

## **Addressing the Legacy of Northern Ireland's Past – the Human Rights Dimension**

### **QUB Human Rights Centre**

Whatever measures are taken to address the legacy of Northern Ireland's past, it is essential that they conform with international human rights standards. If not, their credibility, as well as their effectiveness, could be undermined. We therefore welcome the inclusion of compliance with human rights obligations as one of the general principles which the various institutions established by the proposed Bill to implement the Stormont House Agreement that will have to adhere to when carrying out their functions. However we regret that 'human rights obligations' are defined in narrow terms as obligations arising under the Human Rights Act 1998. This ignores the additional human rights obligations existing under domestic law (such as the right of access to justice) and also those existing under various human rights treaties ratified by the UK other than the European Convention on Human Rights (ECHR). There are also various 'soft law' international human rights best practice standards which we would expect the UK government to comply with.<sup>1</sup>

There are few international human rights standards which set out in general terms how the past should be dealt with if a country is emerging from a violent conflict, but there are a number of binding standards relating to specific rights. This document sets out the various human rights principles that should be kept in mind in the implementation of the legacy institutions. We would be happy to appear in person to provide oral evidence on these issues, including on human rights standards, truth recovery and outstanding issues on redress for those seriously injured and bereaved.

### **The right to life**

The European Court of Human Rights (ECtHR) has laid down specific standards that need to be met whenever an unexplained killing has occurred. The procedural limb of Article 2 ECHR requires an independent, effective and thorough investigation of the killing, including how the

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<sup>1</sup> For instance the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985.

killing was planned and controlled. It must be an investigation that is capable of identifying those who may have been responsible for the killing, though there does not yet seem to be a right to have such persons prosecuted if they are in fact identified. In domestic law, even if not yet in the judgments of the ECtHR, it is clear that the PSNI should not be investigating killings in which other police officers, whether still serving or not, and whether in the PSNI or not, may have been implicated: the dicta to the contrary by the ECtHR in *Brecknell v UK* seems of dubious authority today.<sup>2</sup> In any killing where there is a reasonable suggestion that police officers may have in some way colluded in the killing, or in the obstruction of a thorough investigation of the killing, the investigation should be undertaken by some force other than the PSNI.

### **The right not to be ill-treated**

The ECtHR has said that alleged violations of the right not to be ill-treated must be thoroughly investigated too. To the extent that the proposals in the Stormont House Agreement deal only with the rights of people who have been bereaved in the Northern Ireland conflict there is a danger that people who are still alive, but who suffered physical or mental injuries as a result of a violent incident during the conflict, might claim that they are being improperly discriminated against. While the need for the bereaved to know the truth about what happened to their loved ones is very important, it is arguable that the needs of the living injured are every bit as significant, if not more so (especially in view of the fact that the likelihood of successful prosecutions being initiated in relation to killings is very small).

One of six general principles underpinning the Bill is the principle that the suffering of victims and survivors should be acknowledged, but in truth it does not seem to be in this Bill, certainly as far as survivors are concerned. To give those people fewer rights than people who have been bereaved might be a breach of section 75(1)(c) of the Northern Ireland Act 1998, which requires due regard to be given to the need to promote equality of opportunity between persons with a disability and persons without.

### **The right of access to justice**

Here too the position of the living injured seems inferior to that of the bereaved. If Mr X was killed in an explosion in 1985 and Mrs Y was maimed in the same explosion but is still alive, the

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<sup>2</sup> (2008) 46 EHRR 42.

family of Mr X will be able to trigger an investigation by the Historical Inquiries Team (HIU), but Mrs Y herself will not. This is unfair, and possibly a breach of equality law and of the right of access to justice.

In the interests of ensuring the fairness of the overall trial process we welcome clause 25(8) of the Bill, which declares that it will not be a breach of any obligation of confidence owed by a relevant authority, or of any other restriction on the disclosure of information however imposed, for a relevant authority to make material available to the HIU.

