable by a maximum sentence of life imprisonment, an unlimited fine, or both. In the decision of the Court of Appeal in *Hunter*,<sup>155</sup> the Court noted that the very existence of this offence requires that burials be decent. It stated:

...[I]f it is a crime for the person responsible for burial to prevent it, there is no reason for regarding the act of a stranger in preventing burial as any less reprehensible. We think that in this connection burial means lawful and decent burial.

In the 2008 case of *R v Skidmore*,<sup>156</sup> the notion of a lawful and decent burial was similarly at issue.<sup>157</sup> This case concerned the body of a child. The defendant was an undertaker, who accidentally failed to put the child's body into the correct coffin. Panicking, he placed the child's body in the coffin wherein lay the body of an old lady who was due to be cremated later that day. She and the child, unbeknownst to everyone other than the defendant, were subsequently cremated. Years later, what had transpired was discovered and the defendant was charged with conspiracy to prevent a lawful and decent burial of a corpse. It was claimed that the defendant had prevented the decent burial of the child's body by dealing with it in the manner in which he did and he had not acted in accordance with the wishes of the child's parents. He was convicted and on appeal, his conviction was upheld. The court

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<sup>155</sup> [1974] QB 95 CA (Crim Div).

<sup>156</sup> [2008] EWCA Crim 1464 (CA (Crim Div)).

<sup>157</sup> See also *R v Parry and McLean* (1986) 8 Cr App R (S) 470.

rejected the defendant's argument that his lack of dishonest motive meant that the offence had not been committed.

This offence has been used recently in prosecutions in England.<sup>158</sup> Applying this offence to the Tuam context, a question that arises in the present review is whether the original actions of the operators of the Tuam Mother and Baby Home could have constituted prevention of a lawful and decent burial. Moreover, were the relevant authorities to refuse to exhume, sort and bury the remains, could this constitute a continuing offence of prevention of a lawful and decent burial? In contrast to the tortious claim considered below, this crime does not require there to be any identifiable family member who is affected by the failure to bury.

### ***Tortious Actions in Respect of Dead Bodies***

In certain jurisdictions, the common law recognises a tortious right in respect of interference with a dead body, which is actionable at the suit of the family of the deceased person. The law of most US states recognises a tort in respect of mistreatment of a dead body.<sup>159</sup> The American Law Institute's *Restatement of the Law, Second, Torts* expresses these various torts as a single cause of action, providing:

[O]ne who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or who prevents its proper interment or cremation is subject to liability to a member of the family who is entitled to disposition of the body.<sup>160</sup>

Similarly, the law of certain Canadian provinces recognises a right of action on the part of family members of the deceased where the body is interfered with if that interference causes emotional or physical harm to the surviving relations.<sup>161</sup> Tortious actions in such circumstances have met with less success in England. However, there is a basis in Scottish

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<sup>158</sup> *R v Rausing*. Sentencing Remarks; available at <https://www.judiciary.gov.uk/judgments/rausing-sentencing-remarks-01082012/> accessed 23 February 2018. 'Amanda Hutton jailed for Hamzah Khan killing' BBC News 4 October 2013; available at <http://www.bbc.co.uk/news/uk-england-24401112> accessed 23 February 2018.

<sup>159</sup> See e.g. *Scarpaci v Milwaukee County* 292 NW 2d 816 (Wisc SC 1980).

<sup>160</sup> American Law Institute, *Restatement of the Law, Second, Torts* (Washington, American Law Institute 1965) § 868. As the US jurisdictions are all separate, there is no one common law of the US. The Restatement attempts to formulate general propositions of law that are applied across the States, but it does not, itself, have any legal status.

<sup>161</sup> See e.g. *Mason v Westside Cemeteries* (1996) 135 DLR (4th) 361, *Edmonds v Armstrong Funeral Home* [1931] 1 DLR 676 (SC).

law for recognising unauthorised interference with a dead body as a legal wrong in respect of which the family may claim damages.<sup>162</sup>

In view of the emphasis that Irish culture and tradition places on the dead body in the grieving process, there may be good reasons for saying that the common law of Ireland does recognise a tort of wrongful interference with a dead body. The wake remains central to Irish funeral practice, a feature which strongly distinguishes it from funeral practices in England. Because of this significant cultural difference, it may be that this is one instance in which Irish common law may be said to have diverged from English law, and that therefore the more persuasive precedents are those from Canada and the United States.

Applying these principles to the case of the Tuam Mother and Baby Home, it is possible that the actions and inactions in respect of the interment of the dead bodies were tortious wrongs at the time when they occurred. These wrongs would have been actionable at the suit of the family of the deceased. A question arises as to whether this could potentially also be framed as a present-day tortious duty on the part of the State in respect of the bodies. The Restatement refers to the *withholding* of a body and the *preventing* of its proper interment.

