

## Amnesties Prosecutions and the Rule of Law in Northern Ireland

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## **Briefing Paper**

# ***Amnesties, Prosecutions & the Rule of Law in Northern Ireland***

**Defence Select Committee**

**7 March 2017**

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# AMNESTIES, PROSECUTIONS & THE RULE OF LAW IN NORTHERN IRELAND

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## Introduction

My name is Kieran McEvoy. I am Professor of Law and Transitional Justice at the School of Law and the Senator George J. Mitchell Institute for Global Peace, Security & Justice, Queen's University Belfast. I have conducted extensive international comparative work on the relationship between prosecutions, truth recovery and amnesties in processes of conflict transformation. For a number of years, I have also been leading a programme of work with colleagues at Ulster University and the local human rights non-governmental organisation in Northern Ireland (the Committee on the Administration of Justice) designed to assist political parties and civil society organisations on the technical aspects of the 'dealing with the past' debate in Northern Ireland.<sup>1</sup> Dealing with the past in the aftermath of conflict inevitably involves engaging in sensitive, controversial and legally complex matters. Our role was to provide a useful public service by offering technical and legal information in an accessible fashion on how to deal with the past in a human rights compliant manner. Individuals and groups can thus make decisions based on maximum knowledge and information.

To that end, we have directly briefed the largest political parties in Northern Ireland, all of whom were involved in the Stormont House Agreement negotiations. We also worked closely with the British and Irish governments on many of the technical aspects of this debate. Furthermore, we have delivered extensive briefings to civil society and victims' organisations, former police officers, ex-prisoners and others with an interest in these matters. We have also worked closely with the Commission for Victims and Survivors.

As members will be aware, the Stormont House Agreement proposed the establishment of four mechanisms designed to cumulatively address the legacy of the past in Northern in Northern Ireland. These are:

- Historical Investigations Unit (HIU)
- Independent Commission on Information Retrieval (ICIR)
- Implementation and Reconciliation Group (IRG)
- Oral History Archive (OHA)

In September 2015, at an event in the House of Lords sponsored by Labour Peer and former NIO minister Lord Dubs, we formally launched our version of a *Stormont House Agreement Model Implementation Bill* on the past-related aspects

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<sup>1</sup> For further details of the project, those involved and the various reports and briefing documents see <https://amnesties-prosecution-public-interest.co.uk/>

of the SHA.<sup>2</sup> The latter was prepared by our team, working together with former British Ambassador and legal advisor to the Consultative Group on the Past, Jeremy Hill, and the very experienced Parliamentary Draftsperson, Daniel Greenberg LLB. Since that launch we have continued to work on a range of further challenging issues related to the implementation of the legacy aspects of the Stormont House Agreement.

A commitment by the British government to enact legislation to implement the SHA was included in the Queens Speech in 2015. Political progress to establish these mechanisms has been stalled on a number of fronts, in particular with regard to balancing issues related to national security and the disclosure of information to families who have lost loved ones as a result of the conflict. These matters will feature in political negotiations commencing this week in Northern Ireland.

## Summary of Issues

I have been invited by the Defence Select Committee to address a number of specific matters related to the legacy of the Troubles in Northern Ireland. This paper is structured around the themes identified to me by the Clerk of the Committee as being of interest to members in their deliberations. I have also, as requested, attempted to address the requested issues in plain English - using non-legalistic and non-academic terms insofar as possible.

Finally, in addition to the suggested themes, I have also made a number of specific suggestions at the end of this paper that may assist in addressing concerns regarding prosecutions of former soldiers and police officers for historical offences. I believe that it is possible to address such concerns within the terms of the Stormont House Agreement, whilst upholding the principles of the rule of law that are key to that Agreement.

## The International Criminal Court, Amnesties & International Law

I have been asked to explore the relevance of the International Criminal Court (ICC) and the use of amnesties in terms of the UK's international legal obligations. Specific obligations arising from the European Convention of Human Rights are addressed in detail below. Before looking more closely at the ICC and the status

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<sup>2</sup> Stormont House Agreement: Model Implementation Bill (2015). Available at <https://amnesties-prosecution-public-interest.co.uk/themainevent/wp-content/uploads/2015/09/SHA-Model-Implementation-Bill-September-2015-Final.pdf>  
See also Stormont House Agreement Model Implementation Bill Explanatory Notes (2015) available at <https://amnesties-prosecution-public-interest.co.uk/themainevent/wp-content/uploads/2015/09/SHA-Model-Implementation-Bill-Explanatory-Notes-Final.pdf>

of amnesties in international law, I should like to make one important point. As the Secretary of State for Northern Ireland, James Brokenshire, stated in the House of Commons recently with regard to the Stormont House Agreement negotiations, *'Amnesties were quickly dismissed by all the participants and are not the policy of this Government'*. Any move to introduce an amnesty (however described) would be outside the terms of the Stormont House Agreement and would represent a very dramatic change in policy on the part of the British government.

### **International Criminal Court**

The UK government is a signatory to the treaty (known as the Rome Statute) which established the International Criminal Court (ICC) in July 2002. However, a number of factors render it of very limited relevance to the Northern Ireland context.

(a) The ICC can only exercise jurisdiction over offences committed after the Rome Statute entered into effect. For the United Kingdom, the Statute became effective with the Court's establishment on 1 July 2002. Therefore, the Court has no jurisdiction over crimes committed during the Northern Ireland conflict.

