



RESPONSE TO CALL FOR SUBMISSIONS: THE PANEL OF PARTIES

“;and the past.”

OCTOBER 2013

RIGHTS WATCH (UK) (FORMERLY BRITISH IRISH RIGHTS WATCH)

Our Mission: Promoting human rights and holding governments to account, drawing upon the lessons learned from the conflict in Northern Ireland.

Our Expertise and Achievements: Since 1990 we have provided support and services to anyone whose human rights were violated as a result of conflict. Our interventions have reflected our range of expertise, from the right to a fair trial, to the government's positive obligation to protect life. We have a long record of working closely with NGOs and government authorities to share that expertise. (And) Lastly, (or) we have (also) received wide recognition, as the first winner of the Parliamentary Assembly of the Council of Europe's Human Rights Prize in 2009 alongside other honours.

Rights Watch (UK) and Dealing with the Past in Northern Ireland: Throughout the existence of Rights Watch (UK), formerly British Irish Rights Watch (BIRW), we have been engaged with what has become known as, since the Belfast/Good Friday Agreement of 1998, the issue of Dealing with the Past in Northern Ireland. Specifically we have made submissions to the Eames Bradley Consultative Group on Dealing with the Past in Northern Ireland and have been closely involved with the Northern Ireland inquiries including Bloody Sunday 1972 and the continued campaigns for statutory inquiries into the murder of Patrick Finucane in 1989, the Ballymurphy Massacre of 1972 and the Omagh Bombing of 1998. We have assisted clients engaged with the current mechanisms to investigate the conflict related deaths in Northern Ireland, the inquest system, the Office of the Police Ombudsman for Northern Ireland and the Historical Enquires Team of the Police Service for Northern Ireland, in those cases collectively known as the legacy cases of the conflict.

Through our casework in relation to what have become known as the legacy cases of the conflict related deaths we have developed an expertise regarding the obligations of the UK government arising from the jurisprudence of the European Court of Human Rights (ECtHR). These obligations arise when Article 2 of the European Convention on Human Rights (the Convention) is engaged when there has been either a direct violation of the right to life through the use of lethal force by a state agent or an indirect failure to protect the right to life through the Cory definition of collusion between state agents and paramilitaries.¹ You will be aware of the recent concerns expressed regarding collusion between paramilitary and state agents during the conflict and how this must inform elements of the Dealing with the Past in Northern Ireland discussions of the Panel of Parties.²

We have given testimony to the Helsinki Commission of the US Congress, most recently in 2012, on the theme of "The Prerequisites for Progress in Northern Ireland"³ and in 2011 on the theme of "Why Justice in Individual Cases Matters".⁴ In both sessions of the Helsinki Commission and through engagements with politicians in Washington, we urged the government of the USA to ensure that the peace delivered under the Belfast/Good Friday Agreement 1998, which is an international peace

¹ See: <http://www.bbc.co.uk/news/uk-northern-ireland-20682687>

² See: for example <http://www.independent.co.uk/news/uk/crime/northern-irelands-police-colluded-with-loyalists-to-cover-up-catholic-murders-8899964.html> and <http://www.bbc.co.uk/news/uk-northern-ireland-24645945>

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http://www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewDetail&ContentRecord_id=524&ContentType=H,B&ContentRecordType=H&IsTextOnly=True&CFID=5338&CFTOKEN=46219094

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http://www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewDetail&ContentRecord_id=493&ContentType=H&CFID=38081711&CFTOKEN=14286714

agreement, and the related agreements including Weston Park and Hillsborough is guaranteed and that the human rights obligations secured under the Belfast/GFA are embedded in the social, cultural and political fabric of Northern Ireland's society. These human rights obligations include the delivery of mechanisms to investigate the conflict related deaths and to deliver truth and accountability, no matter how uncomfortable that truth may be and how problematic the consequences of accountability for those found culpable of wrongdoing. We have made similar representations on both thematic issues (such as collusion) and in relation to individual cases at the relevant institutions of the United Nations (such as the murder of Patrick Finucane in 1989). We also note the judgments of the ECtHR in the *McKerr* group of cases and the undertakings given by the UK government to the Council of Ministers following these judgments which lead to the introduction of the current historical investigations institutions in Northern Ireland (the 'package of measures').