We are concerned that under clause 36 of the Bill the Secretary of State may make regulations concerning the handling by the HIU of ‘sensitive information’, defined in clause 39 as including information which, if disclosed generally, might prejudice the national security interests of the United Kingdom. The Bill does not make it clear whether the national security interests are confined to those which pertain today or whether they include those which pertained in the past. Nor does it indicate in any way what national security might mean in this context. Does it include, for example, ‘the fight against terrorism in Northern Ireland’, ‘the way intelligence information is recorded and processed’ or ‘the handling of informers’? Unless and until such questions are answered it is impossible to know whether it would be appropriate to give support to the Bill in this regard. One would hope that the answers would be consistent with two more of the general principles listed in clause 1 of the Bill, namely the principle that the rule of law should be upheld and the principle that the pursuit of justice and the recovery of information should be facilitated.

### **The right to a private and family life**

Care will need to be taken to ensure that submissions made to the Oral History Archive do not violate a third party’s right to a private and family life under Article 8 of the ECHR (as well as that party’s rights under the Data Protection Acts 1998 and 2018).

### **The right to truth**

Although it has not received the legal status and enforceability of rights contained within the Human Rights Act 1998, there is growing international recognition of the right to truth. The UN Special Rapporteur for Freedom of Expression has defined the right to truth as the right to know, to be informed or to freedom of information, while the Human Rights Council has emphasised

that the public are entitled to access, to the fullest extent practicable, information regarding the actions and decision-making processes of their government. This collective dimension of the right to truth has been shared by the ECtHR, by finding that the ‘right to truth implied not only clarification of the immediate circumstances of the particular violations but also the clarification of the general context, the policies and institutional failures and decisions that had enabled their occurrence.’ Otherwise the exposure of the truth of such violations would be dependent on the willingness and capability of individual victims or their next of kin bringing proceedings.<sup>3</sup>

Within human rights law, the right to freedom of information has been included in the Universal Declaration of Human Rights and the ECHR, and there is an emerging awareness of the right to truth in cases of serious violations of human rights. This has been acknowledged by the UN General Assembly, for example in Resolution 68/165, which notes the importance of ‘respecting and ensuring the right to truth so as to contribute to ending impunity and to promote and protect human rights.’ In the context of Northern Ireland, the UN Special Rapporteur for Truth, Justice, Reparations and Guarantees of Non-Recurrence, Pablo de Greiff, has noted the importance of independent and impartial procedures for facilitating truth-disclosure when dealing with the past. These principles should be kept in mind when investigating Troubles-related deaths, and any restrictions on information disclosure proportionately balanced against the rights of individuals.

The draft bill in its principles refers to the ‘recovery of information.’ This should not be a data collection exercise, but rather a cross-community led initiative that has political support and engagement. Finding out the truth is not only the right of an individual, but has a ‘societal benefit’ in that by only understanding the mistakes of the past can we seek to prevent their recurrence.<sup>4</sup> This requires the findings of commissions and investigations to be discussed in an open, public and frank way. The ECtHR has held in a case involving national security and counter-terrorism, that such public scrutiny and debate is ‘essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts’.<sup>5</sup> It is likely that any truth to emerge will be beyond

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<sup>3</sup> See *Al Nashiri v. Poland*, (Application no. 28761/11), Judgment, 24 July 2014, para.482; and *El Masri v the Former Yugoslav Republic of Macedonia*, (Application no. 39630/09), Judgment, 13 December 2012, para.191.

<sup>4</sup> Study on the Right to Truth, para.58; *Anzaldo Castro v. Peru*, Judgment of 22 September 2009, (Preliminary Objection, Merits, Reparations and Costs), Series C No.202, para.119; and *The Massacres of El Mozote and neighbouring locations v. El Salvador*, Judgment of 25 October 2012, Merits, Reparations and Costs, Series C No. 252, para.298.