(b) A key principle of the ICC Statute is complementarity, i.e. that national prosecutors and national courts should address the most serious international crimes (war crimes, crimes against humanity, genocide), where possible and that the ICC should be viewed as complementarity to such local processes, as a court of 'last resort'. Only in instances where local prosecutors or courts cannot or will not prosecute the most serious international crimes can a case be deemed admissible before the ICC. Thus, events related to Northern Ireland that took place after 1 July 2002 would only fall within the jurisdiction of the ICC, firstly, if such events reached the high threshold of either genocide or crimes against humanity (very unlikely), or could be considered war crimes (when arguably the conflict ended in 1998). Secondly, if this threshold was created, the Court could only exercise jurisdiction in a context where the local prosecutors and courts could not or would not deal with such events.

(c) The Rome Statute does not contain a provision on amnesties. During the negotiations to establish the ICC, a number of countries argued that states needed to retain the inherent flexibility to grant amnesties as part of genuine efforts at truth recovery or conflict resolution. As a result of these arguments, no prohibition on amnesties was included in the Rome Statute.

### **Is a Statute of Limitations Different to an Amnesty?**

While there are defined periods within which civil actions must be instigated under the Limitations Act 1980, there is no precedent in UK law of a statute of limitations

for serious criminal offences. However described, any measure which sought to bar criminal prosecutions and or civil liability with regard to the Northern Ireland Troubles against individuals or categories of individuals by reference to the time passed since the offence was committed (or to when an original investigation was completed), would be an amnesty by another name and would be judged against the criteria outlined below.

### **Are Amnesties Lawful Under International Law?**

*Definition* – An amnesty is an exceptional legal measure which bars criminal prosecutions (and in some cases civil actions) against individuals or categories of individuals. Amnesties are distinct from pardons. A pardon is a legal act that exempts the convicted person in whole in part from the serving his or her sentence after he/she has been convicted.

Amnesties continue to be widely used in peace-making efforts. Since 1945, there have been 615 amnesties introduced in over approximately 145 countries, at an average of 12 per year. No international treaty explicitly prohibits amnesties. As a result, the status of amnesties under international law is generally evaluated for incompatibility with treaties prohibiting specific crimes (e.g. genocide, war crimes, torture), with interpretations of customary international law, and with the obligation to provide a remedy under international human rights law. Amnesties that offer unconditional immunity to perpetrators of international crimes and serious human rights violations are widely recognised as unlawful. However, there is a widespread recognition that conditional amnesties (e.g. linked to truth recovery) - what the UN Secretary General has termed 'carefully crafted amnesties' - have a legitimate role in helping to end conflict. In testing whether an amnesty is lawful under international law, a number of factors would normally be examined:

1. If the relevant crimes committed are so grave that they are specifically prohibited by international treaties (e.g. genocide, war crimes, torture).
2. Whether the amnesty is conditional and is part of a genuine effort to deal with the legacy of the past in a particular conflict (e.g. in trading amnesties in return for truth recovery).
3. Whether the rights of victims to a remedy, to know the truth about what happened through an investigation of the facts and to possible reparations are being negated as a result of such an amnesty.
4. Whether the relevant amnesty is what the UN has referred to as a 'self-amnesty' i.e. wherein the state responsible is seeking to negate the criminal and/or civil liability of only state actors. Such actions are usually viewed as the 'epitome of impunity', which the entire international human rights framework was designed to prevent. States have a duty under international law to end such impunity.

## Amnesties in the Northern Ireland Context

### Implications of International Law

In the context of Northern Ireland, the implications of this are as follows. It is possible to design an amnesty which is compatible with international law. However:

1. Such an amnesty could not include certain of the most serious crimes (in particular torture, which may be the most relevant in the Northern Ireland context).
2. It would have to be part of a genuine effort to deal with the legacy of the past.
3. It could not be done at the cost of negating the rights of victims to a remedy, to know the truth about what happened through an investigation (discussed further below re Article 2 and 3 of the ECHR) and to possible reparations.
4. Even if the conditions on ensuring the rights of victims were met, it would be difficult to apply such an amnesty to state actors alone while meeting the state's obligations in international law to prevent impunity.

The devolved nature of the Northern Ireland Assembly presents further practical considerations, including whether or not a Legislative Consent Motion is required.

### Legislative Consent Motion

In general, all justice and policing matters were transferred (devolved) to the Northern Ireland Assembly in 2010. Some justice matters remain reserved to Westminster including the prerogative of mercy in terrorism cases, illicit drug classification, the Serious Organised Crime Agency. In addition, some justice matters remain excepted and devolution was either not discussed or not considered feasible: extradition (as an international relations matter), military justice (i.e. discipline within the armed forces, as a defence matter), enforcement of immigration law by UK Visas and Immigration, and national security (including intelligence services).