### **Other Procedural Options**

One option which may merit further consideration is whether there is an inherent jurisdiction on the part of the High Court to determine whether and how the remains should be dealt with. There is some (although limited) support from other jurisdictions for the proposition that the courts retain a common law power to determine disputes concerning the duty to dispose of the body of the deceased. In the New Zealand Supreme Court decision of *Takamore v Clarke*,<sup>163</sup> Elias CJ suggested that “where there is a dispute as to burial, either party (meaning personal representatives) has standing to bring the dispute to the High Court for resolution”. The High Court of England and Wales reached a similar conclusion in *Oldham MBC v Makin*<sup>164</sup> where a dispute arose as to the manner and timing of the disposal of the remains of

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<sup>162</sup> *Stevens v Yorkhill NHS Trust* [2006] SLT 889. The payment is described as a ‘solatium’.

<sup>163</sup> [2012] NZSC 116.

<sup>164</sup> [2017] EWHC 2543.

the Moors Murderer, Ian Stewart-Brady. While the Court decided the matter on other grounds, it observed that:

In my judgment, the court does have an inherent jurisdiction to direct how the body of a deceased person should be disposed of. The court will normally, as I have said, be deciding between the competing wishes of different sets of relatives, and will only need to decide who should be responsible for disposal rather than what method of disposal should be employed. I cannot see, however, why the court's inherent jurisdiction over estates is not sufficiently extensive to allow it, in a proper case, to give directions as to the method by which a deceased's body should be disposed of.

Perhaps most relevantly, the High Court of England and Wales held in *In re K* that it had an inherent jurisdiction to authorise arrangements to be made for the disposal of a child's body where the parents had neglected to make any arrangements.<sup>165</sup>

It should be emphasised that this does not necessarily mean that the Irish courts have such an inherent power, or that it would be engaged in the case of the Tuam deceased. Aside from the fact that these cases provide limited persuasive authority for the existence of such a power, the courts in those cases are dealing with situations where there is a dispute between personal representatives of an estate; and where the body remains to be dealt with. The legal context of any application here might be quite different. There is also the obvious factual difference that the question at Tuam would be one not of burial but of possible exhumation and re-burial. Nonetheless, the reasoning of the courts in these cases is based in part on the existence of a common law duty to dispose of remains. As discussed elsewhere in this Report it is arguable that duty is engaged and/or may have been breached in the situation in Tuam.

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<sup>165</sup> [2017] 4 WLR 112.

## 8. LIMITATION PERIODS

As regards the tortious actions and actions for breach of constitutional rights, the limitation period which would apply to legal proceedings arising out of events which occurred at the Tuam Mother and Baby Home is the standard limitation period of 6 years.<sup>166</sup> In respect of the original wrongs, this period has elapsed.<sup>167</sup> It is important to note that under the Statute of Limitations Act 1957, limitation periods do not apply in circumstances where (a) the action is based on the fraud of the defendant or (b) the right of action is concealed by the fraud of the defendant.<sup>168</sup> The fraud must either consist of *conduct* which is concealed from the plaintiff or of the failure to disclose the existence of facts known only to the defendant which, if disclosed, would found a cause of action. The fact that persons did not realise the illegality of the conduct in question or that no one in authority took steps to ensure that affected persons were made aware of their legal entitlements will not constitute fraud.<sup>169</sup>

As regards the criminal law, the position is a rather complex one. The question of time limits centres around the distinction between offences which are triable summarily and offences which are triable on indictment only. Generally there is no time limit for indictable offences, whereas in respect of an offence which is triable summarily, a complaint must be made within a period of six months.<sup>170</sup> The crimes identified in relation to failure to bury were misdemeanours, meaning they were relatively minor offences. The distinction between felonies and misdemeanours was abolished by section 3 of the Criminal Law Act 1997. Because there are no reported Irish cases on these common law crimes, it is unclear whether they would have been triable summarily or on indictment. It is important to note, however, that the crime of prevention of a lawful and decent burial is an indictable misdemeanour as a matter of English law.<sup>171</sup> That said, section 3(2) of the 1997 Act provides that “on all matters on which a distinction has previously been made between felony and misdemeanour,

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<sup>166</sup> Section 11 of the Statute of Limitations Act 1957 as amended. On constitutional rights, see *McDonnell v Ireland* [1998] 1 IR 141.

<sup>167</sup> See, however, the judgment of Geoghegan J. in *Murphy v Grealish* [2009] 3 IR 366.

<sup>168</sup> Section 71(1)(b) of the Statute of Limitations Act 1957, as amended.

<sup>169</sup> *O'Dwyer v Daughters of Charity of St Vincent de Paul* [2015] IECA 226.