THE CONTEXT OF THE PANEL OF PARTIES DISCUSSIONS

RW (UK) welcomes the arrival of the Chair of Panel of Parties, Dr Richard Haass and his colleague Dr. Meghan O'Sullivan. A distinguished US diplomat as chair of these discussions demonstrates the continued commitment of at least the government of the USA to peace and progress in Northern Ireland and consolidates the comments of President Obama in Belfast earlier this year and the brief given to Vice-President Biden on Northern Ireland.⁵ Mr Haass will not need reminding of the words of President Obama:

"But as all of you know all too well, for all the strides that you've made, there's still much work to do. There are still people who haven't reaped the rewards of peace. There are those who aren't convinced that the effort is worth it. There are still wounds that haven't healed and communities where tensions and mistrust hangs in the air. There are walls that still stand; there are still many miles to go. From the start, no one was naïve enough to believe that peace would be anything but a long journey. Yeats once wrote "Peace comes dropping slow." But that doesn't mean our efforts to forge a real and lasting peace should come dropping slow. This work is as urgent now as it has ever been, because there's more to lose now than there has ever been."⁶

These words were reflected in executive decisions taken during the summer in Washington when Vice-President Biden assumed an extended brief on Northern Ireland. They were words reflected in the speech of the Tánaiste and Minister for Foreign Affairs and Trade Eamon Gilmore T.D. in his address to the British Irish Association in Cambridge on 7 September 2013:

"People do not want to lose all that has been gained over the past fifteen years. They fear a return of sectarian violence. Communities are aware that their work, on its own, cannot deliver reconciliation. And they recognize how the two governments can bring helpful perspective and practical support, as can broader international focus. I am concerned. I am concerned at the way in which the past is exercising a corrosive effect on political life and on community relations. I am concerned at the pervasive and undiminished influence of sectarianism on civil life – and not solely in the more deprived communities. I am concerned that civil society does not yet have the support it

⁵ <http://iipdigital.usembassy.gov/st/english/texttrans/2013/06/20130617276442.html#axzz2hQ15PxOD> See also: <http://www.whitehouse.gov/the-press-office/2013/07/15/readout-vice-president-s-calls-support-building-united-community-norther>

⁶ See also: <http://www.rwuk.org/all/past-the-but-in-northern-ireland/> and <http://rightsni.org/2013/08/marching-backwards/> and <http://www.thedetail.tv/issues/248/barbara-stephenson/us-vice-president-in-new-role-to-bolster-troubled-northern-ireland-peace-process>

needs to deal with these issues. The Belfast poet Sinead Morrissey captured many of these concerns when she wrote about ‘a delicate unraveling of wishes that leaves the future unspoken’⁷

The Tánaiste was clear on the importance of the Panel of Parties discussions, describing them as a unique opportunity and insisting that what must emerge from these talks is a clear way forward on all the contentious issues – flags, parades, and the past. He emphasized that the basis for agreement on these issues already exists and that the talks are an opportunity to resolve them. What he identified as being required was ambition and resolve.

RW (UK) remains concerned that this political ambition and resolve is strained in the landscape of Northern Ireland, that local political allegiances remain steadfast, that the Westminster politicians are convinced that its responsibility to Northern Ireland ended on that Good Friday 1998 and that for the Republic of Ireland there may be good but its national interest dictate efforts being placed elsewhere. It is time to re-focus the political sights on Northern Ireland to avoid ‘The But’ in President Obama’s speech and the fall away from peace, security and human rights mired in the toxicity of Northern Ireland’s recent troubled history. As an NGO working with individuals and groups in Northern Ireland on issues of human rights we are all too aware of the fragility of the peace and how the past sits within the present and continues to dictate the future in Northern Ireland.