Mechanisms for dealing with the past, including those proposed under the Stormont House Agreement, are, in general devolved. In the Northern Ireland Office document summarising the proposed measures in the Northern Ireland (Stormont House Agreement) Bill 2015,<sup>3</sup> the Government comments that:

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<sup>3</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/462888/Policy\\_Paper\\_-\\_Summary\\_of\\_Measures\\_23\\_Sept\\_2015\\_Final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/462888/Policy_Paper_-_Summary_of_Measures_23_Sept_2015_Final.pdf)

The majority of the commitments in the Agreement, including some of those related to the past, deal with matters within the legislative competence of the Northern Ireland Assembly, and are the responsibility of the Northern Ireland Executive. However, in order to expedite the establishment of the legacy institutions, the Government has agreed to include the provisions outlined above in a single Bill before Parliament.

The document goes on to say:

In line with the convention that the UK Parliament will not normally legislate on a devolved matter without the consent of the devolved legislature, the UK Government is seeking a Legislative Consent Motion in respect of transferred matters.

The convention to which the document refers is known as the "Sewel Convention" and the relevant part reads as follows:

The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government". (December 2001, Cm 5240, paragraph 13)

"Agreement" in the case of a piece of legislation is through a "legislative consent motion" to be passed through the Assembly. Devolution Guidance Notice 8: Post-Devolution Legislation Affecting Northern Ireland interprets the above convention and the Memorandum of Understanding between the UK Government and the devolved administrations for officials who may be considering bringing forward legislation. Paragraphs 4 and 5 contain the following text:

III. Contains provisions applying to Northern Ireland and which deal with transferred matters (but not reserved or excepted matters), or which alter the legislative competence of the Northern Ireland Assembly or the executive functions of Northern Ireland Ministers or departments.

Only Bills with provisions in category III are subject to the convention on seeking the agreement of the Northern Ireland Assembly.

The Supreme Court has recently made clear, however, that this constitutional convention operates in the political sphere and is not enforceable in the courts. In the *Agnew and Others* case (dealing with whether the consent of the NI Assembly was required to an Act implementing Brexit) the court ruled in the following terms:

The consent of the Northern Ireland Assembly is not a legal requirement before the relevant Act of the UK Parliament is passed.

151. In reaching this conclusion we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.<sup>4</sup>

The position in relation to any “statute of limitations” on prosecutions relating to troubles-era cases is that a Westminster Act would require a legislative consent motion in the NI Assembly by constitutional convention but this convention is not enforceable in the courts. However, to override the convention in such a case would make the legislation even more controversial than it would already be. It would also contradict the UK Government’s assertion that “political consensus” in Northern Ireland is required before the UK Parliament will enact, for example, the Stormont House Agreement. Any such action outside the terms of the Stormont House Agreement would in all probability result in the dissolution of that Agreement.

## The Political & Legal Context of Legacy Investigations

As requested, in this section, I have provided a very basic overview of some of the key Troubles-related data as well as some of the key challenges related to ongoing debates on historical prosecutions.

### Casualties

The figures normally used for conflict related deaths in Northern Ireland tend to rely on a number of key academic and journalistic sources.<sup>5</sup> These record an overall figure of between 3,523 and 3,635 deaths, and attribute around 2000 of these deaths as having been caused by republicans, around 1000 to loyalists, and

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<sup>4</sup> <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>

<sup>5</sup> M. Fay, M. Morrissey, and M. Smyth, *Northern Ireland’s Troubles: the Human Costs* (London, Pluto Press, 1999); M. Sutton (1994) *Bear in Mind These Dead: An Index of Deaths from the Conflict in Ireland 1969-1993*. Belfast: Beyond the Pale; C. Thornton, S. Kelter, B. Feeney, D. McKittrick (2001) *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles*. Edinburgh: Mainstream Publishing.

around 360 to the security forces (including the Army).<sup>6</sup> Figures relating to the status of victims during the conflict, from the same aforementioned studies, indicate that most of the victims, around 2,000, were civilians. Around 120-150 loyalists and 360-390 republican paramilitaries lost their lives as did around 1,000 members of the security forces. In relation to specific figures for the military, *Lost Lives* records that 503 British soldiers and 206 members of the UDR lost their lives.

### Historical Prosecutions

As has been noted recently by the UN, definitive data on historical prosecutions during the troubles is difficult to access.<sup>7</sup> Officially cited estimates of the number of republican and loyalist prisoners prosecuted and imprisoned for conflict related offences range from around 20,000–40,000.<sup>8</sup> In relation to convictions of members of the military, precise figures are more quantifiable due to their small numbers.

As noted above, the state was directly responsible for approximately 360 deaths, with the army being responsible for approximately 300 of these.<sup>9</sup> Using court records (in particular inquest records), newspapers and other open sources, Professor Fionnuala Ní Aoláin (Ulster University and Minnesota Law School) created a database of a total of 350 people killed by state actors between 1969-

<sup>6</sup> However, it should be noted that these are deaths directly attributed to members of the security forces, and the figures do not include cases involving collusion. Obviously, any state actor involved in collusive activities could also be liable for historical prosecutions. By way of illustration, in a recent Police Ombudsman report, the Ombudsman documents the involvements of paid state agents "*at the most senior levels within Loyalist paramilitary organisations*" including in the importation of large amounts of weapons from Apartheid South Africa in the mid to late 1980s. The Ombudsman further documents that, according to police figures, these weapons were used in at least 70 murders and attempted murders and that the weapons were imported when a Brian Nelson, a Force Research Unit (FRU – A British Army unit in the UDA) was dispatched to South Africa for this purpose. Office of the Police Ombudsman Northern Ireland (2016) *The Murders at the Heights Bar Loughinisland*, 18 June 1994, p445. Belfast: OPONI. Currently Chief Constable John Boutcher is leading a team of 48 detectives investigating up to 50 murders involving the alleged state agent Stakeknife which is examining '*the activities of current and former police officers, members of the army and MI5, and former members of the IRA.*' BBC News, 14<sup>th</sup> October 2016 '*Stakeknife: Investigation May Result in Prosecutions.*