<sup>5</sup> *Al Nashiri v. Romania*, (Application No. 33234/12), Judgment, 31 May 2018, para.641.

criminal investigations as required under Articles 2 and 3. Thus the ICIR will likely be the primary body for most victims to find out information requiring substantial effort to make it work and to be approachable for all interested actors.

### **Right to Information**

Victims, their relatives and the public should have access to easily obtainable and concise information on the legacy mechanisms and the progress of the relevant bodies (in relevant languages and styles – e.g, braille, large print). The state is responsible for disseminating information to victims and the general public on 'all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.'<sup>6</sup> Engagement with victims should be a 'two-way communication ... to conduct interactive activities, to listen to victims and respond to what they are saying, and to take into account victims' concerns'.<sup>7</sup>

In terms of consultations the Office of the High Commissioner for Human Rights sets out that:

'national consultations are a form of vigorous and respectful dialogue whereby the consulted parties are given the space to express themselves freely, in a secure environment, with a view to shaping or enhancing the design of transitional justice programmes.'<sup>8</sup>

The ECtHR under Article 10 on the right to freedom of expression and information has recognised its connection with the collective dimension of the right to truth for society and not just victims.<sup>9</sup>

### **Non-Recurrence and the Future of Rights and Equality**

If there is to be comprehensive consideration of the needs of the victims and survivors of the conflict then much more thought should be given to the adequacy of the current human rights and equality framework in Northern Ireland. It remains troubling that the conversations about the

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<sup>6</sup> Principle 24, 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, A/RES/60/147, 16 December 2005, (UNBPG).

<sup>7</sup> ICC Strategy in Relation to Victims 2009, ICC-ASP/8/45, para. 22.

<sup>8</sup> National consultations on transitional justice, Rule-of-Law Tools for Post-Conflict States, (2009), p3.

<sup>9</sup> See *Youth Initiative for Human Rights v. Serbia*, (Application No. 48135/06), 25 June 2013; and *Magyar Helsinki Bizottság v Hungary*, (Application No. 18030/11, 8 November 2016).

past and the future are decoupled to a significant extent in this consultation process. More thought should be given to the need for reflection and reform. This includes ensuring that relevant international legal standards are fully and effectively implemented in Northern Ireland. The Bill of Rights process has been and remains one part of a larger discussion about the future of NI and there are many good ideas out there that can be revisited to ensure that future generations live in a society where there is a genuine culture of respect for human rights. It is regrettable that more thought has not been given to these questions. UN Special Rapporteur Pablo de Greiff notes that, a bill of rights can be an effective way to sustain peace and can help ensure that a ‘State commits itself to guaranteeing, respecting and promoting has a preventive potential that can be considerable’ through the articulation of a list of fundamental rights.<sup>10</sup> A bill of rights can also ‘act as a disincentive to marginalization and in this way remove a conflict factor’.<sup>11</sup> Such efforts can contribute to strengthening the separation of powers and the rule of law through restraining executive powers.

## **Gender**

The Troubles/conflict in and around Northern Ireland has had a gendered impact. While the majority of those killed were young men, it had a profound impact on women who were forced to become primary breadwinners, carers and legacy advocates for their killed or injured relatives, sacrificing their own careers, education and dreams, as well as affecting their physical and mental health. In the legacy legislation and institutions, particular attention should be paid to the Gender Principles for Dealing with the Legacy of the Past as well as international standards such as the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation.<sup>12</sup> This requires efforts for gender inclusion in the design, participation and decision-making of such processes, as well as gender sensitivity in the understanding of harm and appropriate remedies. There is also a large information gap on the use of gender based and sexual violence during the Troubles/conflict in and around Northern Ireland that requires further research on its extent and appropriate redress.

## **Children**

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<sup>10</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence: Prevention, A/72/523, 12 October 2017, para.38.

<sup>11</sup> Ibid. paras.39-40.

<sup>12</sup> See S. Gilmore, J. Guillerot and C. Sandoval, *Beyond Silence and Stigma – Crafting a Gender-Sensitive Approach for Victims of Sexual Violence in Domestic Reparation Programmes*, RRV (2020).