THE MANDATE OF THE PANEL OF PARTIES

“The Panel of Parties in the NI Executive is an independently-chaired panel created in July 2013. In the May 2013 strategy, *Together: Building a United Community*, the members of the NI Executive recognised obstacles that are frustrating the movement to a society based on equality of opportunity, good relations, and reconciliation. In the body of the May strategy, the five executive parties proposed a way forward involving the establishment of a Panel of Parties in the NI Executive (“Panel”) to consider parades and protests; flags, symbols and emblems, and related matters; and the past.”

Whilst this submission from RW (UK) concentrates on the issue of Dealing with the Past in Northern Ireland, it is clear that the Mandate or Terms of Reference of the Panel of Parties engages those issues of contention in Northern Ireland whose roots lie within the past: parades and flags. We understand this to mean the historical traditions of parading by members of the Loyalist community on and following 12 July and the recent demonstrations by members of the Loyalist community regarding the flying of the union flag over Belfast City Hall. The historic rites and the recent sleights considered by some in the Loyalist community have intensified tensions between the Loyalist and Nationalist communities in addition to leading to stand offs with the police and intensifying cross-community tensions in some areas of Northern Ireland. We make a number of points:

- The matter of investigating conflict related deaths in Northern Ireland engages Article 2 of the Convention regarding the right to life and the obligation of a contracting state of the Council of Europe to discharge its procedural obligations to investigate when there has been a violation of this right either directly or indirectly. This jurisprudence point cannot be avoided by the contracting state and is not subject to a time bar (despite the demand for the promptness of discharge). In addition whilst the kin of victims must be engaged with the process of investigation (in terms of their rights to participate and in the process of

⁷ <http://www.dfa.ie/home/index.aspx?id=89773>

transparency) they cannot be forced to participate (this is different to compulsion of alleged perpetrators).

- Victims of conflict must include those who were injured during the conflict and their rights are analogously protected by the duty on the state to investigate violations arising from a breach of Article 3 of the Convention (the prohibition from torture)
- There must be no hierarchy of victims in the process of investigation
- There are outstanding obligations arising from the international peace settlements starting with the Belfast/GFA which includes the demand for a statutory inquiry into the murder of Patrick Finucane in 1989 and the delivery of a Bill of Rights for Northern Ireland which addresses the particular circumstances of Northern Ireland. The Panel of Parties should be cognisant of the fact that a Bill of Rights for Northern Ireland as described in the Advice on a Bill of Rights for Northern Ireland was presented to the Secretary of State for Northern Ireland by the Northern Ireland Human Rights Commission on 10 December 2008 after extensive and exhaustive public consultation and it addresses the issue of parades and flags in a human rights compliant way.⁸ Suturing the ‘broken covenants’ of the peace should be one of tasks of the Panel of Parties and is one of the prerequisites for progress in Northern Ireland.
- We also continue to support the demands made by Omagh Support and Self Help Group for a statutory inquiry into the Omagh Bombing of 1998 on 15 August 1998; which is not part of the legacy of the conflict, but which requires thorough investigation as the first terrorist violation of the peace
- The Panel of Parties will also be cognisant of the work already done on the issue of Dealing with the past in Northern Ireland and we would refer you to this source including the Eames Bradley Consultative Group on the Past (CPG)⁹ and The Healing Through Remembering Project.¹⁰ The work of the former deserves wider recognition and consideration than it was given on its publication when compensation to victims became an issue of contention and its core proposals became side-lined. This side-lining may have been because of political expediency based on cost of the Legacy Commission proposed by the CPG or because the drive behind the Eames Bradley initiative was from within civil society in Northern Ireland as opposed to coming from political actors.¹¹
- In addition, we invite the Panel of Parties to consider the recent important report of Amnesty International “Northern Ireland: Time to Deal with the Past”.¹² These sources should inform the Panel of Parties in its considerations of its brief.