<sup>7</sup> UN DOC A/HRC/34/62/Add.1, (UNSR Report 2016) *Report Of The Special Rapporteur On The Promotion Of Truth, Justice, Reparation And Guarantees Of Non-Recurrence On His Mission To The United Kingdom Of Great Britain And Northern Ireland*, 17 November 2016. Geneva: United Nations Britain and Northern Ireland, 17. November 2016, p12.

<sup>8</sup> OFMDFM 'Report of the Review Panel, Employers' Guidance on Recruiting People with Conflict-Related Convictions', March 2012, page 14.

<sup>9</sup> M. McKeown (2001) Post-Mortem An examination of the patterns of politically associated violence in Northern Ireland during the years 1969-2001 as reflected in the fatality figures for those years. <http://cain.ulst.ac.uk/victims/mckeown/mckeown01.pdf>. p.14

1994.<sup>10</sup> Many of these deaths occurred in the early (and most violent) period of the conflict. Between 1969 and 1974, 189 people were killed by state actors, the majority (170) by the army. There were no criminal prosecutions levied against state actors during this period.<sup>11</sup> According to the database produced by Professor Fionnuala Ní Aoláin, 63% of those killed were undisputedly unarmed at the time of death, 12% (24 people) were confirmed as having been in possession of a weapon and a further 14 deaths were listed as being 'possibly armed'.<sup>12</sup> As the official *Operation Banner* review notes, only a dozen or so serious cases involving Army personnel killing or injuring others came to court during the 30 years of the Troubles.<sup>13</sup> In relation to operational shootings the report cites 4 convictions for murder, one of which was overturned on retrial.<sup>14</sup> These figures do not appear to include members of the Ulster Defence Regiment.<sup>15</sup>

### Contemporary Prosecutions

There has been some critical commentary concerning a perceived imbalance in conflict related prosecutions against state actors since the Good Friday Agreement, particularly since the current Director of Public Prosecutions took up his post in 2011. The DPP recently issued a statement detailing the following.

- There have been 17 prosecutorial decisions on legacy related cases since 2011.
- 8 cases relate to alleged offences attributed to republicans, in 7 of the cases decisions were taken to prosecute;
- 3 cases relate to loyalists and have resulted in prosecutions;
- 3 cases relate to soldiers, two of these have resulted in decisions to prosecute and one a decision not to prosecute.
- 3 cases relate to police officers, in two decisions were taken not to prosecute.<sup>16</sup>

<sup>10</sup> F. Ní Aoláin (2000) *The Politics of Force. Conflict Management of State Violence in Northern Ireland*. Belfast: Blackstaff Press.

<sup>11</sup> F. Ní Aoláin (2000) 'The Politics of Force: Conflict Management and State Violence in Northern Ireland - A Brief Historical Overview.' *Minnesota Legal Studies Research Paper* No. 12-12, p.23.

<sup>12</sup> Ibid.

<sup>13</sup> British Army (2006) *An Analysis of Military Operations in Northern Ireland*. Available [http://www.vilaweb.cat/media/attach/vwedts/docs/op\\_banner\\_analysis\\_released.pdf](http://www.vilaweb.cat/media/attach/vwedts/docs/op_banner_analysis_released.pdf) p. 46, para 431.

<sup>14</sup> As above, namely R v Thain (1984) R v Clegg (1993) (acquitted on retrial in 1999) and R v Fisher and Wright (1995).

<sup>15</sup> C. Ryder (1991) *The Ulster Defence Regiment: An Instrument of Peace?* Methuen suggests that 18 UDR soldiers were convicted of murder and 11 of manslaughter during the Troubles p.150.

<sup>16</sup> <http://www.belfasttelegraph.co.uk/news/northern-ireland/no-imbalance-of-approach-in-decision-to-prosecute-troublesrelated-cases-35409088.html>

## **The Historical Enquiries Team (HET), Legacy Investigative Branch (LIB) and Challenges Related to Historical Prosecutions**

In 2004 the then PSNI Chief Constable, Sir Hugh Orde established the Historical Enquiries Team (HET). Its remit was to re-examine all Troubles-related deaths between 1969 and 1998. Using contemporary policing techniques, this 'family focused' initiative had two principal tasks (i) to present families with a report into the circumstances of the death of their loved one and (ii) where possible, to gather evidence with a view to prosecuting those responsible. The HET was ultimately wound up following a critical report by Her Majesty's Inspectorate of Constabulary (HMIC) which found that the HET's reviewing of historical cases involving members of the army and police was inconsistent with Article 2 of the European Convention on Human Rights (discussed further below).<sup>17</sup>

There has been considerable confusion recently about the number of cases that the PSNI have dealt with involving different groups of protagonists and consequently the PSNI have recently published figures in the media. These state that:

The HET completed reviews of 1,625 cases, which related to 2,051 deaths; of these 1,038 were attributed to republicans, 536 to loyalists, 32 to the army, and 9 cases where it is not known.<sup>18</sup>

The HET ultimately formalised a two-stage process whereby reviewed cases would be referred internally within the PSNI for further investigation. The HMIC report was highly critical of how this process had been applied regarding military cases, stating that it was 'striking' that in the HETs work "*not one state involvement case relating to the British Army has to date been referred to the PSNI for further investigation or for prosecution.*"<sup>19</sup>

Whilst a small number of convictions did result from the HET investigations it remains the case that not one single member of the security forces has been convicted to date as a result of a legacy investigation into a conflict-related death.