There remains a lack of concerted effort to understand and redress the transgenerational impact of the Troubles/conflict in and around Northern Ireland. The Commission for Victims and Survivors Northern Ireland found that transgenerational trauma is a ‘distinctive factor associated with mental illness, substance dependency, and other problems for young people and their families.’<sup>13</sup> Greater effort needs to be taken to reduce and eventually remove social and economic barriers faced by children and grandchildren of those directly affected by the violence, as well as cultural and political barriers between communities. This ‘thick’ reconciliation will be a difficult, if not impossible, task for the Implementation and Reconciliation Group alone. It will instead require a substantial shift in policy and politicking from ‘green and orange’ issues, to substantially addressing low educational attainment amongst some communities, mental health and suicide amongst young people, shared education, as well as creating a sustainable economy, which is to an extent dependent on political stability. As clichéd as it is to say that children are our future, there is a need to educate them on the mistakes of our shared past, so that they can learn and grow from our shortcomings to prevent the recurrence of violence in the future.

## **LGBT+**

The importance of ensuring equality of opportunity for victims and survivors of all sexual orientations has regrettably been given little attention by the s.75 assessment of the legacy proposals. In particular, it does not recognise that the human rights belonging to homosexual members of Northern Ireland society may have been affected by the conflict in unique ways and that specific action may be ‘required in order to ensure the full enjoyment of the human rights of these persons’.<sup>14</sup> Explicitly recognising the possibility of unique impacts on individuals with a historically marginalised sexual orientation might help engender better conditions for the participation of this group in the proposed mechanisms. The Oral History Archive, in particular, presents various opportunities and risks to be borne in mind in this respect. Given the historical hostility levelled at homosexuality in Northern Ireland, the role of the Public Records Office in ‘inviting the contribution of oral history records’ under clause 51(8)(a) of the Bill holds some potential to realise the right of homosexuals to impart information about their experiences during the conflict in keeping with Article 10 ECHR, something which might not have been possible

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<sup>13</sup> Commission for Victims and Survivors (2015), *Towards a Better Future?*, p96.

<sup>14</sup> Council of Europe, Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity (31 March 2010).

due to state-imposed restrictions on homosexual practices during some of the time period defined by clause 51(1)(a). Engagement with relevant community organisations in the LGBT+ sector would therefore be particularly advisable as part of the pursuit to fulfil clause 51(8)(a) in our view.

At the same time, those with a responsibility for maintaining the Oral History Archive should be kept alive to the risk of receiving records containing homophobic statements capable of amounting to hate speech and be made mindful of the limitations on Article 10 ECHR in this regard. It is also possible that the mechanisms proposed could lead to the exposure of uniquely unacceptable treatment towards homosexuals either in detention or in the security forces during the period of time defined by clause 51(1)(a). Both of these possibilities engage the risk of disclosures relating to torture or inhuman or degrading treatment or punishment contrary to the absolute requirements of Article 3 ECHR in conjunction with Article 14 ECHR.<sup>15</sup> Moreover, it is essential that equal respect for any impact on the private and family lives of homosexuals affected by the conflict should be recognised with appropriate sensitivity in accordance with Article 8 ECHR.

### **Other harms**

The Troubles/conflict in and around Northern Ireland caused a range of harms to individuals, families and communities. While the focus on the right to life and Article 2 requirements is important, they are not the only dimensions of violence suffered. Many individuals were forced into exile and still live under threat from returning home.<sup>16</sup> Others were forcibly displaced from their homes, forced to sell homes and farms at reduced amounts and are still unable to live in their family homestead.

It seems that other harms have been back-ended through them being within the remit of the themes under the Implementation and Reconciliation Group. Instead greater consideration needs to be given to addressing these violations beyond just Article 2 compliance, to understand and remedy the nature and context of violence, and web of responsible actors. This may require

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<sup>15</sup> We emphasise these risks because both environments have been historically prone to the ill-treatment of homosexuals, thereby engaging the rights set out above and resulting in applications to the European Court of Human Rights.