The Panel of Parties is conducting its discussions in this 15th anniversary year of the Belfast/GFA and RW (UK) point to the following selection of factors which should influence the thinking of the Panel of Parties in its work on its mandate:

- The deficit in internal financial investment in many communities in Northern Ireland

⁸ See: <http://www.nihrc.org/documents/bill%20of%20rights/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf>

⁹ See: <http://www.community-relations.org.uk/about-us/news/item/215/eames-bradley-report/>

¹⁰ See:

<http://www.healingthroughremembering.org/images/pdf/Making%20Peace%20with%20the%20Past.pdf>

¹¹ See: <http://www.community-relations.org.uk/about-us/news/item/215/eames-bradley-report/>

¹² See: <http://www.amnesty.org/en/library/asset/EUR45/004/2013/en/067171bf-e295-4ec5-82d3-0452769b572f/eur450042013en.pdf>

- The continued diaspora of young professionals from Northern Ireland which destabilizes the regional demographic and workforce
- The persistence of sectarian violence exacerbated by economic forces in Northern Ireland (economic disenfranchisement relating to political disenfranchisement which leads to potential criminality, paramilitary engagement and violent political dissent)
- The connection between economic forces and dissident (Nationalist/Republican and Unionist/Loyalist) political extremism located in the deep fissures of culture and identity
- The perceived remoteness of the devolved state (Stormont), the central state (Westminster) and connected states (Dublin and Washington) from many sectarian segregated communities in Northern Ireland
- The failure of these states to deliver on the expectations created by the Belfast-GFA and the ensuing agreements (including a statutory inquiry into the murder of Patrick Finucane and the implementation of a Bill of Rights for Northern Ireland); the failure to satisfactorily investigate the Omagh Bombing 15 August 1998
- The failure of the UK government to devolve key aspects of executive power (internal security) and its continued 'dead hand' on important aspects of the administration (exceptionalism) (for example in relation to the separated regime at HMP Maghaberry)
- The perception at cross-community level that the Belfast-GFA was a deal brokered by political elites and that one party, now sharing power, (the DUP), continues to oppose it and that the political grip of the power sharing executive in the Northern Ireland Assembly at Stormont has maintained state immunity in relation to the legacy of the conflict
- The failure of the processes of normalization in Northern Ireland due to the persistence of exceptionalism and the democratic deficit caused by dissident political violence
- The failure to confront the recent violent past in Northern Ireland and to bring those responsible for the crimes of the conflict (including those agents of the UK government) to account without impunity
- The perception that aspects of policing and the administration of criminal justice in Northern Ireland are flawed and therefore do not have public confidence (elements of which have become known as Mapping the Roll-Back – for example in the flaws in the institutions for investigating conflict related deaths including the Police Service of Northern Ireland Historical Enquires Team, the Office of Police Ombudsman for Northern Ireland, and the backlog of historical inquests and the declaration by the UK government that there will be no more statutory inquiries into conflict related deaths in Northern Ireland)
- The persistence that there are 'suspect communities' in Northern Ireland which demand 'special' policing, criminal justice measures and counter-terrorism provisions (exceptionalism, again)

The issue of the past in Northern Ireland is intrinsically linked to many aspects of these factors. In dealing with its past Northern Ireland will be assisted in developing its future and guaranteeing the peace and security of the present. However, as the Tánaiste identified, what is needed is ambition and resolve. The Panel of Parties must reconcile the demands of political will with the demands of a human rights compliant society without compromise. The point of contest at which this is tested is in the issues of parades and flags. The symbolic relevance of these issues are rooted in the past but where the contemporary response tests the limit of the fragile political state in Northern Ireland, resonates within the sectarian divisions which still permeate society in Northern Ireland, and stretches the boundaries of policing, punishment and criminal justice.

Our fear is that the ambition and resolve required to negotiate the territory of parades and flags will be left to the institutions of civil society (the same civil society that delivered the Advice on the Bill of Rights for Northern Ireland and was then told by the Westminster government to deliver the politicians to the negotiation table on this issue despite the huge public support across the

communities¹³). The beleaguered civil society organizations in Northern Ireland cannot be so relied upon if there is no real political will and where many in Northern Ireland feel out-with of the political system, dispossessed from the political system and reliant upon old allegiances and conflicts in their rhetorical stances and reliance's on dissident political expression sometime rooted in direct violence against the authority of the state.