Following the HMIC report and similarly critical research by Professor Patricia Lundy, the then Chief Constable, Matt Baggott, took a decision in 2013 to direct that all 238 military killings that had been in the remit of the HET be the subject

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<sup>17</sup> HMIC (2013) Inspection of the Police Service of Northern Ireland Historical Enquiries Team. London: HMIC.

<sup>18</sup>Troubles legacy cases bias disputed by figures BBC News Online 2 February 2017, <http://www.bbc.co.uk/news/uk-northern-ireland-38844453>

<sup>19</sup> HMIC report p25.

of a fresh investigation. These cases are now part of the caseload of the PSNI Legacy Investigations Branch (LIB).<sup>20</sup>

The LIB caseload reportedly involves 530 killings carried out by republicans, 271 by loyalists, 354 by the security forces, and 33 other killings (a total of 1,188).<sup>21</sup> As is discussed further below, the reason for the comparatively high number of security force killings still 'in the system' may be largely due to concerns about whether previous investigations were in fact lawful.

The LIB is clearly not considering all of these cases at once, and it had been planned that both its work and that of the Ombudsman's legacy unit would be subsumed in to the Stormont House Agreement Historical Investigations Unit (HIU). In relation to live case load the LIB currently has four teams: team A is examining the 'On the Runs' inquiry, in relation to 238 republicans; team B is examining two republican cases and the activities of the Military Reaction Force (MRF), further to revelations from that unit in a Panorama documentary; team C is dealing with the killings of 14 civil rights demonstrators on Bloody Sunday by the Parachute regiment and the killings of 10 civilians by the IRA in the 1976 Kingsmill massacre; a final team, D, is dealing with 7 killings attributed to republicans.<sup>22</sup>

In an important case before the Northern Ireland High Court on Friday March 3<sup>rd</sup> 2017, Mr Justice Maguire held (in a case involving allegations of the involvement of the Army's Military Reaction Force in shooting an unarmed civilian in 1972) both the HET and the LIB lacked the required elements of independence to perform an Article 2 compliant investigation of the case. He concluded (para 109):

'...there is no evidence to suggest that the deceased was other than a wholly innocent person who was in the wrong place at the wrong time. However the awkward truth in this case is that the system for investigating serious crime has let her and her family down over a period of decades now<sup>23</sup>

The significance of this and related cases is discussed below.

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<sup>20</sup> Questions to the Chief Constable to the Policing Board Northern Ireland 'Killings during the Troubles by the army', 2 February 2017.

<https://www.nipolicingboard.org.uk/sites/nipb/files/media-files/written-response-to-questions-for-2-February-2017-Meeting.pdf>

<sup>21</sup> Troubles legacy cases bias disputed by figures BBC News Online 2 February 2017, <http://www.bbc.co.uk/news/uk-northern-ireland-38844453>

<sup>22</sup> As above.

<sup>23</sup> *Re Margaret McQuillan in Matter of Review by the HET into the Circumstances of the Death of Mrs Jean Smyth and Other Suspected British Army Military Reaction Force Killings*. 3<sup>rd</sup> March 2017. REF 15/57619/01

## Evidential and Legal Difficulties with Regard to Historical Prosecutions

There are very significant legal and evidential challenges related to prosecuting people for historical events, particularly events which occurred during such a violent conflict as Northern Ireland. Sir Hugh Orde, former Chief Constable of the PSNI, has given a vivid account of the difficulties of investigating such historical crimes. Speaking about the recovery of evidence by the Historical Enquiries Team (HET) – the body he established to conduct historical investigations in Northern Ireland - he said:

The likelihood of solving cases was clearly going to be slight. Witnesses would be old or dead. Exhibits, if still available, could be contaminated or inadmissible. Informants and agents would be in the mix; the original paperwork incomplete or missing... At the height of the Troubles, 497 people were murdered in one year. The forensic laboratory was blown up twice. Numerous police stations were blown up, stations housing much of the investigative material. ... The fact that evidential opportunities lost at the time would be hard to recover did not render the initiative worthless. We had to shift the focus to ensure that, mindful of our primary role as investigators, the driving force behind this initiative would be to deliver a meaningful outcome for the families.<sup>24</sup>

Sir Hugh and his successors in the PSNI, and indeed the team who were involved in the working on the HET (and now the PSNI Legacy Investigative Branch) have always been careful to emphasise these and related difficulties with historical investigations, not least to responsibly manage the expectations of the affected families. In addition to overcoming the investigative challenges, such prosecutions must pass the DPP prosecutorial test i.e. the evidential test whether there is sufficient evidence to offer a 'reasonable prospect of a conviction' and whether it is in the public interest that such a prosecution be taken.<sup>25</sup> Finally, if historical prosecutions do reach court, one would expect defence counsel in many such cases to raise the delay in such proceeding as an abuse of process which would prejudice the defendant's right to a fair trial. Cumulatively therefore, the bar for successful prosecutions for historical troubles related cases remains quite high.