<sup>16</sup> See L. Moffett, C. Lawther, K. Hearty, A. Godden and R. Hickey, *Report on Land, Conflict and Inclusion in Northern Ireland*, June 2020.

going beyond legal institutions by for example, involving community organisations to facilitate the return of those forced from their homes or creating a safe and supportive environment for SGBV victims to come forward, whether through the ICIR, Oral History Archive or the PSNI.

### **Right to Remedy**

In the SHA bill Principle 1(c) makes reference to the fact that ‘the suffering of victims and survivors should be acknowledged’, echoing the sentiments of the Good Friday Agreement. States are obliged to provide appropriate reparations to victims of gross violations of human rights and grave breaches of international law, no matter who the responsible party is for the violence.<sup>17</sup> The United Kingdom and Irish government supported these principles at the UN.<sup>18</sup> The state is bound to facilitate and provide for victims’ right to remedy, which goes beyond acknowledgement, to provide substantive measures to alleviate their harm through reparations, including restitution, compensation, rehabilitation, measures of satisfaction and guarantees of non-recurrence.

Greater attention needs to be paid to victims’ right to reparation that acknowledges their suffering and provides adequate and appropriate measures to redress their suffering. Compensation was not adequately provided to injured victims and those bereaved, with many victims having their awards unnecessarily reduced and amounts provided an ‘insult’. We strongly recommend that thought is given to creating a comprehensive reparation package to those bereaved and not adequately redressed, the seriously injured, those who suffered torture and those who experienced sexual violence.

The stalling by the Northern Ireland Executive to designate a responsible department and a dedicated budget line for the pension for seriously injured victims represents bad faith. This is compounding the harm of victims, many of whom are self-isolating during the pandemic due to continuing health problems as a result of their injuries. The *New Deal, New Approach* agreement sets out that the legacy institutions under the Stormont House Agreement will be established within 100 days by the UK government with ‘intensive’ engagement process with parties to

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<sup>17</sup> Principles 15 and 16, UNBPG.

<sup>18</sup> Both states sponsored and voted for the 2005 UN 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, Economic and Social Council 61st Session, 19 April 2005, E/CN.4/2005/L.10/Add.11, p16-17.

maintain ‘broad-consensus’ on these issues. Unfortunately this has not occurred and represents a further false dawn for victims’ redress.

### **Statutes of limitations**

International law sets out that statutes of limitations are prohibited for international crimes (war crimes, crimes against humanity and genocide),<sup>19</sup> and for domestic crimes should not be ‘unduly restrictive’.<sup>20</sup> The UN Impunity Principles set out that such limitations are not effective against civil or administrative actions brought by victims seeking reparations.<sup>21</sup> The Geneva Conventions also set out requirements for belligerents to investigate and prosecute those who commit serious breaches. The failure to investigate and prosecute serious violations of human rights or grave breaches of the Geneva Conventions undermines morale in armed forces and the values it fights for in the quest to protect its citizens. The failure to investigate and prosecute violations may also raise issues of command responsibility in allowing such crimes to be permissible. Indeed there is a general rejection for statutes of limitations that cover fundamental human rights violations, which would allow states to remove the personal responsibility of individuals who have committed summary and arbitrary killing, enforced disappearance and torture or similar cruel, inhuman and degrading treatment.<sup>22</sup>

*May 2020*

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<sup>19</sup> Article 29, Rome Statute of the International Criminal Court.

<sup>20</sup> Principles 6 and 7, UNBPG.

<sup>21</sup> Principle 23.

<sup>22</sup> *Marguš v. Croatia* (Application no. 4455/10), 27 May 2014, para.139; General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para.18. See also *Gelman v. Uruguay*, Merits and Reparations, Judgment, 24 February 2011, Series C No. 221, para.209-213.