A SINGLE STATUTORY INVESTIGATORY AUTHORITY TO INVESTIGATE THE LEGACY CASES

It will be clear to the Panel of Parties from our comments above, and from those submissions received from our colleagues at both the Committee on the Administration of Justice¹⁴ and Amnesty International¹⁵, that we are suggesting the creation of a single statutory investigatory authority to resolve the legacy cases of the conflict including the claims brought by those survivors who were injured. This would be a separate legal authority to a non-statutory Legacy Commission or variant of a truth and reconciliation commission. It would proceed on the basis that there is no hierarchy of victims and that victims cannot be compelled to participate.

We are aware of the dangers of re-traumatization and the distinction between criminal justice and transitional justice models which is why we distinguish this model from a Legacy Commission or similar truth and reconciliation model.

Whether the single statutory authority would have jurisdiction over those cases reviewed by the PSNI HET or the Omagh Bombing 1998 or the Weston Park commitment for an inquiry into the murder of Patrick Finucane in 1989 would remain to be resolved.

- We suggest that the work of the PSNI HET was and has been fatally compromised casting doubt on all the cases it reviewed, whether state agent cases, collusion cases or paramilitary cases
- We continue to support the demands of the family of Patrick Finucane in their demand for a statutory inquiry into his murder
- We continue support to the Omagh Support and Self Help Group in its campaign for a statutory cross border inquiry and whether the proposed statutory investigatory authority has jurisdiction here would also have to be resolved to satisfaction of those in support of a statutory inquiry

Our suggestion of legislating for a statutory investigatory authority is based upon the following two precepts: first, the existing package of measures for investigating/reviewing conflict related deaths are all compromised for reasons identified by the Committee on the Administration of Justice and Amnesty International. These compromises stem from a variety of factors primary of which is issue of relation between independence, governance and the collapse of public confidence. Second, as we have noted, the Strasbourg jurisprudence of the ECtHR is clear in relation to breaches of Article 2 of the Convention (and under Article 3) that there are procedural investigatory requirements needed (to?)discharge the obligations arising when there has been an Article 2 breach and this applies to the legacy cases of the conflict in Northern Ireland. The Strasbourg jurisprudence describes the

¹³ See: <http://www.theyworkforyou.com/wms/?id=2010-12-16a.131WS.0>

¹⁴ See: [http://www.caj.org.uk/files/2013/09/09/S419_CAJs_submission_to_the_multi-Party_Gp_-_Dealing_with_the_Past,_Investigating_Troubles-Related_Deaths,_Haass_\(Aug_13\).pdf](http://www.caj.org.uk/files/2013/09/09/S419_CAJs_submission_to_the_multi-Party_Gp_-_Dealing_with_the_Past,_Investigating_Troubles-Related_Deaths,_Haass_(Aug_13).pdf)

¹⁵ See: footnote 11

acceptable forms of mechanisms and the core precepts: independence, effectiveness, transparency and promptness. These precepts have all been accepted by the UK judiciary. CAJ and RW(UK) have commenced independent analyses of how this mechanism would work in practice to comply with the jurisprudential procedural requirements of Article 2. We agree that governance, personnel, intelligence management and statutory powers are necessary components to be worked through. RW (UK) has started to gather research from international models.

The statutory investigatory authority must have Westminster legislative assent for it to have political credibility in Northern Ireland and this assumes the acquiescence that the British government bears a shared responsibility in many of the legacy cases. In addition, the authority must have statutory authority to prosecute or refer to prosecution perpetrators or to endorse arrangements for combatant suite immunity. The issue of witness cooperation, witness compulsion and amnesty would also be have to worked through and acceptable arrangements arrived at.

RW(UK) attaches its two submissions to the Northern Ireland Policing Board in response to its request to the Northern Ireland NGOs following the publication of the HMIC Report of Inspection of the PSNI HET. These two submissions provide elaboration of the form of the statutory investigatory authority we propose.

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