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<sup>24</sup> Sir Hugh Orde, War is Easy. Peace is the Difficult Prize, Longford Lecture, London, 2 December 2009. Available at: [http://www.longfordtrust.org/lecture\\_details.php?id=6](http://www.longfordtrust.org/lecture_details.php?id=6).

<sup>25</sup> PPSNI Code for Prosecutors, para. 4.1.2, available at: <http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Code%20for%20Prosecutors/Code%20for%20Prosecutors%20Revised%202008%20FINAL.pdf>. For a detailed discussion on the meaning and relevance of public interest in such cases See G. Anthony, K. McEvoy, L. Mallinder, and L. Moffatt (2015) *Investigations, Prosecutions and the Public Interest*. Belfast: Queens University Human Rights Centre.

### **‘Thorough’ Investigation, Statute of Limitations and Troubles Legacy Cases**

Another issue which I have been asked to address is whether any statute of limitations with regard to prosecutions could be introduced after investigations. In the recent House of Commons debate on this matter Sir Jeffrey Donaldson framed the matter thus:

The Government must therefore give urgent consideration to introducing a statute of limitations for soldiers and police officers who face the prospect of prosecution in cases that—this is very important—have previously been the subject of full police investigations. Let me clear about that: we are talking about cases that were previously the subject of rigorous police investigations relating to killings and deaths that occurred before 1998. ...This is not an amnesty, as each case will have previously been the subject of a thorough investigation.<sup>26</sup>

As noted above, I would respectfully disagree with Sir Jeffrey’s assertion that a statute of limitations which removed the prospect of prosecution could be distinguished from an amnesty. More importantly however, Sir Jeffrey does make the important point that consideration of such a measure would only occur in the wake of a ‘full’, ‘rigorous’ and ‘thorough’ police investigation.

There has been quite a lot of consideration about what constitutes such an investigation in Northern Ireland. Indeed the lack of such investigations in some historical cases (as illustrated above by Mr Justice Maguire) has significantly undermined the work of both the HET and the LIB.

By way of illustration, in the period between 1970 and 1973 there was an RUC Force Order in place. The latter reflected an agreement between the GOCNI and the Chief Constable which meant that police officers investigating a death caused by a soldier never got to interview the soldier in question. Such interviews were conducted by the Royal Military Police (RMP) rather than the investigating detectives. The purposes of these investigations have been described in HET reports and other sources as ‘managerial’.<sup>27</sup> This was the period when over 150

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<sup>26</sup> Sir Jeffrey Donaldson, Armed Forces: Historical Cases Debate, House of Commons 23<sup>rd</sup> February 2017.

<sup>27</sup> See HET report into the fatal shooting of William McGreanery by Grenadier Guards in Derry, September 1971. Available at: <http://www.patfinucanecentre.org/cases/mcgreanery.pdf>. This describes the work of the RMP Investigator as seeking ‘information for managerial, not criminal purposes. The Saville Inquiry into the killings on Bloody Sunday also highlights how it is also noted that the Saville Report also highlights how RMP questioning was conducted for ‘managerial’ purposes rather than for independent ‘criminal’ investigations. See ‘Saville inquiry: Over 150 killings by soldiers during Troubles in Northern Ireland never fully investigated’ The Guardian, 20 June 2010.

of the approximate 300 army killings took place. The practice was stopped in 1973 at the insistence of the recently appointed Director of Prosecutions Sir Basil Shaw, himself a former soldier. In case heard by the then Lord Chief Justice Lowry the following year, the LCJ noted:

'This practice has been discontinued, but we deprecate this curtailment of the functions of the police and hope that the practice will not be revived.'<sup>28</sup>

However, no decision was taken at the time to review those investigations which had taken place between 1970 and the ending of the practice 1973.

There is clear authority from the domestic courts that RMP investigations did not meet legal requirements under Article 2 of the European Convention (discussed below). For example, the case of a judicial review take by the family of Kathleen Thompson (a civilian 47-year old mother of six children who was shot dead by a single shot to the chest whilst standing in her back garden by a member of the Royal Green Jackets on the 6 November 1971) is instructive. Mr Justice Kerr held that judged by the standards that applied in 1971-1972 the necessary procedural safeguards to ensure adherence to Article 2 compliance were not complied with. The ruling stated that the RMP interview of the soldier who fired the shot did not satisfy the investigative duty. The legal authority of the RUC to delegate the investigative function to the RMP was questioned, and the judge pointed to interviews not lasting more than half an hour and discrepancies in the statements made which were not subject to further investigation as sufficient to demonstrate the inadequacy of the investigation. He added:

By any standard it is clear that the investigation into the death of Mrs Thompson was not effective. Even allowing for the constraints that might have obtained at the time and the difficulty in visiting the locus where the shooting happened, I am satisfied that a more rigorous examination than in fact took place ought to have occurred.<sup>29</sup>

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<sup>28</sup> Northern Ireland Law Reports/1974/R v FOXFORD - [1974] NI 181

<sup>29</sup> *In the Matter of an Application by Mary Louise Thompson for Judicial Review [2003] NIQB 80*

### **The Criteria for Reviving an Investigation**

There has also been detailed consideration in Northern Ireland legacy-related cases concerning in what circumstances an investigation should be revived. The Article 2 duty to reinvestigate cases where there is new evidence is set out in a Northern Ireland case – *Brecknell v UK*. Concerning the question of when a fresh investigative obligation is triggered the Court took the view that, whilst this not the case with any assertion or allegation, the duty did apply:

Where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures.