<sup>170</sup> Petty Sessions (Ireland) Act 1851, section 10.

<sup>171</sup> *Re v Hunter* [1974] QB 95 CA (Crim Div) relying on JWC Turner Russell on Crime (London: Sweet and Maxwell, 12th edn, 1964).

including mode of trial, the law and practice in relation to all offences shall be the law and practice applicable at the commencement of this Act in relation to misdemeanour”.<sup>172</sup>

Regard must also be had to the right under Article 38.1 of the Constitution to a trial within a reasonable period of time.<sup>173</sup> This right is not absolute and must be balanced against the community’s interest in prosecution. One of the key issues in considering this balancing exercise is whether any delay has impacted on the ability of an accused to defend himself/herself so that there is a real and substantial risk of an unfair trial. That is a fact-based assessment which will depend on the circumstances of the case.<sup>174</sup> As a general principle, the risk of unfairness increases as time passes, especially in matters where the recollection of witnesses may be relevant to the issues to be tried. This could have some bearing on whether criminal prosecutions are constitutionally permissible after this period of time.

Historical abuse cases cover several potential civil causes of action - actions in tort such as negligence, assault or trespass to the person or false imprisonment and actions for breach of constitutional rights - both of which are treated as an action in tort for limitation period purposes. Gallen argues that it may not be fair, however, for these limitation periods to operate where victims of historical abuse may not have pursued litigation under these causes of action on the belief that the conduct under which they were abused was legal and endorsed by the State.<sup>175</sup> He also argues that it may be possible to claim that the lack of social and legal recognition of the wrongdoing in such contexts would render it unconstitutional for a state defendant to rely on the Statute, as expecting victims to have pursued legal action contemporaneously to their abuse ignores the traumatic impact of the abuse. This, he states, “...creates an artificially receptive historical context”. Nonetheless, it should be noted that as a matter of Irish law, a number of actions brought by persons in respect of their historic mistreatment in mother and baby homes<sup>176</sup> or hospitals<sup>177</sup> have been found to be statute barred.

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<sup>172</sup> See also section 15 of the Act.

<sup>173</sup> See, for example, *PP v Director of Public Prosecutions* [2000] 1 IR 403; *PM v Malone* [2002] 2 IR 560.

<sup>174</sup> *Donoghue v DPP* [2014] IESC 56.

<sup>175</sup> *Statute Law Review*, 2016, Vol.00, No.00, 1-15.

<sup>176</sup> *O’Dwyer v Daughters of Charity of St Vincent de Paul* [2015] IECA 226.

<sup>177</sup> *Farrell v Ryan* [2016] IECA 281.



In contrast with the approach taken in other common law jurisdictions, the Irish limitation period regime is different. While the law in relation to limitation periods in Ireland and the UK is broadly similar, under the UK Limitation Act 1980, section 33, courts have an equitable discretion to allow an action to proceed, having regard to the degree to which the limitation periods for personal injuries prejudice the plaintiff or defendant. In exercising this jurisdiction, the court is required to have regard to a number of factors, including: the length of, and reasons for the delay on the part of the plaintiff in bringing his/her claim, the extent to which his/her evidence is likely to be less cogent than if the action was brought within the allowed time; and whether the plaintiff acted promptly once he/she knew the act or omission of the defendant might be capable of giving rise to an action for damages. Case law in the UK indicates that situations of both physical and sexual abuse can engage a court's discretion under section 33 of the Act – the key factor is to assess whether a fair trial is no longer possible even where a claimant had an ostensible strong case on the facts. The English approach highlights the restrictive position in Ireland, with no judicial discretion.

Regarding any pre-ratification violations: the Inter-American Court of Human Rights (IACtHR), the UN Human Rights Committee and ECtHR have each recognised that a failure to investigate pre-ratification substantive violations of the relevant Convention may, in certain circumstances, amount to ill-treatment in itself (which exists post-ratification and carries a right to a remedy).

Apart from the Committee against Torture (CAT), none of the treaty bodies appears to have stated that there is an indefinite right to redress for torture or ill-treatment. The ECtHR, Inter-American Commission on Human Rights (IACmHR) and Human Rights Committee (HRC) all apply time limits. Nonetheless, in some cases the IACmHR and ECtHR have extended the time limit for complaints regarding torture or ill-treatment on the basis of the violation's effects on the victim.<sup>178</sup>

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<sup>178</sup> See *Mocanu v Romania* (2015) 60 EHRR 19, *Garcia Lucero v Chile*, judgment of 28 August 2013 (Preliminary Objection, Merits and Reparations) Series C No. 267, *Rio Negro Massacres v Guatemala*, judgment of 4 September 2012 (Preliminary Objection, Merits and Reparations) Series C No. 250 and the CAT's General Comment No. 3.