The Court explicitly set out that this included information that highlighted defects in a previous investigation stating “*given the fundamental importance of this provision, the 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.*”<sup>30</sup> The aforementioned Judicial Review into the killing of Kathleen Thompson has also established that deficiencies in previous investigations mean that the Article 2 investigative duty has not been discharged in such circumstances.

### **Is It Possible To Design An Amnesty Which Is Compliant With The European Convention On Human Rights?**

The Article 2 requirements for an effective investigation require that such investigations must ‘be capable of leading to the punishment of those responsible’ but do not include a specific requirement that the perpetrators be punished. Among the few cases in which amnesties for violations of Article 2 have been considered is the European Commission on Human Rights’ admissibility decision in *Dujardin and others v France*. The case was taken by the families of some unarmed gendarmes (military personnel tasked with policing duties) who were killed in a politically-motivated attack by rebels on the island of New Caledonia, a French overseas territory. The rebels were subsequently granted an amnesty by the French government. The families were seeking a declaration that the amnesty was incompatible with their rights under Article 2 of the Convention. In declaring that the application was inadmissible the Commission stated:

‘...as with any criminal offence, the crime of murder may be covered by an amnesty. That in itself does not contravene the Convention

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<sup>30</sup> *Brecknell v United Kingdom* (2008) 46 EHRR, paragraphs 70-71.

unless it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes...The Commission considers ... that the amnesty law, which is entirely exceptional in character, was adopted in the context of a process designed to resolve conflicts between the various communities of the islands. It is not for the Commission to assess the advisability of the measures taken by France to that end. The State is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law.'

The decision in the Dujardin case was issued in 1991, sometime before the Court developed its jurisprudence on the procedural obligations to investigate under Article 2. However, the reasoning of the Commission in Dujardin has been followed by the European Court of Human Rights in its 2012 Tarbuk v Croatia judgment. In this case the applicant, Dušan Tarbuk, was arrested and placed in pre-trial detention in 1995 on suspicion of having committed espionage during the 1991-5 conflict in Croatia. With the passing of the General Amnesty Act 1996, the criminal proceedings against him were discontinued. Following his release, he launched civil proceedings for damages in relation to his detention. During the civil case, the amnesty was amended to prevent any compensation claims for detention in cases where the amnesty had been applied. In its judgment, the Court was not asked to rule on the legality of the amnesty itself. However, it chose to reiterate the position adopted by the Commission in the Dujardin case, stating:

'even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public.'

Although the Court has not yet been asked to address directly whether an amnesty for Article 2 violations is permissible under the Convention, the above rulings suggest that the Court may grant states broad discretion in this area. Nonetheless, the judgment does suggest some criteria that amnesties should meet in order to be permissible:

- The amnesty should be exceptional in character, meaning that it is designed to address particular events or a particular group of offenders and does not have wider application or is not reflective of a general practice of impunity within the state, which may undermine the rule of law or public confidence in legal institutions.

- The amnesty should be necessary, meaning that the state is enacting the amnesty in order to fulfil its legitimate aims. The example of the French amnesty for New Caledonia suggests that amnesties enacted to contribute to the peaceful resolution of armed conflicts may fulfil this criterion.
- The interests of individual members of the public are respected. This can relate to their interests in having their right to life protected by the end of conflict or the application of criminal law. It may also relate to the interests of victims and society to know the truth about the violations.
- The amnesty must not impede the fulfilment of the state's duty to conduct effective investigations into Article 2 violations as outlined above. However, where amnesty coexists with or is used to support investigative processes, this may be compatible with Article 2, provided that the investigative processes are themselves compliant with the procedural obligations under Article 2.

The Court has not been asked to rule directly on amnesties that have been granted for violations of Article 3 (torture, inhuman or degrading treatment). However, in a series of judgments the Court has opted to articulate its views. Firstly, in the 2004 *Abdülşamet Yaman v Turkey* case which involved allegations of torture against a 12-year old boy by the Turkish police, the Court stated in relation to a hypothetical amnesty that:

'where a state agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an 'effective remedy' that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.'

This contrasts strongly with the more flexible approach towards amnesties for Article 2 violations that is articulated in the *Dujardin* and *Tarbuk* cases.

### **The Early Release Provisions of the Good Friday Agreement**

The early release of prisoners was a key element in the negotiations on the Good Friday Agreement. The Agreement states that both British and Irish governments would put legislation in place to provide for the accelerated release of prisoners convicted of scheduled offences in Northern Ireland (or similar offences for those convicted elsewhere). It stipulated that those who qualified would be released within two years of the passing of this legislation. The legislation excluded prisoners who were supporters of organisations which were not then maintaining a ceasefire. The Early Release Scheme was enacted through the Northern Ireland (Sentences) Act 1998. Under this scheme, qualifying prisoners have to apply to the Sentence Review Commissioners for early release. All prisoners have to satisfy a number of conditions in order to be eligible:

- (a) they have to have been convicted of a qualifying offence (i.e. a scheduled offence within the meaning of the Emergency Provision Act 1973 as amended)
- (b) they must not support an organisation not on ceasefire;
- (c) upon release they would be unlikely to become a supporter of a specified organisation or
- (d) become involved concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.
- (e) Life prisoners have to satisfy a fourth condition that if released they would not be a danger to the community.

The terms of the Agreement were that all qualifying prisoners would be released within two years of the signing of the Accord. Prisoners released under this scheme are released on license – for those individuals who are on a fixed term sentence until the date when they would have been released normally, and for life-sentenced prisoners, for the rest of their life. As of 2013, 482 prisoners were released early under the scheme, 21 of whom were recalled as having breached the terms of their license, approximately half of whom were for alleged re-involvement in paramilitary activities.

Two matters are of direct relevance for current purposes;

- (i) There were two soldiers in prison at the time of the passing of the Act who had been convicted of murder. It was originally considered that they would apply to have their sentences reviewed and their releases ordered by the Sentence Review Commission. However it appears that these soldiers were ultimately released using the Royal Prerogative of Mercy.
- (ii) In recent years an anomaly has become apparent in the operation of the Northern Ireland Sentences Act. Given that the Act refers specifically to scheduled offences from 1973 onwards, it appears that anyone convicted of a conflict related offence before 1973 is liable to serve a full sentence rather than the two year maximum for anyone convicted for offences committed between 1973-1998. As is discussed below, a review of the operation of the Northern Ireland Sentences Act might present one option to address some of the concerns of the Committee.

## Conclusion

This discussion document is designed to assist members in their deliberations on former soldiers and legacy related matters in Northern Ireland. The British army was deployed in Northern Ireland to uphold the rule of law and many of its members paid a heavy price towards that objective. It is possible in my view to find ways to address legitimate concerns in this area while still ensuring that the rule of law remains sacrosanct. Two broad options are outlined below.

### Option One: A Statute of Limitations

A statute of limitations which sought to bar criminal prosecutions and or civil liability with regard to the Northern Ireland Troubles against individuals or categories of individuals would be an amnesty by another name. It is possible to design an amnesty which is lawful, and compliant with international and domestic legal obligations.

- It would have to be part of a genuine effort to deal with the legacy of the past.
- It could not be done at the cost of negating the rights of victims under Article 2 or 3 of the European Convention on Human Rights to an effective investigation into what happened and to possible reparations.
- Even if the conditions on ensuring the rights of victims were met, it would be difficult to apply such an amnesty to state actors alone while meeting the state's legal obligations in international law to prevent impunity.

In addition to these legal challenges, it would face significant political difficulties. Such an amnesty would be outside the terms of the Stormont House Agreement. It was not advanced by any of the parties to that Agreement – including the British government which has historically been opposed to such amnesties – and would represent quite a dramatic departure in policy for the British government. It would also probably mean the collapse of the Stormont House Agreement which has taken years to negotiate. Such a collapse would mean that the victims of the Troubles in Northern Ireland who have waited for decades for truth, justice and accountability would again be disappointed. Moreover, the 'state-centricity' of some of the existing mechanisms (e.g. the Office of the Police Ombudsman) would continue.

## **Option 2 Implement the Stormont House Agreement and Review the Northern Ireland Sentences Act (1998)**

A more attractive option in my view would be to implement the Stormont House Agreement in full, ensuring that its mechanisms (particularly the Historical Investigations Unit) are Article 2 compliant in terms of providing an independent, effective, prompt and transparent investigation into past events. In order to protect the rule of law in the jurisdiction the police involved in the HIU investigations should be allowed to do their work independently and follow the evidence wherever it leads free from all political interference. Similarly, if there is sufficient evidence, cases should be referred to the DPP and he\she should make a determination on whether or not to prosecute individuals in the normal fashion. Such cases should then be adjudicated by a judge, again in the normal fashion, and again ensuring that the rule of law is upheld.

In addition to allowing rule of law to run its course as envisaged under the terms of the Stormont House Agreement, the government could propose in the ongoing negotiations to review the operation of the Northern Ireland Sentences Act. As noted above, given that there is an anomaly with regard to pre 1973 offences, such a review is arguably warranted in any case. It should be possible to include in the criteria to be assessed by the Sentence Review Commission (the body which determines the amount of time to be spent in prison) a number of additional criteria including the age and health of the defendants, the time since the offence was committed.

In addition, there is an additional mechanism envisaged under the Stormont House Agreement, the Independent Commission on Information Retrieval (ICIR). The latter is designed to allow victims to seek information from state and non-state actors about the Troubles related deaths of their next of kin. None of the information given to this body is admissible in legal proceedings. However, it might be possible to envisage a process whereby any person who provided information to the ICIR would have their evidence reviewed and triangulated to determine as far as possible its accuracy. Any such person who was investigated by the HIU, convicted and sentenced could ask for some form of certification from the ICIR that they had cooperated fully with the ICIR and the latter could be included as an additional criteria to consider a sentence reduction by the Sentence Review Commission.